

Viewing the Package Half Full: The Case for Federal Legislation to Reduce Environmental Harm from Shrinkflation and Slack-Fill Packaging

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ABSTRACT

Existing legislation against nonfunctional slack-fill unfortunately focuses on consumer deception and ignores the environmental harm. Consequently, existing case law affords numerous defenses to businesses engaged in the practice that do nothing to mitigate the environmental harm. Under these existing standards, courts rarely permit nonfunctional slack-fill lawsuits to proceed past the motion-to-dismiss phase. This first-of-its-kind Article utilizes an environmental framework to assess the full ramifications of nonfunctional slack-fill and proposes new federal legislation to limit the practice. Properly understood, nonfunctional slack-fill contributes great harm to the environment while providing no offsetting societal benefit. It harms consumers, retailers, and even the wholesalers who engage in the practice, in addition to the environment.

While nonfunctional slack-fill is not the most pressing environmental matter of our time, it is perhaps the one with the most universally beneficial solution. As documented in this Article, not only does the environment benefit, but consumers, retailers, and even the product wholesalers do as well. The practice of nonfunctional slack-fill is expanding at an alarming rate, and some jurisdictions are passing defendant-friendly legislation regarding nonfunctional slack-fill litigation. Furthermore, this rare, universally beneficial public policy option could serve as a powerful catalyst for igniting bipartisan agreement on other commonsense environmental protections—something desperately needed in the current, polarizing political climate. Finally, the United States could serve as a compelling leader on nonfunctional slack-fill, as this issue is largely unaddressed globally.

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“[C]ompanies are shrinking the size of their products, but you pay the same Back in the day, you bought a big bag of chips. Everybody ate. These days, you open the bag, and there’s just one chip holding open the sides to make it look big.”

—Trevor Noah¹

I. INTRODUCTION

In 2020, McCormick settled a \$2.5 million class action lawsuit after five years of litigation.² This was the result of McCormick responding to wholesale price increases of ground pepper and peppercorns by reducing the amount of those products in the tins and grinders they are sold in.³ The plaintiffs alleged that, regardless of McCormick correctly labeling these containers with the new product weight, using the same size containers confused consumers.⁴ While media accounts and even some judges have poked fun at such nonfunctional slack-fill lawsuits,⁵ the environmental harm resulting from the practice is no laughing

1. The Daily Show (@thedailyshow), *Shrinkflation Has Gatorade Looking Gooooood*, TIKTOK, (July 20, 2022), <https://perma.cc/79J6-5Q2F>.

2. *FeganScott Secures \$2.5 Million Settlement in McCormick Black Pepper Class-Action Lawsuit, Pending Final Approval*, BUSINESSWIRE (Feb. 18, 2020, 1:20 PM), <https://perma.cc/D93A-URGH>.

3. *Id.*

4. *Id.*

5. *See, e.g.*, Kim Bousquet & Rachael Moore, *Empty Spaces Causing Big Problems: The Rise of Slack-Fill Litigation*, THOMPSON COBURN LLP (Sept. 19, 2016), <https://perma.cc/V925-WRTA> (explaining how a Starbucks lawsuit regarding too much ice in its beverages “was the subject of derision in the media and general public, and even the district court seemed incredulous [as to the plaintiff’s

matter. Unfortunately, existing legislation against nonfunctional slack-fill focuses on consumer deception and ignores the environmental harm. Consequently, existing case law affords numerous defenses to businesses engaged in the practice that do nothing to mitigate the environmental harm. Under these existing standards, courts rarely permit nonfunctional slack-fill lawsuits to proceed past the motion-to-dismiss phase.⁶ This first-of-its-kind Article utilizes an environmental framework to assess the full ramifications of nonfunctional slack-fill and proposes new federal legislation to limit the practice. Properly understood, nonfunctional slack-fill contributes great harm to the environment while providing no offsetting societal benefit. In addition to harming the environment, it harms consumers, retailers, and even the wholesalers who engage in the practice.⁷ While nonfunctional slack-fill is not the most pressing environmental concern of our time, it is perhaps the easiest to address in a universally beneficial manner. This proposed legislation has the potential to serve as a powerful catalyst for igniting bipartisan agreement on commonsense environmental protection—something desperately needed in the current, polarizing political climate.

This Article primarily focuses on the practice of “nonfunctional slack-fill,” although there are many related phrases and practices. Slack-fill includes “non-functioning slack-fill” and “functioning slack-fill.”⁸ The latter refers to empty space in a package that serves some purpose, such as when potato chip bags are filled with air to protect the chips from breaking, when the heat sealing process of packaging would damage the contents if they were filled to the rim, or when it is necessary for anti-theft protection.⁹ Nonfunctional slack-fill refers to empty space in a package that does not serve any of the above or similar purposes.¹⁰

The related term “shrinkflation” occurs when a business reduces the quantity or weight of its product while the price either stays the same or increases.¹¹ Shrinkflation may be accomplished by simply increasing the slack-fill in the existing package but could also include producing a new, smaller package. Other terms used to refer to shrinkflation and slack-fill include “contents reduction

claims]”); Meghana Shah, Brittany Cambre & Amber Unwala, *Recent Developments Have Let the Air Out of Slack Fill Lawsuits*, N.Y. L.J. (May 18, 2018, 3:20 PM), <https://perma.cc/3DCH-KXJC> (“Aside from the technical inability to assert a plausible claim, courts have lambasted these claims as unable to ‘pass the proverbial laugh test.’”).

6. Lori Lustrin & Ilana Drescher, *Courts Continue to Let the Air Out of Slack-Fill Litigation: Another Class Action Dismissed*, BILZIN SUMBERG (Jan. 18, 2022), <https://perma.cc/TF3X-VUY3>; see also Shah, Cambre & Unwala, *supra* note 5.

7. The only potential candidate for a “winner” is the law firms that settle multi-million-dollar class action lawsuits for nonfunctional slack-fill.

8. Jacob Goldstein, *Too Much Empty Space in Pepper Tin Prompts Class-Action Lawsuit*, NPR (Apr. 20, 2016, 5:15 AM), <https://perma.cc/AE42-7KGJ>.

9. Kaitlyn Tiffany, *Half-Empty Boxes of Milk Duds, Underfilled Halo Top: People Keep Suing over ‘Slack Fill’ in Food*, VOX (July 31, 2019, 11:50 AM), <https://perma.cc/5VGQ-5RS5>.

10. *Id.*

11. Lorie Konish, *64% of Consumers Are Worried About ‘Shrinkflation.’ What It Is and How to Watch for It While Shopping*, CNBC (Aug. 29, 2022, 3:11 PM), <https://perma.cc/Z6K7-EETW>.

strategy,”¹² “downsizing,”¹³ “down-switching,”¹⁴ “package downsizing,”¹⁵ and a “weight-out strategy.”¹⁶

Another related phenomenon is “skimpflation,” in which a business reduces (or “skimps”) on the quality of its product while maintaining or increasing the price.¹⁷ Common examples include when a food producer changes the formula of its food to substitute cheaper, artificial sweeteners or cheaper oils for more expensive ingredients.¹⁸ Other examples include going to a medical clinic and being treated by a nurse practitioner rather than a physician¹⁹ or moving a call center overseas.²⁰ Skimpflation also refers to instances when a company gets customers to do more of the work, thus reducing the service provided.²¹ Examples of customer-focused skimpflation include self-checkout machines at grocery stores, online ordering and kiosk ordering at fast food restaurants, and requiring the customer to assemble the product. Skimpflation is even harder for consumers to recognize, because the changes are often subtle and the packaging may not explicitly notify consumers of the changes.²² For example, McDonald’s and Domino’s Pizza have shrunk the sizes of their value meals while simultaneously increasing the prices.²³ Consumers are unlikely to notice such changes, as product weights are neither mandatory on fast food packaging nor required on restaurant menus.²⁴

While the practice is not new, the term “shrinkflation” was not coined until 2009.²⁵ It was officially added to the Merriam-Webster dictionary in 2022.²⁶ The

12. Jun Yao, Di Wang & Gary Mortimer, *All New Smaller Size! Why Getting Less with Shrinkflation Is Preferable to Paying More*, THE CONVERSATION (Apr. 25, 2022, 6:18 AM), <https://perma.cc/4XB4-YRDL>.

13. JEANNETTE BENNETT, FED. RSRV. BANK OF ST. LOUIS, *BEYOND INFLATION NUMBERS: SHRINKFLATION AND SKIMPFLATION 2* (Dec. 2022), <https://perma.cc/D5AW-VFWR>.

14. *Smaller Boxes in the Cereal Aisle? Say Hello to Shrinkflation*, CBS NEWS (June 8, 2022, 2:01 PM), <https://perma.cc/ALL6-W3G9>.

15. Metin Cakir & Joseph V. Balagtas, *Consumer Response to Package Downsizing: Evidence from the Chicago Ice Cream Market*, 90 J. RETAILING 1 (2014).

16. Michael Miller, *Frito-Lay Left Holding the Bag*, S. FLA. BUS. J. (Jan. 29, 2001, 12:00 AM), <https://perma.cc/AY65-84ET>.

17. BENNETT, *supra* note 13, at 3.

18. *Id.* at 4.

19. Sheldon H. Jacobson, *Service Sector ‘Shrinkflation’ Has Some Benefits*, THE HILL (Sept. 19, 2022, 11:30 AM), <https://perma.cc/8E8W-PR9S>.

20. *Id.*

21. BENNETT, *supra* note 13, at 3.

22. *Id.* at 4.

23. Goh Chiew Tong, *Tired of Paying More for Less, Shoppers Take to TikTok to Call Out Companies for ‘Shrinkflation’*, CNBC (Aug. 25, 2022, 7:43 PM), <https://perma.cc/Z2Y2-LX7X>.

24. *Questions and Answers on the Menu and Vending Machines Nutrition Labeling Requirements*, U.S. FOOD & DRUG ADMIN. (July 11, 2018), <https://perma.cc/9L7A-URZV>.

25. Yao et al., *supra* note 12.

26. Martine Paris & BLOOMBERG, *Hello ‘Shrinkflation’ and ‘Side Hustle’: Newest Dictionary Words Are Heavy on Economic Anxiety*, FORTUNE (Sept. 8, 2022, 5:41 AM), <https://perma.cc/F2MR-X67Z>.

practice has surged since then, likely as a corporate response to rising inflation.²⁷ In the United Kingdom, there were 2,529 documented examples of shrinkflation from 2012 to 2017.²⁸ Experts predict this behavior will only increase in the future.²⁹ A 2022 survey found that 64% of consumers are worried about it.³⁰ The shrinkflation subreddit has over 80,000 members who upload images of shrinkflation in action to the platform daily.³¹ Shrinkflation even trended on Twitter in 2022, likely because younger people are hit hardest, as food products make up a larger percentage of their expenses.³² There has also been a corresponding increase in shrinkflation-related litigation.³³

Businesses have faced numerous challenges as of late. In recent years, the food industry has been plagued by a heightened vulnerability to cyberattacks.³⁴ The Russian invasion of Ukraine has led to shortages in some key ingredients.³⁵ There are widespread labor shortages.³⁶ Both former President Trump's trade war with China³⁷ and President Biden's subsequent refusal to reverse the Trump administration's policies harm U.S. businesses.³⁸ Additionally, lingering supply chain constraints from the COVID-19 pandemic make achieving profitability increasingly difficult for companies.³⁹ The resulting inflationary pressures put businesses in a difficult position. While raising prices and keeping the packaging and product weight unchanged is the simplest response to inflation, it is not the most profitable. Customers are highly sensitive to price increases since they are highly salient.⁴⁰ Another factor working against increased prices is that twenty-first century consumers have low brand loyalty, and modern grocery stores provide

27. Chad G. Marzen & Michael Conklin, *Stagflation in American Jurisprudence*, 42 PACE L. REV. 1 (2021).

28. Yao et al., *supra* note 12.

29. *Id.*

30. Konish, *supra* note 11.

31. See *R/shrinkflation*, REDDIT, <https://perma.cc/QWB3-HLFU> (last visited July 31, 2023).

32. Tong, *supra* note 23.

33. Kristi Wolff, *Suing over Empty Space: Why Lawsuits over Slack Fill in Packaging Are Growing*, NUTRITIONAL OUTLOOK (Feb. 3, 2017), <https://perma.cc/X4K4-FCKH>.

34. 5@5: 'Shrinkflation' Explained | US May Restrict PFAS | Food Supply Cyberattack Warnings, NEW HOPE NETWORK (June 7, 2021), <https://perma.cc/EL95-5K44> ("The food system is incredibly vulnerable to cyberattacks. . .").

35. Heinz Strubenhoff, *The War in Ukraine Triggered a Global Food Shortage*, BROOKINGS (June 14, 2022), <https://perma.cc/J7QT-DQTU>.

36. Stephanie Ferguson & Makinzi Hoover, *Understanding America's Labor Shortage: The Most Impacted Industries*, U.S. CHAMBER OF COM. (Jan. 9, 2024), <https://perma.cc/XD7M-DFKB>.

37. Ryan Hass & Abraham Denmark, *More Pain than Gain: How the US-China Trade War Hurt America*, BROOKINGS (Aug. 7, 2020), <https://perma.cc/XP5P-7KL9>.

38. Katie Lobosco, *Why Biden Is Keeping Trump's China Tariffs in Place*, CNN (Jan. 26, 2022, 5:14 PM), <https://perma.cc/NA6K-5MTJ>.

39. Melissa Repko & Amelia Lucas, *Stores and Suppliers Clash Over Price Hikes as Shoppers Hit by Sticker Shock*, CNBC (Aug. 15, 2022, 2:45 PM), <https://perma.cc/Q5JJ-EWJN>.

40. Marielle Segarra, *How Sensitive Are People to Price Hikes?*, MARKETPLACE (July 30, 2021), <https://perma.cc/ZTA9-ATPL>.

numerous alternatives for nearly every product.⁴¹ Because of the effects of price lining, even slight increases to prices can result in dramatic decreases in sales.⁴² Finally, with razor-thin net profit margins of less than 1% on average, even slight decreases in volume are devastating to businesses.⁴³

Nonfunctional slack-fill is an attractive alternative to raising the price of goods.⁴⁴ Recent studies find this strategy considerably more profitable than the alternative of increasing the price of a product but keeping its weight the same.⁴⁵ This effect is referred to as “nominal price rigidity.”⁴⁶ Research into the food industry’s pricing and packaging behaviors demonstrates that the companies who engage in nonfunctional slack-fill and shrinkflation are acting consistently with the notion that decreasing the weight and keeping the price the same is considerably more profitable than increasing the price and keeping the weight the same.⁴⁷

Some companies go to great lengths to camouflage their slack-fill and shrinkflation strategies. Examples include switching to taller and thinner containers that look similar but hold less product and increasing the dimple on the bottom of jars and bottles.⁴⁸ While the stated net weight printed on the label is adjusted down to reflect the diminished product volume, many consumers do not check these, nor do they engage in the per-unit calculations necessary to identify nonfunctional

41. Glenn Llopis, *Consumers Are no Longer Brand Loyal*, FORBES (Dec. 10, 2014, 9:30 AM), <https://perma.cc/8CN8-MRU7>.

42. Remy Melina, *Why Do Most Prices End in .99?*, LIVE SCI. (Feb. 17, 2011), <https://perma.cc/G6E8-57JH>.

43. *What Is a Good Gross Profit Margin?* (2024), POLYMER (Aug. 9, 2023), <https://perma.cc/RG4W-T7YM> (reporting the average net profit margin of “food wholesalers” as 0.69%). Note that reducing volume does not simply reduce the volume on which the supplier is receiving 0.69%. It reduces this profit margin further because the fixed costs that are included in the net gross profit do not decrease. For example, imagine a company that sells a product for \$10, makes \$0.69 profit on each unit, and sells 10,000 units, therefore making \$6,900 in profit. Assume the fixed costs per unit are \$4.00 and the variable costs are \$5.31. In this scenario, a 10% reduction in sales would not result in a 10% reduction in profits but a 64% reduction in profit. This is because each unit now has to shoulder \$4.44 of the fixed costs.

44. Dee-Ann Durbin, *No, You’re Not Imagining It—Package Sizes Are Shrinking*, ASSOCIATED PRESS (June 8, 2022, 3:16 PM), <https://perma.cc/7LNW-JF73>.

45. Yao et al., *supra* note 12 (finding that, compared to a shrinkflation strategy, decreasing the weight but keeping the price the same decreased sales 21.8% and increasing the price but keeping the weight the same decreased sales 35.5%); JOHN T. GOURVILLE & JONATHAN J. KOEHLER, *DOWNSIZING PRICE INCREASES: A GREATER SENSITIVITY TO PRICE THAN QUANTITY IN CONSUMER MARKETS* 26 (Harv. Bus. Sch. Mktg. Rsch. Papers, Paper No. 04-01, 2004), <https://perma.cc/YWN8-F48E> (presenting the results of a study that measured four food products over a 145-week period and found that while price changes dramatically changed consumer buying behavior, decreasing quantity while keeping price the same did not); Cakir & Balagtas, *supra* note 15, at 6 (explaining that consumer response to price increases is about four times that of volume decreases in the ice cream market); DANIEL LEVY & AVICHAJ SNIR, *SHRINKING GOODS* 25–26 (Emory University Working Paper, Paper No. 13-03, 2013) (explaining that the reason consumers react more to a price increase than a volume reduction is because the information processing costs are much greater in the latter than the former).

46. Levy & Snir, *supra* note 45.

47. GOURVILLE & KOEHLER, *supra* note 45, at 11–12; David Jevons, *Shrinkflation! A Bite Missing?*, OXERA (Apr. 26, 2017), <https://perma.cc/AM9T-7XK8>.

48. BENNETT, *supra* note 13, at 3.

slack-fill and shrinkflation. However, other companies are upfront about the changes. In Japan, snack maker Calbee Inc. publicly announced its 10% weight reductions—and 10% price increases—for many of its products, including veggie chips and crispy edamame.⁴⁹

Some companies have been so bold as to attempt to put a positive spin on non-functional slack-fill and shrinkflation. One company boasted that, while it did decrease the size of its product in 2022, it had been ten years since it last reduced the size.⁵⁰ A more creative marketing attempt is to reframe it as beneficial “portion-control.”⁵¹ While studies have shown that people overconsume food when they believe there exists a larger total supply, the idea that there *is* a larger supply is based on perception and not reality.⁵² By tricking consumers through nonfunctional slack-fill and shrinkflation that there is more food present in the container, consumers will simply indulge according to their mistaken perceptions. Therefore, a smaller box with the same amount of product would likely result in better portion control. Fortunately, the legislation proposed in this Article prompts such a result.

Despite the growing trend of multi-million-dollar lawsuits alleging nonfunctional slack-fill, little has been written in legal academia on this issue. Only a few law review articles have explored the concepts of nonfunctional slack-fill and shrinkflation.⁵³ And despite the growing need for practical, environmental solutions, no law review article has presented an environmental basis for nonfunctional slack-fill reform. Existing case law likewise ignores environmental harm, with the potential exception of a 2022 lawsuit that tangentially involved an environmental claim.⁵⁴

II. EXISTING CASE LAW

Within the past decade, several courts throughout the country have examined situations in which plaintiffs have alleged impermissible nonfunctional slack-fill is present in a consumer product. These allegations typically revolve around purported violations of state consumer protection laws, with a number of cases involving the application of New York General Business Law section 349(a)⁵⁵ or California’s Sherman Food, Drug and Cosmetic Laws.⁵⁶

49. Durbin, *supra* note 44.

50. Tong, *supra* note 23.

51. Elizabeth Crawford, *Could Reframing ‘Shinkflation’ as Portion-Control Boost Sales?*, FOOD NAVIGATOR (Jan. 16, 2023, 4:06 PM), <https://perma.cc/K5MM-Q3S3>.

52. *Larger-Sized Portions, Packages and Tableware Lead to Higher Consumption of Food and Drink*, UNIV. OF CAMBRIDGE (Sept. 14, 2015), <https://perma.cc/5AXD-5545>.

53. See, e.g., Cary Silverman, *In Search of the Reasonable Consumer: When Courts Find Food Class Action Litigation Goes Too Far*, 86 U. CIN. L. REV. 1, 4 (2018).

54. See *infra* notes 173–176 and accompanying text.

55. See N.Y. GEN. BUS. LAW § 349(a) (McKinney 2014) (“Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.”).

56. See CAL. HEALTH & SAFETY CODE § 110100 (West 1995) (“All food labeling regulations and any amendments to those regulations adopted pursuant to the federal act, in effect on January 1, 1993, or adopted on or after that date shall be the food labeling regulations of this state.”).

Under federal law, the Food, Drug and Cosmetics Act (FDCA) prohibits companies from misbranding products by utilizing misleading containers.⁵⁷ Under regulations interpreting the FDCA, a container is misleading if it contains “non-functional slack-fill.”⁵⁸ Nonfunctional slack-fill is defined as:

The empty space in a package that is filled less than its capacity for reasons other than: (1) protection of the contents of the package; (2) requirements of the machines used to enclose the contents in the package; (3) unavoidable product settling during shipping and handling; (4) the need for the package to perform a specific function; (5) the food is packaged in a reusable container with empty space as part of the presentation of the food; and/or (6) the inability to increase the fill level or reduce the package size.⁵⁹

In 1990, Congress further amended the FDCA by enacting the Nutrition Labeling and Education Act (NLEA), which strengthened the authority of the Food and Drug Administration (FDA) to require nutrition labeling on foods and outlined the requirements of claims that companies can make regarding nutritional content in foods.⁶⁰

A. CASES INVOLVING PREEMPTION

With the presence of the FDCA and NLEA as federal statutes regulating the misbranding of consumer products, the issue of preemption of state consumer law claims has arisen. An express preemption provision is included within the NLEA.⁶¹ The express preemption provision provides that states can enact food labeling requirements that are only equivalent to, and consistent with, federal labeling requirements.⁶² In *Izquierdo v. Mondelez International, Inc.*, the U.S. District Court for the Southern District of New York succinctly noted that, “state laws that impose affirmatively different labeling requirements from federal law in these areas are preempted. However, state laws that seek to impose labeling requirements identical to those required by federal regulations are not preempted.”⁶³

1. Cases Finding Preemption

Two courts have found preemption of state consumer law claims. In *Bimont v. Unilever United States, Inc.*, a group of plaintiffs brought a class action alleging

57. See 21 U.S.C.A. § 343(d).

58. See 21 C.F.R. § 100.100(a) (2023).

59. See *id.* § 100.100(a)(1)-(6) (2023); *Kamal v. Eden Creamery, LLC*, No. 18-cv-01298-BAS-AGS, 2019 WL 2617041, at *7 (S.D. Cal. June 26, 2019).

60. See *Ivie v. Kraft Foods Global, Inc.*, No. C-12-02554-RMW, 2013 WL 685372, at *1 (N.D. Cal. Feb. 12, 2023).

61. See 21 U.S.C. § 343-1.

62. See *Izquierdo v. Mondelez Int'l, Inc.*, No. 16-cv-04697, 2016 WL 6459832, at *4 (S.D.N.Y. Oct. 26, 2016).

63. *Id.*

that the packaging of “AXE” and “Degree” brand deodorants contained impermissible nonfunctional slack-fill in violation of the consumer protection laws of New York and other states.⁶⁴ As noted earlier, state laws with labeling requirements identical to federal law are not preempted, and state laws also cannot add requirements that are not present under federal law.

In its preemption analysis in *Bimont v. Unilever United Nations, Inc.*, the U.S. District Court for the Southern District of New York focused on the observation that the FDA only covered slack-fill in food products when it implemented slack-fill regulations, not slack-fill in drugs or cosmetics packaging.⁶⁵ The court further noted that state laws regulating nonfunctional slack-fill in drugs or cosmetics would implement a requirement additional to existing federal law and thus are preempted.⁶⁶

Similarly, in *O’Connor v. Henkel Corp.*, the U.S. District Court for the Eastern District of New York analyzed allegations that certain “Right Guard” antiperspirant and deodorant products contained nonfunctional slack-fill.⁶⁷ As in *Bimont*, the court in *O’Connor* remarked that state laws regulating nonfunctional slack-fill in cosmetics “would impose requirements different from or additional to those required by federal law and usurp the role of the FDA in determining what if any slack-fill requirements are necessary to protect consumers.”⁶⁸ Consequently, the *O’Connor* court ruled that plaintiff’s allegations of nonfunctional slack-fill were preempted.⁶⁹

While the courts in *Bimont* and *O’Connor* ruled in favor of preemption in cases involving state claims alleging nonfunctional slack-fill, the two decisions are, in general, in the minority of cases pertaining to preemption. Most court decisions in which plaintiffs allege nonfunctional slack-fill have found the claims to not be preempted; however, such claims may still be dismissed on other grounds.

2. Cases Rejecting Preemption

Hendricks v. Starkist Co. serves as a typical example of a court decision rejecting preemption.⁷⁰ In *Hendricks*, a consumer filed a class action alleging the defendant underfilled five-ounce cans of tuna by anywhere from 1.1% to 17.3%.⁷¹ The plaintiff cited FDA regulations specifically on the canned tuna standards of

64. See *Bimont v. Unilever United States, Inc.*, No. 14-CV-7749, 2015 WL 5256988, at *1 (S.D.N.Y. Sept. 9, 2015).

65. *Id.* at 4.

66. *Id.* at 6.

67. See *O’Connor v. Henkel Corp.*, No. 14-CV-5547, 2015 WL 5922183, at *1–2 (E.D.N.Y. Sept. 22, 2015).

68. *Id.* at *6.

69. *Id.*

70. See, e.g., *Hendricks v. Starkist Co.*, 30 F. Supp. 3d 917 (N.D. Cal. 2014).

71. *Id.* at 922.

fill in alleging that the amount of fill in the tuna cans was “inadequate.”⁷² Given the plaintiff’s mention of specific FDA regulations that allegedly were violated and considering that the allegations in the complaint did not utilize a standard differing from FDA regulations, the court in *Hendricks* held that the plaintiff’s claims that the tuna cans contained an “inadequate” amount of tuna were not preempted.⁷³ Therefore, in cases in which allegations are made that specifically reference the violation of FDCA standards, it appears more likely that a court will not dismiss the action on preemption grounds.

The U.S. District Court for the Northern District of California reached a similar result in the case of *Ivie v. Kraft Foods Global, Inc.*⁷⁴ In *Ivie*, the plaintiff alleged that slack-fill packaging utilized in defendant’s “Easy Mac,” “Jello-O Sugar Free Strawberry,” and “Stove Top Cornbread Stuffing Mix” products were unlawful due to nonfunctional slack-fill.⁷⁵ The court rejected the argument that plaintiff’s claim was preempted, stating specifically that the “plaintiff does not ask the court to require anything different than the FDA requirements, specifically 21 C.F.R. ¶ 100.100.”⁷⁶

Other decisions have rejected defense preemption arguments at the pleadings stage but still either dismissed or upheld a dismissal of claims due to the lack of any cognizable injury being demonstrated by the consumer. In *Benson v. Fannie May Confections Brands, Inc.*, plaintiffs alleged that a seven-ounce box of melt-away mints that they purchased for \$9.99 plus tax contained approximately 33% empty space.⁷⁷ Plaintiffs further alleged that the empty space was nonfunctional and misled consumers into believing there were more meltaway mints in the box than actually received, constituting a violation of the Illinois Consumer Fraud and Deceptive Practices Act.⁷⁸

In *Benson v. Fannie May Confections Brands, Inc.*, the U.S. District Court for the Northern District of Illinois dismissed the case on preemption grounds because the plaintiffs had not specifically pleaded nonfunctional slack-fill pursuant to 21 C.F.R. § 100.100(a)(1)–(6).⁷⁹ However, on appeal, the Seventh Circuit reversed the district court on preemption grounds.⁸⁰ The Seventh Circuit remarked that the defendant bore the burden of proof for an affirmative defense, such as preemption, and held that the “district court thus erred by penalizing

72. *Id.* at 928.

73. *Id.*

74. See *Ivie v. Kraft Foods Global, Inc.*, No. C-12-02554-RMW, 2013 WL 685372, at *43 (N.D. Cal. Feb. 12, 2023).

75. *Id.* at *11.

76. *Id.*

77. See *Benson v. Fannie May Confections Brands, Inc.*, 944 F.3d 639, 644 (7th Cir. 2019).

78. *Id.*

79. *Id.*; see *Benson v. Fannie May Confections Brands, Inc.*, No. 17-C-3519, 2018 WL 6446391, at *2 (N.D. Ill. Dec. 10, 2018).

80. See *Benson*, 944 F.3d at 645.

[plaintiff] for failing to anticipate an affirmative defense in her complaint and dismissing the action based on FDCA preemption.”⁸¹

Although the Seventh Circuit reversed the district court on the preemption issue, the court nonetheless upheld the dismissal of the case on another ground—that the plaintiffs did not sufficiently plead cognizable damages.⁸² The plaintiffs alleged damages based on the percentage of nonfunctional slack-fill in the melt-away mints boxes and sought compensation based on the nonfunctional slack-fill percentage in each box.⁸³ However, the Seventh Circuit did not discern any sufficient allegation of pecuniary loss able to withstand dismissal.⁸⁴ The appellate court specifically noted the absence of any allegation that they could have received a better price for the meltaway mints elsewhere, that the meltaway mints were not worth \$9.99 a box, and that the plaintiffs did “not explain how a percentage refund of the purchase price based on the percentage of nonfunctional slack-fill corresponds to their alleged harm.”⁸⁵ Consequently, the Seventh Circuit upheld the dismissal of the Illinois Consumer Fraud and Deceptive Practices Act allegations by the district court.⁸⁶

The U.S. District Court for the Southern District of New York similarly rejected a preemption argument while at the same time dismissing a class action complaint due to a lack of injury in a nonfunctional slack-fill case in *Izquierdo v. Mondelez International, Inc.*⁸⁷ In *Izquierdo*, the plaintiffs alleged that boxes of the defendant’s “Sour Patch Watermelon Candy” contained 44% nonfunctional slack-fill.⁸⁸ The plaintiffs alleged this constituted a violation of New York General Business Law section 349, which prohibits deceptive acts or practices by businesses.⁸⁹

On the preemption issue, the district court in *Izquierdo* found that the New York General Business Law incorporated the food labeling standard of the FDCA.⁹⁰ As such, the *Izquierdo* court held that plaintiffs’ claims were not preempted by federal law.⁹¹ Moreover, the court also found that plaintiffs did not sufficiently allege an injury under section 349 of the New York General Business Law.⁹² The court focused on the observation that plaintiffs did not allege that, absent deceptive acts, they paid a higher price for the candy than they otherwise would have.⁹³ Ultimately, because plaintiffs collapsed the deception as both act

81. *Id.*

82. *Id.* at 648.

83. *Id.* at 644.

84. *Id.* at 648.

85. *Id.*

86. *Id.* at 649.

87. See *Izquierdo v. Mondelez Int’l, Inc.*, No. 16-cv-04697, 2016 WL 6459832, at *1 (S.D.N.Y. Oct. 26, 2016).

88. *Id.*

89. *Id.* at *2.

90. *Id.* at *4.

91. *Id.*

92. *Id.* at *7.

93. *Id.*

and injury, rather than alleging specific cognizable injuries, the court dismissed the claims.⁹⁴

Perhaps one of the most comprehensive analyses of a court rejecting a preemption argument is the U.S. District Court for the Southern District of California's analysis in the 2019 case of *Kamal v. Eden Creamery, LLC*.⁹⁵ The *Kamal* case involved alleged underfilling of "Halo Top" ice cream, which was sold by the defendant in pints.⁹⁶ Plaintiffs contended that defendant "routinely" underfilled the containers and even noted that the defendant had a "low fill response form" included on its website and had known of the slack-fill issue for years.⁹⁷ Plaintiffs also claimed that defendant routinely sent a form response on the issue from customer representatives, but nothing was done to address the issue.⁹⁸ In response to plaintiff's contentions that the underfilling was impermissible "nonfunctional slack-fill," defendant argued that the underfilling was due to "unavoidable settling" during the shipping and handling process.⁹⁹

In examining plaintiff's allegations, the *Kamal* court placed a strong emphasis on defendant's provision of full pints of ice cream on some occasions, and also on the photographs of underfilled pints that were included with the Complaint.¹⁰⁰ Affording tremendous weight to the visual evidence, the court found the evidence to be of the "strongest" nature in alleging "that the underfilled pints are not attributable to an inability of [defendant] to increase the level of fill."¹⁰¹

Defendant also claimed in its defense that the pint-sized containers that were less than full were only in such condition because of melting and refreezing, which may occur when third-party distributors handle the containers.¹⁰² The court rejected defendant's argument that the settling was "unavoidable" and that defendant had made statements alleged in the complaint that there are potential means to avoid settling during shipping and distribution.¹⁰³ Consequently, the court concluded that alleged conduct "if true, violates the federal slack-fill standard. Plaintiff's state law claims in turn rely on state law duties that are consistent with the federal standard. As such, the Court reject[ed] Defendants' argument that the FDCA preempts Plaintiffs' claims at this stage."¹⁰⁴

94. *Id.* at *7-8.

95. *See Kamal v. Eden Creamery, LLC*, No. 18-cv-01298-BAS-AGS, 2019 WL 2617041, at *17 (S.D. Cal. June 26, 2019).

96. *Id.* at *2.

97. *Id.*

98. *Id.*

99. *Id.* at *8.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at *9.

104. *Id.*

B. CASES DISMISSING NONFUNCTIONAL SLACK-FILL CLAIMS

Outside of the preemption issue, a review of recent decisions on nonfunctional slack-fill indicates that most decisions result in the dismissal of lawsuits alleging impermissible nonfunctional slack-fill. This Section will discuss the rationales for dismissal as classified into the following five categories: (1) the allegations in a lawsuit are essentially conclusory, (2) either no comparison with other products on nonfunctional slack-fill are made or the comparisons made with other products are insufficient, (3) the net weight of the product is clearly disclosed by the company, (4) the argument that consumers should reasonably expect products to contain slack-fill, and (5) the plaintiff has not suffered any discernible damages from alleged nonfunctional slack-fill.

1. Conclusory Allegations

A common reason federal courts have dismissed claims alleging nonfunctional slack-fill is that the allegations are essentially conclusory. One such example is the U.S. District Court for the Southern District of New York case of *Bautista v. Cytosport, Inc.*¹⁰⁵ In *Bautista*, plaintiff alleged that defendant's produced "Muscle Milk" protein powder included approximately 30% empty space.¹⁰⁶ Plaintiff further contended that defendant intentionally included this nonfunctional slack-fill in its packaging in violation of New York's Deceptive Trade Practices statute.¹⁰⁷

The court in *Bautista* found plaintiff's nonfunctional slack-fill allegations to be a "naked assertion."¹⁰⁸ Although the court acknowledged it may be somewhat of a difficult hurdle for a plaintiff to incorporate more specific facts before discovery, it also noted that "experts in the relevant field can be consulted or comparisons to similar products can be made" for more facts to be alleged.¹⁰⁹ The court then ordered the dismissal of plaintiff's New York Deceptive Trade Practices Act claim.¹¹⁰

A similar result was found under a California Unfair Competition Law claim in the case of *Bush v. Mondelez International, Inc.*¹¹¹ There, plaintiff had purchased products as varied as "Mini Chips Ahoy!," "Mini Oreo," "Golden Oreo Mini," "Nutter Butter Bites," "Mini Nilla Wafers," "Ritz Bits," and "Teddy Grahams."¹¹² Plaintiff claimed that defendants misled consumers through the

105. See *Bautista v. Cytosport, Inc.*, 223 F. Supp. 3d 182 (S.D.N.Y. 2016).

106. *Id.* at 186.

107. *Id.* at 187.

108. *Id.* at 191.

109. *Id.*

110. *Id.*

111. See *Bush v. Mondelez Int'l, Inc.*, No. 16-cv-02460-RS, 2016 WL 5886886, at *1 (N.D. Cal. Oct. 7, 2016).

112. *Id.*

container sizes to lead consumers to believe there was more snack than actually existed and that he relied on the defendant's packaging.¹¹³ Plaintiff thus alleged that the packaging violated the FDA's regulation prohibiting nonfunctional slack-fill.¹¹⁴

However, the U.S. District Court for the Southern District of California noted that the allegations were "threadbare recitals of the elements of a cause of action," and were conclusory.¹¹⁵ The court found the allegations insufficient to support an unlawful packaging claim and dismissed the claim.¹¹⁶ Similarly, the same court found insufficient facts to allege nonfunctional slack-fill in both *Buso v. Vigo Importing Co.*¹¹⁷ in 2018 and *Buso v. ACH Food Companies, Inc.*¹¹⁸ in 2020.

2. Insufficient Comparisons

In some cases, plaintiffs have not made sufficient comparisons with products of competitors to properly plead nonfunctional slack-fill. For example, in *Daniel v. Mondelez International, Inc.*, plaintiff alleged nonfunctional slack-fill in the packaging of defendant's "Swedish Fish" candy that was in excess of other gummy candy products, such as Dots, that were "packaged in similar sized boxes with significantly less slack-fill."¹¹⁹ Plaintiff even included pictures of defendant's packaging as well as the packaging of competitors.¹²⁰

In analyzing the comparisons, the court in *Daniel* remarked that the mere fact that assertions claim that the products are the "same" does not make them the same.¹²¹ As the court noted, "Plaintiff must avoid a common pitfall—*telling*, rather than *showing*—and explain to the Court *why* the candies and their packaging are the same or sufficiently similar."¹²² The court dismissed plaintiff's claim based upon violations of New York General Business Law section 349.¹²³

An insufficient comparison was also made in *Morrison v. Barcel USA, LLC*.¹²⁴ The plaintiff in the *Morrison* case alleged that the defendant's "Takis Rolled Tortilla Chips" bags contained 59% slack-fill as opposed to 43% slack-fill contained in bags of "Doritos," a product of a competitor of the defendant.¹²⁵

113. *Id.*

114. *Id.* at *4.

115. *Id.*

116. *Id.*

117. See *Buso v. Vigo Importing Co.*, No. 18cv1328-WQH-BGS, 2018 WL 6191390, at *6 (S.D. Cal. Nov. 28, 2018).

118. See *Buso v. Vigo Importing Co.*, 445 F. Supp. 3d 1033, 1040 (S.D. Cal. 2020).

119. See *Daniel v. Mondelez International, Inc.*, 287 F. Supp. 3d 177, 181 (E.D.N.Y. 2018).

120. *Id.*

121. *Id.* at 188.

122. *Id.*

123. *Id.* at 189.

124. See *Morrison v. Barcel USA, LLC*, No. 18-CV-531, 2019 WL 95477, at *1 (S.D.N.Y. Jan. 2, 2019).

125. *Id.* at *3.

Plaintiff then concluded that due to the difference in bags, the defendant's bags must contain nonfunctional slack-fill.¹²⁶ However, the court noted that defendant's product and the competitor's product "have different numbers of chips per bag, different manufacturers, and different distributors."¹²⁷ Therefore, this comparison was not sufficient, and the court dismissed the plaintiff's claims.¹²⁸

3. Clear Disclosure of Product Net Weight

Courts have also dismissed cases alleging nonfunctional slack-fill in circumstances in which a product's net weight is clearly disclosed to the consumer. In *Klausner v. Annie's, Inc.*, plaintiff alleged the defendant's "Fruit Snacks" contained over 60% nonfunctional slack-fill.¹²⁹ Plaintiff alleged violation of New York General Business Law section 349, which prohibits conduct by businesses that is "materially misleading."¹³⁰ However, the *Klausner* court specifically noted that the defendant disclosed in "large, color-differentiated font, the actual amount of Fruit Snacks in each box."¹³¹ With this clear disclosure, the court held a reasonable consumer could not be materially misled.¹³²

Comparable to the *Klausner* case, judges in at least two other cases in the United States District Court of the Southern District of New York—*Miao Xin Hu v. Iovate Health Sciences U.S.A. Inc.*¹³³ and *Alce v. Wise Foods, Inc.*¹³⁴—each found that clear disclosures of product weight precluded plaintiffs from recovering on a nonfunctional slack-fill claim.

4. Consumer Expectations

Similar to the rationale that the clear disclosure of product net weight should bar cases alleging nonfunctional slack-fill, courts also reason that, in this era, consumers should be cognizant that slack-fill is an ordinary part of product packaging. In *Daniel v. Tootsie Roll Industries, Inc.*, plaintiff alleged boxes of the defendant's "Junior Mints" contained more than 40% slack-fill and that at least

126. *Id.*

127. *Id.* at *4.

128. *Id.*

129. *See Klausner v. Annie's, Inc.*, 581 F. Supp. 3d 538, 544 (S.D.N.Y. 2022).

130. *Id.* at 547.

131. *Id.* at 548.

132. *Id.*

133. *See Miao Xin Hu v. Iovate Health Scis. U.S.A Inc.*, No. 17-Civ.-0927, 2018 WL 4954105, at *3 (S.D.N.Y. Oct. 12, 2018) ("Here, the Herbal Zen package discloses, in large, color-differentiated font, the actual amount of protein power in each package. Given the prominence of this information, the Court finds, as a matter of law, that the allegedly nonfunctional slack-fill would not mislead a reasonable consumer acting reasonably under the circumstances.") (citation omitted).

134. *See Alce v. Wise Foods, Inc.*, No. 17-Civ.-2402, 2018 WL 1737750, at *10 (S.D.N.Y. March 27, 2018) ("First and foremost, the weight of the chips enclosed is prominently displayed on the front of each Product, in large sized font, in a color differentiated from the package background, and there is no allegation that the full weight represented is not actually in the bag.")

some of it was impermissible slack-fill.¹³⁵ In dismissing plaintiff's claim of non-functional slack-fill, the *Daniel* court contended that consumers today should know that numerous products contain slack-fill, noting "consumers are not operating on a *tabula rasa* with respect to their expectations of product fill."¹³⁶ In addition, in *Alce v. Wise Foods, Inc.*, the United States District Court for the Southern District of New York stated that "consumers may have come to expect significant slack-fill in potato chips and other snack products."¹³⁷ As the issue of shrinkflation and slack-fill becomes more prominent, the argument of consumer expectations will only become stronger as more consumers become accustomed to the practice.

5. Lack of Damages

Nonfunctional slack-fill claims may also be dismissed on the basis that the plaintiff has not suffered any actual damages. In *Stemm v. Tootsie Roll Industries, Inc.*, the plaintiff alleged a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act due to alleged nonfunctional slack-fill in boxes of "Junior Mints."¹³⁸

The United States District Court for the Northern District of Illinois in the *Stemm* case observed that the plaintiff claimed she expected to receive more candy than actually received, not that the candy was defective or worth less than what she paid for it.¹³⁹ The court remarked that the fact that the plaintiff "expected to receive something more than what she got, in and of itself, does not constitute actual damages."¹⁴⁰ Thus, the Illinois Consumer Fraud and Deceptive Business Practices Act claim was dismissed.¹⁴¹

6. Other Reasons

Finally, in at least one nonfunctional slack-fill case, the plaintiff admitted that he could not assert any specific details as to why slack-fill in the defendant's "Glutino Gluten Free Pretzels" was nonfunctional.¹⁴² Despite this, the plaintiff argued that he should be able to conduct discovery past a motion to dismiss.¹⁴³ The court in *Cordes v. Boulder Brands USA, Inc.* disagreed, noting that conclusory statements do not create a plausible claim.¹⁴⁴

135. See *Daniel v. Tootsie Roll Indus., LLC*, No. 17-Civ.-7541, 2018 WL 3650015, at *10 (S.D.N.Y. Aug. 1, 2018).

136. *Id.* at *13.

137. See *Alce*, 2018 WL 1737750 at *11.

138. See *Stemm v. Tootsie Roll Indus., Inc.*, 374 F. Supp. 3d 734, 737–38 (N.D. Ill. 2019).

139. *Id.* at 743.

140. *Id.*

141. *Id.* at 744.

142. See *Cordes v. Boulder Brands USA, Inc.*, No. CV-18-6534 PSG, 2018 WL 6714323, at *6 (C.D. Cal. Oct. 17, 2018).

143. *Id.*

144. *Id.*

C. CASES ALLOWING NONFUNCTIONAL SLACK-FILL CLAIMS TO PROCEED

In contrast to the cases dismissing nonfunctional slack-fill claims, several courts have allowed consumer claims to proceed to the discovery phase of litigation. The *Kamal* case discussed earlier is a prime example of a court placing great weight on the visual evidence presented in pictures of alleged nonfunctional slack-fill.¹⁴⁵

For these minority of cases, courts have generally found three discernible reasons to allow consumer claims to proceed beyond a motion to dismiss. First, at least one court has found the potential for a question of fact on nonfunctional slack-fill through inference via a comparison with the defendant's other consumer products.¹⁴⁶ Second, some courts have found that the issue of whether a reasonable consumer would expect excessive slack-fill is a question of fact left for a jury. Finally, courts have closely examined the specific allegations of a complaint and in a couple of cases have found that the plaintiff sufficiently pled facts to create a question of fact on nonfunctional slack-fill.

1. Inference Through Comparison

In *Clevenger v. Welch Foods, Inc.*, plaintiff proffered a claim under the California Unfair Competition Law for alleged nonfunctional slack-fill in defendant's "Yogurt Fruit Snacks" and "Reduced Sugar Snacks."¹⁴⁷ In other cases in which nonfunctional slack-fill claims were dismissed, comparisons of slack-fill were generally made to competitors. However, in *Clevenger*, plaintiff made comparisons to other products of the same defendant.¹⁴⁸ Plaintiff compared the "Yogurt Fruit Snacks" and "Reduced Sugar Snacks" to the "Reduced Sugar Snacks" at issue in the case and alleged that the "Reduced Sugar Snacks" were almost 30% less full by weight and 20% less full by quantity.¹⁴⁹ The *Clevenger* court therefore found that the comparison created "a plausible inference that Defendants' products contain substantially empty space" and thus a plausible claim for relief was stated to survive a motion to dismiss.¹⁵⁰

2. Reasonable Consumer Is a Question of Fact

In several cases, plaintiffs that have alleged nonfunctional slack-fill in packaging have had their claims survive a motion to dismiss due to the substantial amount of the slack-fill. In *White v. Just Born, Inc.*, plaintiff alleged that boxes of

145. See *Kamal v. Eden Creamery, LLC*, No. 18-cv-01298-BAS-AGS, 2019 WL 2617041, at *8 (S.D. Cal. June 26, 2019).

146. See *Clevenger v. Welch Foods, Inc.*, 501 F. Supp. 3d 875, 884 (C.D. Cal. 2020).

147. See *id.* at 881.

148. *Id.* at 884.

149. *Id.*

150. *Id.*

the defendant's "Hot Tamales" and "Mike and Ike" contained substantial non-functional slack-fill.¹⁵¹ The U.S. District Court for the Western District of Missouri found that whether a reasonable consumer would expect slack-fill was a suitable jury question in the *White* case, especially since the slack-fill was at a rate of 34–35%.¹⁵²

Similarly, the U.S. District Court for the Northern District of California found a question of fact pertaining to nonfunctional slack-fill in a case involving "Alexia Sweet Potato Fries with Sea Salt" that allegedly contained more than 50% slack-fill.¹⁵³ Sometimes, the nature of the packaging itself will create a question of fact as to whether a reasonable consumer would make a connection between the size of a box and the amount of product in it. In *Hawkins v. Nestle U.S.A., Inc.*, the U.S. District Court for the Eastern District of Missouri stated, "Defendant's candy boxes are opaque and nonpliable, and a reasonable consumer could conclude that the size of a box suggests the amount of candy in it."¹⁵⁴

3. Sufficient Pleading

Finally, courts will decline to dismiss a case that contains sufficient pleading and includes detailed, particular facts as to why slack-fill is nonfunctional. In *Escobar v. Just Born, Inc.*, plaintiff described in particularity how the slack-fill did not protect contents of a package and the process of the settling of the product in the package.¹⁵⁵ The plaintiff in *Coleman v. Mondelez International, Inc.* also made similar detailed allegations sufficient to survive a motion to dismiss.¹⁵⁶

D. THE FUTURE OF NONFUNCTIONAL SLACK-FILL CLAIMS

The paucity of federal appellate decisions regarding nonfunctional slack-fill claims leaves many questions as to the future trajectory of consumer class action claims in which nonfunctional slack-fill is alleged. Despite the lack of appellate cases, current claims in this new era have a high hurdle to proceed to the discovery phase and eventually to trial because many federal judges have dismissed claims alleging nonfunctional slack-fill.

151. See *White v. Just Born, Inc.*, No. 2-17-CV-04025-C-NKL, 2017 WL 3130333 (W.D. Mo. July 21, 2017).

152. *Id.* at *7.

153. See *Kennard v. Lamb Weston Holdings, Inc.*, No. 18-cv-04665-YGR, 2019 WL 1586022, at *21 (N.D. Cal. April 12, 2019).

154. See *Hawkins v. Nestle U.S.A., Inc.*, 309 F. Supp. 3d 696, 702 (E.D. Mo. 2018).

155. See *Escobar v. Just Born, Inc.*, No. CV-17-01826 BRO, 2017 WL 5125740, at *12 (C.D. Cal. June 12, 2017).

156. See *Coleman v. Mondelez Int'l, Inc.*, 554 F. Supp. 3d 1055, 1061–62 (C.D. Cal. 2021).

III. ENVIRONMENTAL SIGNIFICANCE

The practice of nonfunctional slack-fill naturally results in more post-consumer waste, as the unnecessarily larger containers are then thrown away. This waste in turn leads to various types of pollution from landfills. Despite mitigation attempts, landfills may then result in contamination of the water supply.¹⁵⁷ Landfills also contribute to air pollution through the emission of harmful chemicals, such as methane and toxic benzene.¹⁵⁸ The former is one of the largest sources of climate change, while the latter can cause cancer.¹⁵⁹

Environmental harm from nonfunctional slack-fill is not just limited to landfills; the negative effects are present throughout the consumption process. For example, when McCormick went from putting four ounces of ground black pepper to three in the same sized container, this action increases the per-ounce energy expenditure (increased carbon dioxide (CO₂) emissions) in the packaging assembly line process. It also increases the per-ounce warehouse space needed to store the product before shipping. For some products, this warehousing requires freezing, refrigeration, or otherwise climate-controlled space, which results in increased CO₂ emissions. When the product is shipped to the store, the new slack-filled package increases the per-ounce CO₂ emissions, as each shipment would be emitting the same carbon emissions but transporting less product. Once at the retail store, these packages take up more shelf space per-ounce, contributing to the need of larger stores, which requires greater energy expenditures to build, maintain, and keep climate controlled. Less product in each package also likely results in more frequent trips to the store by consumers, which further results in increased CO₂ emissions. And finally, nonfunctional slack-filled packages occupy more space in a consumer's kitchen, thus increasing the demand for houses with larger kitchens thus requiring increased home energy expenditures.¹⁶⁰

The unnecessary increased waste resulting from nonfunctional slack-fill is particularly important to the United States, which is by far the world's top per capita producer of waste.¹⁶¹ This not only negatively affects the United States but results in a significant problem shared by all countries. For example, 16.5 million tons of plastic waste wash into the world's oceans annually.¹⁶² Such plastic waste

157. Justin King, *Landfill Pollution & Water Pollution*, SCIENCING (Apr. 25, 2017), <https://perma.cc/JVP7-C7XP>.

158. *EPA Unveils Plan to Reduce Dangerous Pollution from Landfills*, ENV'T DEF. FUND (May 17, 2021), <https://perma.cc/W2P5-RLND>.

159. *Id.*

160. Lee Wallender, *Average Kitchen Size: A Comprehensive Guide*, THE SPRUCE (Dec. 26, 2023), <https://perma.cc/SW93-KQ5R> (explaining that not only has the average home size increased almost 60% since the 1970's but that the average kitchen size has increased at an even faster rate).

161. Niall Smith, *US Tops List of Countries Fueling the Waste Crisis*, VERISK MAPLECROFT (July 2, 2019), <https://perma.cc/A379-DCCG>.

162. John Stout, *How Much Trash Does America Really Produce?*, ENV'T AM. (Oct. 20, 2021), <https://perma.cc/NFK5-TDQW>.

remains in the environment for hundreds of years and can kill marine life.¹⁶³ The water contamination that results from consumer waste is also not limited to geographic borders.¹⁶⁴ High garbage production is also associated with the worldwide problem of climate change.¹⁶⁵ This is because garbage indicates high consumption rates, which means higher production, which in turn requires resource extraction, a process that results in roughly 42% of all U.S. greenhouse gas emissions.¹⁶⁶ An even more direct example of how U.S. garbage negatively affects other countries is the great amount of garbage the United States exports. For example, the United States exported 48 million tons of scrap plastic in 2020, nearly a 7% increase from 2019 levels.¹⁶⁷ This waste may contaminate local water sources¹⁶⁸ and is often openly burned, contaminating the air.¹⁶⁹ These effects have led to an outcry from some in countries that import waste.¹⁷⁰ This problem is so prevalent that in 2019, 187 countries signed on to the Basel Convention to limit exports of plastic waste from richer countries to poorer ones.¹⁷¹ It is easy to see how the outsized role that the United States plays in this matter could lead to disdain and a diminution in the United States' moral authority.

Increased recycling is unlikely to mitigate the environmental harm from non-functional slack-fill. Even when consumers attempt to recycle their food packaging, a significant amount of the time it does not end up recycled. Even when it is recycled, the recycling process may result in more environmental harm than good.¹⁷² When people believe they are recycling, they are less likely to do other, more meaningful practices. Furthermore, the use of nonfunctional slack-fill has been increasing, and experts predict it will continue to increase.¹⁷³ Therefore, increasing rates of recycling may only function to keep the harm at current levels rather than mitigate any of the harm.

Because existing FDA regulations and state legislation regarding nonfunctional slack-fill are aimed at protecting consumers from deceptive packaging and not environmental concerns, it is no surprise that nearly all case law on the subject ignores environmental impact. A 2022 case in the Northern District of

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Hiroko Tabuchi & Michael Corkery, *Countries Tried to Curb Trade in Plastic Waste. The U.S. Is Shipping More*, N.Y. TIMES (Mar. 12, 2021), <https://perma.cc/CD7U-VHH2>.

168. King, *supra* note 157.

169. Tabuchi & Corkery, *supra* note 167.

170. *Id.*

171. *New International Requirements for the Export and Import of Plastic Recyclables and Waste*, ENV'T PROTECTION AGENCY (June 22, 2022), <https://perma.cc/PE8N-97UN>. The full name of this convention—which the United States did not sign on to—is the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

172. Laura Sullivan, Emily Kwong & Rebecca Ramirez, *The Myth of Plastic Recycling*, NPR (Dec. 12, 2022), <https://perma.cc/UZT5-G3PY>.

173. BENNETT, *supra* note 13, at 3.

Illinois may be the sole exception.¹⁷⁴ This case is a nonfunctional slack-fill class action against Whole Foods for selling rice pilaf in packaging that is over 50% larger than necessary.¹⁷⁵ The plaintiffs allege that they were deceived because Whole Foods has promoted a commitment to environmentally friendly practices, specifically the practice of reducing excess packing materials.¹⁷⁶ The complaint alleges violations of the Magnuson-Moss Warranty Act, the state of Illinois's consumer-protection statutes, fraud, negligent misrepresentation, and unjust enrichment.¹⁷⁷

Despite the one exception of the Whole Foods lawsuit, nonfunctional slack-fill litigation has ignored the environmental degradation resulting from nonfunctional slack-fill. This is unfortunate for two main reasons. First, the cumulative environmental harm from the practice is significant. Second, using environmental protection as the basis against nonfunctional slack-fill would create more uniformity. This is because the existing standard, which is based on customer deception, is highly subjective. Exactly how much nonfunctional slack-fill is required to be considered misleading to consumers? Does this threshold vary based on product type? The lack of a universal nonfunctional-slack-fill-percentage standard harms not only the environment but also customers and producers. It is unclear to consumers how much slack-fill is required to win a lawsuit. And it is unclear to producers what packaging options will avoid costly litigation. A more objective standard based on environmental protection rather than customer deception would therefore benefit all involved.¹⁷⁸

IV. PROPOSED SOLUTION

Fortunately, there is a relatively simple and effective solution to the environmental problems caused by nonfunctional slack-fill. This Article proposes the solution of federal legislation enforced by the FDA limiting nonfunctional slack-fill to 15% by volume. Nonfunctional slack-fill would be defined as “empty space in a package that is filled less than its capacity for reasons other than: (1) protection of the contents of the package, (2) reasonable requirements of the machines used to enclose the contents in the package, or (3) unavoidable product settling during shipping and handling.” Such legislation provides numerous benefits and imposes a minimal burden. Properly understood, this legislation would benefit the environment, consumers, retailers, and even wholesalers.

174. *Jacobs v. Whole Foods Mkt. Grp.*, 621 F. Supp. 3d 894 (N.D. Ill. 2022).

175. *Id.*

176. *Id.*

177. *Id.*

178. One could attempt to argue that it does not benefit wholesalers because they would no longer be able to engage in the practice. However, such criticism ignores how this is ultimately a zero-sum game. Competitors will likely notice the advantage of the practice and adjust their packaging accordingly. Thus, there would be no net gain from utilizing nonfunctional slack-fill, just increased inefficiencies.

A federal, universal standard is preferable to the current piecemeal approach of using state laws. This is due largely to how a national standard would create uniformity in how the law is applied. The subjective language in existing legislation and case law provides very little guidance for businesses. For example, existing standards do not even inform businesses what percent of nonfunctional slack-fill is impermissible.¹⁷⁹ Wholesalers who sell their products in various states would not have to worry about the arduous task of creating packaging that satisfies different legal standards, some of which may not have been adjudicated yet. This would also create more uniform grounds for competition between wholesalers who sell their products in all fifty states compared to a wholesaler who only sells its product in a few states that happen to not have such protections.

The proposed federal legislation is also more objective than the existing state law standards. Some of the existing standards require the consultation of experts in the field,¹⁸⁰ comparisons to other products,¹⁸¹ and subjective determinations, such as what constitutes a “clear disclosure,”¹⁸² and what levels of nonfunctional slack-fill a “reasonable consumer” would expect.¹⁸³ Finally, the ambiguity surrounding what qualifies as a cognizable damage injects further subjectivity under the existing standard.¹⁸⁴

Therefore, the objectivity from the federal standard proposed in this Article provides numerous benefits. There is less room for interpretation, making disagreements less likely between a potential plaintiff and defendant as to whether it was in violation of the statute. This would likely result in lower litigation costs to wholesalers, as it will be easier to prove whether they were in compliance or not, either of which would increase the likelihood of the dispute not resulting in a full trial.¹⁸⁵ The more objective nature of this federal legislation would also reduce the likelihood that wholesalers would have to incur the costs of retooling their supply chains after a new state law on nonfunctional slack-fill or a new state court interpretation of existing nonfunctional-slack-fill legislation. Finally, the objective and universally applicable nature of this federal legislation would reduce the incentive for businesses to spend money on lobbying efforts.¹⁸⁶

179. Tiffany, *supra* note 9.

180. *See* Bautista v. Cytosport, Inc., 223 F. Supp. 3d 182, 191 (S.D.N.Y. 2016).

181. *See supra* notes 119–128.

182. *See supra* notes 129–134.

183. *See supra* notes 135–137; White v. Just Born, Inc., Case No. 2-17-CV-04025-C-NKL, 2017 WL 3130333, at *7 (W.D. Mo. July 21, 2017).

184. *See supra* notes 138–141.

185. If the wholesaler is clearly not in violation of the statute, then consumers are less likely to pursue legal action and more likely to be ruled against on summary judgement. If the wholesaler is clearly in violation of the statute, then the wholesaler is more likely to settle or to have the dispute resolved on a motion for summary judgement.

186. For example, an article in the *New York Law Journal* explains, “Lobbyists, pro-business organizations, and lawmakers in Missouri have also taken notice of the spate of slack fill claims filed in the state and have mobilized around tort reform efforts that would preclude the filing of such nuisance suits.” Shah, Cambre & Unwala, *supra* note 5.

Existing legislation ignores the environmental harm from nonfunctional slack-fill. Consequently, existing case law also ignores this pressing matter. This results in the existence of numerous defenses to nonfunctional slack-fill that severely limit legal liability for the practice. Allowing businesses to avoid liability based on adequate disclosure does nothing to mitigate the environmental harm. Likewise, exceptions for when “the mode of commerce does not allow the consumer to view or handle the physical container or product” does nothing to mitigate environmental harm.¹⁸⁷ Neither does allowing defenses based on a reasonable consumer’s expectations and lack of cognizable damages. Finally, a defense based on nonfunctional slack-fill in similar products does not mitigate environmental harm. This last example is a peculiar exception, as it essentially allows the harmful practice to continue so long as it is widespread. This creates a perverse incentive to make nonfunctional slack-fill more pervasive, as courts have allowed plaintiffs to use the defendant’s other products for this comparison.¹⁸⁸

One may be tempted to claim that this proposed federal legislation would harm wholesalers because it is more restrictive than existing state legislation. While it is true that this federal legislation would limit the practice of nonfunctional slack-fill more than existing state legislation, this would nevertheless help wholesalers, not harm them. This is because the practice of nonfunctional slack-fill is largely a zero-sum game. If only one wholesaler engaged in the practice, then yes, it would receive a competitive advantage. But, as demonstrated by the recent rise in litigation and the highly competitive nature of food wholesalers, competitors quickly engage in the same practice. Therefore, the practice quickly results in a race to the bottom in which everyone must engage in the practice to remain profitable.¹⁸⁹ These businesses are still competing over the same piece of the pie.

This proposed federal legislation would also likely help businesses by protecting their reputations. In Gallup’s 2023 rankings of the honesty and ethics of various professions, advertising practitioners and business executives sit near the bottom.¹⁹⁰ They rank worse than journalists and lawyers and are only better than

187. *Three Slack Fill Regulatory Changes for Manufacturers to Watch*, NAT’L L. REV. (Jan. 22, 2019), <https://perma.cc/HGM6-TG7N>.

188. *See, e.g., Clevenger v. Welch Foods, Inc.*, 501 F. Supp. 3d 875, 884 (C.D. Cal. 2020).

189. The race to the bottom is illustrated in the McCormick case:

“[A]s a major player, McCormick sets the precedent for the size of spice packaging, thus brands competing with McCormick will often use the same sizes. If McCormick reduces the amount of pepper in a product without reducing the price, its competition suffers from selling more product for a comparable price as McCormick in the same size packaging. There may be less pepper contained within the McCormick product, thus McCormick has a higher margin than its competitors for the same size packaging.”

Carolyn Heneghan, *McCormick Sued over Pepper Packaging Discrepancy*, FOOD DIVE (June 10, 2015), <https://perma.cc/BD7C-D3PT>.

190. Megan Brenan, *Nurses Retain Top Ethics Rating in U.S., but Below 2020 High*, GALLUP (Jan. 10, 2023), <https://perma.cc/2PDB-72H5>.

car salespeople, members of Congress, and telemarketers.¹⁹¹ The practices of nonfunctional slack-fill, shrinkflation, and skimpflation are unsurprisingly viewed negatively by consumers, as they are often interpreted as deceptive and a violation of trust.¹⁹² Consequently, by reducing these practices—even if only through governmental coercion—the reputation of businesses should be, to a small extent, rehabilitated.

Notably, this proposed federal legislation would only cover nonfunctional slack-fill. The practice of shrinkflation and skimpflation would not be covered. One could argue that shrinkflation also contributes to environmental harm because of the necessary supply chain retooling and more frequent trips to the grocery store by consumers. However, it would pose an undue hardship on businesses to never allow them to adjust their container sizes. Additionally, businesses would inevitably circumvent shrinkflation legislation by introducing “new” products in smaller containers, thus incurring the same environmental harm.

V. CONCLUSION

Many environmental concerns involve the difficult task of balancing subjective tradeoffs. For example, the environmental harm from fossil fuel consumption must be weighed against the benefits of low-cost air travel, life-saving generators, domestic jobs production, and a reliable electric grid. The reductions in greenhouse gasses from adding ethanol to gasoline must be weighed against increasing food costs and engine corrosion.¹⁹³ And the environmental benefits from zero-emission electric vehicles must be weighed against the harms from rare-earth mining.¹⁹⁴ To further complicate the public policy process of balancing the costs and benefits of these practices, the factors being balanced are often hard to quantify and probabilistic in nature. For example, any public policy analysis of deep-sea drilling needs to consider the harms from environmental catastrophes such as the Deepwater Horizon oil spill of 2010, which released four million barrels of oil into the Gulf of Mexico.¹⁹⁵ But it is unclear exactly how to weigh this risk. What is the probability that such an occurrence will happen again? What is the total harm from such a spill? And exactly how much benefit would be required to outweigh the future chance of this harm?

191. *Id.*

192. *See, e.g.,* Tong, *supra* note 23 (explaining that these practices are more than just a typical business strategy to increase profits and are essentially an attempt to trick consumers); Greg Rosalsky, *Beware of ‘Shrinkflation,’ Inflation’s Devious Cousin*, NPR: PLANET MONEY (July 6, 2021, 6:30 AM), <https://perma.cc/G6E2-R2NB> (explaining that the practices are also referred to as the “devious cousin” of inflation and a “sneaky price increase”).

193. C. Ford Runge, *The Case Against More Ethanol: It’s Simply Bad for Environment*, YALE ENV’T 360 (May 25, 2016), <https://perma.cc/2CQH-J69G>.

194. Jaya Nayar, *Not So “Green” Technology: The Complicated Legacy of Rare Earth Mining*, HARV. INT’L REV. (Aug. 12, 2021, 9:00 AM), <https://perma.cc/4H3P-XUUG>.

195. *Deepwater Horizon – BP Gulf of Mexico Oil Spill*, ENV’T PROTECTION AGENCY (Aug. 14, 2022), <https://perma.cc/F2JU-78EB>.

While nonfunctional slack-fill is not the most pressing environmental matter of our time, it is perhaps the one with the most universally beneficial solution. As documented in this Article, not only does the environment benefit, but consumers, retailers, and even the product wholesalers do as well. The only loser would be the lawyers who would potentially miss out on lucrative class action lawsuits. This proposed federal legislation is needed now more than ever. The practice of nonfunctional slack-fill is expanding at an alarming rate,¹⁹⁶ and some jurisdictions are passing defendant-friendly legislation regarding nonfunctional slack-fill litigation.¹⁹⁷ Furthermore, this rare, universally beneficial public policy option could even serve as a powerful catalyst for igniting bipartisan agreement on other common sense environmental protections—something desperately needed in the current, polarizing political climate. Finally, the United States could serve as a compelling leader regarding nonfunctional slack-fill on a world stage, as this issue is largely unaddressed globally.¹⁹⁸

196. See *supra* notes 28–32.

197. See, e.g., *Three Slack Fill Regulatory Changes*, *supra* note 187 (explaining new defenses for liability, including the presence of a “fill line,” conspicuously displayed container dimensions, and when “the mode of commerce does not allow the consumer to view or handle the physical container or product”).

198. Nina Van Toulon, *Every Centimetre Counts—Exploring Non-functional Slack-Fill in Packaging*, LINKEDIN (Oct. 22, 2021), <https://perma.cc/9MYE-NZDN> (“Globally there is no legislation which directly links non-functional slack-filling to the impact on the climate, waste and plastic pollution crises.”).