

Food Advertising: A Primer on the Regulation of Misleading Ads By Dara Lovitz, Esq

An estimated 34.2% of adults aged 20 and older are overweight, while 33.8% are obese, according to results from the 2007-2008 National Health and Nutrition Examination Survey.¹ For children and adolescents, the statistics are just as staggering, with obesity appearing in 10.4% of children aged 2 to 5, 19.6% aged 6 to 11, and 18.1% aged 12 to 19.² As the US Department of Health and Human Service's Office of the Surgeon General states, "The primary concern of overweight and obesity is one of health and not appearance" because overweight and obesity are linked to a higher incidence of heart disease, diabetes, some types of cancer, and premature death.³ Appearances, however, play an integral role in the food advertising industry—but are food advertising appearances all that they seem?

Food advertising is partially responsible for the incidence of overweight and obesity in this country.^{4,5} However, the government cannot place general restrictions on food advertising due to companies' rights to commercial speech. Nevertheless, food advertising is monitored and regulated in meaningful ways, and laws and legal mechanisms exist to protect consumers' rights with respect to confusing, misleading, and false advertising of food products.

This continuing education article examines how food advertising affects overweight and obesity rates in the United States and how various laws and regulations seek to govern food advertising that misleads consumers.

Connection Between Food Advertising and Eating Habits

A recent study in *Health Psychology* disclosed compelling data to support a direct causal link between food advertising and greater snack consumption.⁵ In the study, a group of adults were shown a short television documentary that included advertisements for either unhealthful snack foods, nutritious foods, or no food at all. After the program, participants took part in what they were told was a separate study in which they taste tested a variety of healthful foods (eg, fruits) and unhealthful foods (eg, cookies). The adults who watched the snack food ads ate more of all types of food during the taste test compared with those who watched ads for nutritious foods or saw no food-related ads. Thus, the exposure to the snack food ads led to higher overall consumption rates. The increased consumption occurred regardless of participants' reported levels of hunger.⁵

Adults are not the only subgroup of the US population affected by food advertising. According to the American Psychological Association, children ranging from ages 8 to 18 spend approximately 44.5 hours per week in front of computers, televisions, and game screens, which is more than any other activity in their lives, other than sleeping.⁴ The average child sees an average of about 40,000 television commercials per year.⁶ This exposes children to food marketing that appears in these various media channels, whether the advertising comes directly from the manufacturer or is an indirect promotion of a food product by a particular television character.

The vast majority of all food marketing to children is for foods that are high in fat, sugar, and/or salt.⁷ Compounding the problem, children have a keen sense of recall for content from advertising and are thus apt to develop product preferences that influence parents' purchasing decisions.⁶ Such preferences can be generated from one advertisement and then substantially strengthened with repeat exposure.⁴

In addition, there is often a psychological implication to food advertisements and particularly to food advertising directed to children. That is, the advertising has an impact on children's (and parents') normative beliefs about what people should and should not eat. The advertisements generally feature children who are energetic and of normal weight, and they appear to eat any unhealthful food at any time without hesitation. According to social learning theory, these portrayals lead viewers to conclude that most children consume fattening and caloric foods on a regular basis, parents allow this eating behavior, and neither poor health nor weight gain result from such consumption.⁸

This evidence demonstrates that adults and children, with increased exposure to food advertising, are being primed for increased daily consumption of calories, often originating from unhealthful foods that are high in fat, sugar, and salt.

Regulation of Food Advertising

Food advertising, like all advertising, is afforded significant protection under the First Amendment when the advertising is accurate and truthful. But what about advertising that contains information that is false or likely to deceive consumers?

The Federal Trade Commission (FTC) is one of 15 federal agencies responsible for food oversight, which includes food safety, quality control, labeling, and advertising. Of those 15 agencies, the FTC is primarily responsible for enforcing prohibitions against the false advertising of food products.⁹ The FTC assumes primary responsibility for regulating food advertising under the FTC Act.¹⁰ The FTC's mission is to prevent businesses from engaging in practices that are anticompetitive with regard to other businesses or deceptive, misleading, or unfair with regard to consumers. The FTC also seeks to enhance informed consumer choice and public understanding of the competitive process. To reach these goals, however, the FTC aims to not unduly burden legitimate business activity or those practices that meet accepted standards for competition in the particular business' industry.¹¹

In 1914, the FTC Act transformed the Bureau of Corporations (under the Commerce Department) into the five-member, independent agency that became the FTC. The FTC was given the authority to conduct studies, issue reports, and enforce compliance with legislation. Its main focus was breaking apart monopolies that threatened and discouraged competition from small businesses. Over the years, the FTC's authority expanded to include a vast array of consumer protection laws, such as those dealing with truth in advertising and price fixing.

Within the FTC is the Bureau of Consumer Protection, which seeks to protect consumers against deceptive or fraudulent practices in the marketplace. The Division of Advertising Practices, which is part of the bureau, aims to shield consumers from unfair or deceptive advertising practices that raise health and safety concerns and/or cause economic injury. The division further monitors and reports on the advertising of food to children, including the impact of practices by food companies and the media on childhood obesity.

When the FTC discovers a false or misleading advertisement, the organization, as part of its administrative procedures, may do the following:

- File a formal complaint against a company for false advertising.
- Issue a cease-and-desist order and/or monetary penalty.
- Oversee and enforce corrective advertising.

If the FTC and the company are unable to agree on an advertising adjustment, the matter may be submitted to a court for review and ruling.

Citizens or citizen groups may petition the FTC to pursue a false advertising claim against a manufacturer, and the FTC may either grant or decline the request. If the FTC grants the request, it typically follows the above-detailed administrative procedure.

When evaluating advertisements, the FTC will find an advertisement to be deceptive and therefore unlawful if it contains a material representation that is likely to mislead consumers, who reasonably rely on the representation.¹² Each element of a deceptive food advertising claim is expanded as follows:

Is there a representation? When the FTC evaluates the perceived deceptiveness of an advertisement it first determines whether there is a material representation that is likely to confuse or mislead consumers. A representation can be deceptive because of a misleading affirmative, express statement (“these cookies will make you thin”), an implied concept (a loaf of bread depicting images of Amish people baking could imply that the product was made by Amish people), or an omission of fact (failing to disclose that in order for a product to look like it does on the box, one would have to make significant changes to it).

Is the consumer’s reliance on the representation reasonable? A company is not liable for every possible erroneous interpretation of its ads. Reasonableness of the consumer must be established. For instance, if an actor in a commercial states that the cereal he ate every day helped him lose 75 lbs in eight weeks, it is not reasonable for the consumer to believe that simply by eating that cereal every day, he also will lose 75 lbs in eight weeks. A reasonable reliance regarding a weight-loss claim would be if an actor claimed to lose 1 lb per week by drinking a diet beverage rather than the full sugared version and the viewer believed that he, too, could lose 1 lb per week simply by switching to a diet beverage. To assess reasonableness, the FTC considers whether the reliance on the representation is reasonable for the consumer to whom the advertising was directed; this could be a particular subgroup of the population, such as women of child-bearing age.

Is the representation material? After establishing that a consumer could reasonably rely on the misrepresentation, the FTC evaluates whether the representation was material, (ie, whether it likely affected the consumer’s decision to purchase the product). The materiality element is primarily designed to protect consumers from paying for a product after being misled by its false advertising.

Effectiveness of the FTC

The FTC has had difficulty securing passage of legislation that would further its mission with regard to food advertising. For instance, after receiving petitions from three consumer advocacy groups to act on the threat that television advertising posed to children's health, the FTC invited comment on a proposed rule that would ban all television advertising directed to audiences with a significant proportion of children for food products posing serious dental health risks. This rule would also require that television advertising for sugared food products not included in the ban, but directed to audiences with a significant portion of older children, be balanced by health disclosures funded by advertisers.

The FTC launched an extensive investigation into television commercials directed to children, the allegedly resulting rise in sugar consumption, and further resulting rise in nutritional problems among children, including tooth decay.¹³ The proposed rule making failed substantially after the FTC received strong criticism from food-making industries and the media.

Federal regulation of advertising is even more complicated by manufacturers' efforts at self-regulation. In 2007, then-Sen Sam Brownback (R-Kansas) and Sen Tom Harkin (D-Iowa) formed a task force with the Federal Communications Commission to conduct a government study on childhood obesity. The impending study and other threats of possible federal regulations that would restrict companies' advertisements to children led 11 companies, including McDonald's, Campbell Soup, Hershey, Kellogg, Kraft, and Mars, to agree to stop advertising products that do not meet certain nutritional standards to children under age 12 as part of the Children's Food and Beverage Advertising Initiative.¹⁴ The nutritional standards are all based on the 2005 Dietary Guidelines developed by the USDA and Health and Human Services and vary depending on the company. Once the food companies came to this agreement, Brownback and Harkin announced they would postpone the childhood obesity report.

As of February 2012, there are 17 participants in the Children's Food and Beverage Advertising Initiative.⁸ The core principles of the program provide that the companies should do the following:

- devote 100% of child-directed advertising to more healthful foods or not engage in such advertising;
- establish nutrition standards that govern what foods they may advertise to children;
- limit the use of celebrities and movie tie-ins in child-directed advertising;
- not actively seek to place their products in the program/editorial content of any medium that is child directed for the purpose of promoting the sale of those products; and
- not advertise their branded foods to children in elementary schools.¹⁵

Civil Actions: Citizen Suits Under State Law

Manufacturers that successfully avoid an FTC action regarding a particular advertisement are not necessarily in the clear. Citizens may bring lawsuits against manufacturers for false advertising under state law. Each state has some form of false advertising law, often either in a consumer protection law or one that regulates business practices.

Sometimes, consumer-interest groups file suit on behalf of consumers at large. In *Consumers Union of U.S., Inc v Alta-Dena Certified Dairy*,¹⁶ consumer groups sued Alta-Dena, one of the world's largest dairy product companies, based on the company's claim that raw certified milk is the safest and purest milk available and that it is better for one's health than pasteurized milk. The consumer groups argued that raw, unpasteurized milk could cause various serious, and sometimes fatal, ailments, such as *Campylobacter* and *Salmonella dublin*. There was also no scientific evidence to support Alta-Dena's claim that raw milk was more healthful than pasteurized milk. The court agreed with the consumer groups and found that Alta-Dena's claims were false and misleading. The court ordered Alta-Dena to disclose the dangers associated with raw certified milk products by placing the following warning on its products: "Warning: This milk may contain dangerous bacteria. Those facing the highest risk of disease or death include babies, pregnant women, the elderly, alcoholics, those with cancer, AIDS, or reduced immunity, and those taking cortisone, antibiotics, or antacids. Questions regarding the use of raw certified milk should be directed to your physician."

For any product on which Alta-Dena made representations regarding health or nutritional benefits, the product packaging was required to include the following corrective statement: "Warning: The Food and Drug Administration (FDA) has determined (1) that there is no satisfactory scientific proof that pasteurization significantly reduces the nutritional value of milk and (2) that the risks associated with consuming raw certified milk outweigh any of its alleged health benefits."

Civil Actions: Competitor Suits Under Lanham Act

In addition to those waged by consumers, false advertising lawsuits can be filed by companies in competition with the offending company. Those suits are filed under the Lanham Act, a federal law that regulates trademark usage and offers a cause of action for unfair competition in the marketplace. If nothing else, these lawsuits give consumers a behind-the-scenes look at the manufacturing process of popular foods. The following cases are some examples.

Potato Chip Institute v General Mills, Inc (1971)¹⁷

The Potato Chip Institute, a nonprofit corporation that encouraged the development of new techniques in the storage, processing, finishing, and packaging of potato chips, sued General Mills under the Lanham Act for allegedly falsely advertising its product CHIPOS as potato chips. CHIPOS contained rice flour and dehydrated potato granules. The Potato Chip Institute argued that the term "potato chip" exclusively refers to a thin slice of raw potato fried in deep fat until it becomes crispy. The court declared that potato chip alone might mislead consumers, so General Mills was permitted to use potato chips to describe CHIPOS as long as the package contained a prominent declaration that the product was made from dehydrated potatoes.

Pizza Hut, Inc v Papa John's International, Inc (2000)¹⁸

Pizza Hut and Papa John's are among the largest pizza chains in the country. In 1995, Papa John's started using the slogan "Better Ingredients. Better Pizza." in its advertising campaigns. This slogan appeared on signs, shirts, menus, pizza boxes, and napkins and was regularly featured as the tagline at the end of Papa John's radio or television ads.

In 1997, Papa John's launched an ad campaign that compared ingredients it used in its pizzas with ingredients used by its competitors. These highlighted that Papa John's dough was made from "clear filtered water," while its competitors used tap water. The ads also claimed that Papa John's sauce was made from fresh, vine-ripened tomatoes that were canned through a process called "fresh pack," while its competitors used sauce made from tomato paste. The ads concluded with the Papa John's slogan.

Pizza Hut sued Papa John's under the Lanham Act for false advertising and unfair competition. Pizza Hut did not argue that Papa John's was making false statements about the processes used to make its respective dough and sauces. Instead, Pizza Hut contended that Papa John's was making false statements when it claimed that the dough and sauce processes resulted in "better pizza." Pizza Hut presented evidence of independent taste tests revealing that filtered water made no discernible taste difference in pizza dough and that there was no scientifically provable taste improvement with Papa John's fresh-pack sauce over Pizza Hut's tomato paste sauce.

The court agreed that Papa John's slogan, in conjunction with unproved claims about dough and sauce, was false and misleading, but the court also found there was no evidence that the dough and sauce claims had any material impact on the buying decisions of consumers. (Remember the "materiality" element of a typical false advertising claim: In order to win the false advertising claim, the complainant must show that the false statement affected the consumer's decision to buy the product; here there was no evidence to suggest that consumers purchased the product as a result of the false claims.) Thus, Papa John's was permitted to continue using the slogan.

Merisant Co v McNeil Nutritionals, LLC (2007)¹⁹

Merisant Company, which manufactures artificial sweeteners, including Equal and NutraSweet, sued McNeil Nutritionals, which markets and distributes the artificial sweetener Splenda. Merisant claimed that McNeil violated the Lanham Act by engaging in false advertising by using the tagline "Made from sugar so it tastes like sugar" on its Splenda products. The process by which Splenda is made came under scrutiny: The sweetening ingredient in Splenda is sucralose, an artificial sweetening ingredient made through a process that begins with sucrose (sugar) and then replaces three of eight hydroxyl groupings on the sucrose molecule with three chlorine atoms. The other ingredients in Splenda are maltodextrin and dextrose.

Merisant argued there was no "causal relationship between the original sugar molecule and the resulting sugar-like taste of the sucralose molecule" and thus any claim that Splenda is made from sugar is misleading to consumers. The month-long trial ended in a confidential settlement between the parties before the jury announced its verdict. Without a court order as to how it may or may not advertise, Splenda currently states that its product "starts with sugar" and "tastes like sugar."²⁰

Sanderson Farms, Inc v Tyson Foods, Inc (2008)²¹

Chicken meat producers Sanderson Farms and Perdue Farms (referred to collectively as Sanderson) brought suit under the Lanham Act against competitor Tyson Foods for false advertising. Sanderson claimed that Tyson's advertisements stating "raised without antibiotics" and "raised without antibiotics that impact antibiotic resistance in humans" were false and misleading because Tyson used ionophores (antibiotics) in their chicken feed. Chicken producers use ionophores to prevent coccidiosis, a potentially fatal disease caused by a parasite that lives and multiplies in the intestinal tract of animals.

The court agreed that Tyson's statements were false and ordered Tyson to remove such statements from its labels and advertisements.

The Battle Continues

Despite the government's claim that "health and not appearance" is the primary concern related to obesity, it has been losing the country's battle of the bulge. Legal actions for false advertising only begin to chip away at the problem, especially when there are some built-in legal protections, such as the protection of commercial speech. Commercial speech is protected to allow the free flow of commercial information from the business to the consumer. Commercial speech ends, however, where misleading and false statements begin.

However, as the cases discussed here demonstrate, a misleading statement alone will not necessarily inspire a court to order removal of the advertisement from the stream of commerce. Other elements of false advertising claims, such as material reliance by the consumer, must be present. So where the laws fall short in protecting consumers from false and harmful advertisements, RDs can help individuals build inner tools to resist the temptations inherent in celebrity endorsements and fantasized images.

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Examination

1. Which of the following government agencies regulates food advertising?

- A. US Health and Welfare Committee
- B. Federal Trade Commission (FTC)
- C. Better Business Bureau
- D. American Department of Fairness in Competition

2. The average child in America sees approximately how many television commercials in a given year?

- A. 1,000
- B. 5,000
- C. 10,000
- D. 40,000

3. Which of the following statements is false?

- A. There are more than 10 government agencies responsible for food safety, quality control, labeling, and advertising.
- B. Once a company has been sued for false advertising by a competitor, it may not be sued thereafter by citizens or the FTC.
- C. Many food advertisements directed at children affect their normative belief systems.
- D. Adults can be negatively influenced by food advertisements.

4. The majority of food advertising directed at children features foods that are high in fat, sugar, and/or salt.

- A. True
- B. False

5. In *Pizza Hut v. Papa John's*, Papa John's was allowed to continue using its slogan "Better Ingredients. Better Pizza." because:

- A. in conjunction with the claims about the sauce and dough, the slogan was not misleading.
- B. Pizza Hut's pizzas have been on the market longer and therefore the company had more opportunity to refute Papa John's claims.
- C. the slogan is grammatically correct.
- D. the representations made by Papa John's within the slogan were not material.

6. The Splenda lawsuit for false advertising was brought under the theory that:

- A. the claim that "Splenda is made from sugar" is misleading because there is no causal relationship between the original sugar molecule and the resulting sucralose molecule.
- B. Splenda is not as sweet as Equal.
- C. Splenda does not actually taste like sugar.
- D. Splenda allegedly contains harmful chemicals.

7. The FTC may regulate food advertising as long as which of the following is not unduly burdened?

- A. FTC personnel
- B. Legitimate business activity
- C. Food production
- D. Public opinion

8. Which of the following elements must be present in a misleading advertisement for the FTC to be able to successfully pursue a claim?

- A. Discussion of food or nutrients within a food
- B. Wrongful imaging
- C. Material representation
- D. Price information

9. The Children's Food and Beverage Advertising Initiative endeavors to do which of the following?

- A. Increase the number of celebrity endorsements for food products.
- B. Ensure that no alcoholic beverages are advertised to children.
- C. Work with companies to make advertisements shorter in duration.
- D. Establish nutrition standards for the foods they advertise to children.

10. Which party may sue a food company for misleading advertising?

- A. Citizen/consumer
- B. Another food company
- C. FTC
- D. All of the above