



LEGISLATION, REGULATIONS & STANDARDS

Subway Sweepstakes Ads Lacked Adequate Disclosures, CARU Finds

After reviewing an ad for Subway’s “Fresh Fit for Kid’s Meal” featuring premium toys and offering a sweepstakes for a tablet, the Children’s Advertising Review Unit (CARU) has recommended that the restaurant chain clearly disclose material information and avoid sales pressure when advertising to children. CARU determined that while the contest rules were available on Subway’s website, the ad itself did not disclose that the contest was only open to those 18 and older, did not provide a free means of entry and did not disclose the odds of winning the tablet. CARU also found that the language “Hurry into Subway ... otherwise you’ll miss out” could create undue sales pressure on children. CARU recommended that future ads contain audible disclosures understandable to children, and Subway agreed to take the recommendations into account.

ASA Rules Heinz Ad Made Impermissible Nutrition Claim

The U.K. Advertising Standards Authority has upheld a challenge to a Heinz television ad for canned beans that claimed the beans contained similar levels of protein, fiber and fat as those in a

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protein shake. The ad showed a man drinking a beverage that he described as “supercharged with high fibre and minimal fat,” and although the beverage was not labeled or identified, ASA decided most consumers would conclude the man was drinking a protein shake. While the ad did not directly compare the nutritional benefits of beans to those of protein drinks and the ad’s nutritional claims for beans were substantiated, ASA ruled that Heinz made a nutrition claim prohibited by broadcast codes.

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LITIGATION

Proposed Class Action Argues “Kombucha Tea Bags” Lack Kombucha

A plaintiff has filed a putative false advertising class action alleging that East West Tea Co.’s kombucha tea bags cannot feasibly be kombucha, which is a fermented product with live cultures. *Cohen v. East West Tea Co., LLC*, No. 17-2339 (S.D. Cal., filed November 17, 2017). The plaintiff asserts that she bought the tea product because it was labeled “organic kombucha” and expected the product to provide the health benefits of probiotic bacteria found in kombucha. The complaint argues that because kombucha is composed of fermented steeped tea, live yeast and bacterial organisms, it cannot be “dried and stuffed into a tea bag.” In addition, the complaint asserts that the company’s pasteurization process destroys the live organisms that provide kombucha’s purported health benefits.

Claiming violations of California’s consumer-protection statutes and breach of express warranty, the plaintiff seeks class certification, injunctive relief, damages, corrective advertising and attorney’s fees.

Vodka Maker Sues to Allow Health-Related Claims

The makers of vodka infused with chemicals that purportedly reduce the risk of alcohol-related damage to DNA have filed a lawsuit against the Treasury Department and the Alcohol and

ABOUT SHOOK

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility inspections, subject to FDA, USDA and FTC regulation.





Tobacco Tax and Trade Bureau (TTB) seeking to include health-related claims in product labeling and advertising. *Bellion Spirits, LLC, v. United States*, No. 17-2538 (D.D.C., filed November 27, 2017). Bellion Spirits asserts that it develops alcohol beverages that protect against the adverse effects of alcohol with “safe additives.” The company petitioned TTB for permission to use health-related claims for vodka containing the additive NTX, according to the complaint, but TTB referred the petition to the U.S. Food and Drug Administration (FDA). Adopting FDA’s finding that the health claims were not adequately substantiated and that the protective effects of NTX were not established, TTB denied the petition.

The plaintiffs allege that TTB violated federal law by deferring to FDA, which used evaluative criteria designed for review of health claims related to dietary supplements and food rather than alcohol. In addition, the plaintiffs argue that the ruling violated their free speech rights because it was not “narrowly tailored to serve government interest” and that product labeling and advertising disclosures are “essential for exercise of informed consumer choice.” The plaintiffs seek declaratory judgment and injunctive relief.

Greece Files Charges Against Group Accused of Selling Fake Olive Oil

Greek officials have reportedly charged seven people with criminal fraud and money laundering related to the sale of adulterated olive oil. The group allegedly added green dyes to sunflower seed oil then sold it off-market as extra-virgin olive oil. Most of the oil was sold in Greece or exported to Germany and other EU countries using invoices that were later destroyed. The Greek police reportedly became aware of the sale of adulterated oil when olive oil producers told the Hellenic Food Authority that their producer codes were being used on packages and products they did not sell.

Lawsuit Challenges NYC Deductions Bill

The National Restaurant Association (NRA) has filed a lawsuit seeking to invalidate a New York City law requiring fast-food

restaurants to remit voluntary deductions from employees' wages to nonprofit groups, including "ideological and political organizations with whom those employers may and do disagree." *Rest. Law Ctr. v. City of New York*, No. 17-9128 (S.D.N.Y., filed November 21, 2017).

NRA asserts that the city's "Deduction Bill," which took effect November 26, 2017, violates the free speech rights of restaurant owners by compelling them to subsidize nonprofits that advocate for labor-related issues such as higher minimum wages. The law resulted from lobbying by the Service Employees International Union (SEIU), the complaint argues, and is ultimately intended to force restaurants to allow unionization of fast-food employees. The Deduction Bill bars labor organizations from seeking remittances, but NRA asserts that "Fast Food Justice," a group working toward registration as a qualifying nonprofit, shares a mailing address with a SEIU location and receives most of its operating funds from the union.

Grocery Websites Inaccessible to Blind, Plaintiff Alleges

Two grocery chains face similar lawsuits filed by a New York plaintiff who argues the stores' websites are inaccessible to the blind or visually impaired, allegedly violating the Americans with Disabilities Act (ADA). *Jorge v. Key Food Mkt., Inc.*, No. 17-9306 (S.D.N.Y., filed November 28, 2017); *Jorge v. Fairway Grp. Holdings Corp.*, No. 17-9309 (S.D.N.Y., filed November 28, 2017). The complaints assert that Key Food and Fairway Market stores have failed to make their websites accessible to screen-reading software, denying the plaintiff equal access to their facilities, goods and services. Alleging violations of the ADA as well as New York state and municipal human rights laws, the plaintiff seeks class certification, injunctive relief, damages and attorney's fees.

SCIENTIFIC / TECHNICAL ITEMS

Cornell Announces Internal Investigation of Brian Wansink

Cornell University has reportedly begun a formal investigation into the research work of Brian Wansink, director of the university's Food and Brand Lab. Four of Wansink's papers have been retracted in 2017, including a *Frontiers of Psychology* article retracted on November 27 and a *JAMA Pediatrics* article retracted in October. Reportedly, an additional eight papers have been or will be corrected, and Wansink has faced scientific misconduct allegations related to at least 50 studies.

Cornell previously reviewed allegations of “inappropriate data handling and statistical analysis” in four of Wansink's published papers but found no scientific misconduct.

Study Reports Association Between “New Generation” SSBs and Dental Disease

University of Sydney researchers have apparently found an association between adolescents' consumption of sugar-sweetened beverages (SSBs) and oral health or obesity. Louise Hardy, et al., “Association between adolescents' consumption of total and different types of sugar-sweetened beverages with oral health impacts and weight status,” *Australian and New Zealand Journal of Public Health*, November 22, 2017. The authors noted a higher association between dental disease and “new generation” SSBs—diet soft drinks, sports drinks and flavored water—than the association found with other SSBs.

The study reported that while daily consumption of SSBs is prevalent among adolescents—90 percent reported drinking at least one cup per day—SSB intake was “more consistently associated” with oral health problems than extra weight or obesity. More than 3,500 youths aged 10-16 participated in the study, which surveyed SSB intake, height and weight measurements, physical activity, dental health and demographic information. Although the study reported that clinical dental examinations were not feasible, the oral health questions were “a validated measure of the social impacts of oral health issues used in other dental surveys, and they correlate strongly with the presence of dental caries (the main oral disease affecting adolescents).”

MEDIA COVERAGE

Website Helps Officials Spot Foodborne Illness Outbreaks

A website that allows individuals to report food poisoning incidents may help health officials identify outbreaks of foodborne illness, according to [*NPR*](#). Developed by Patrick Quade, iwaspoisoned.com has reportedly handled more than 75,000 user posts from 46 states and 90 countries since its launch. After a cluster of reports, the website notifies local health officials; the site has correctly identified the source of four outbreaks before health officials did. Officials reportedly praise the site's ability to identify norovirus outbreaks, which are often underreported.

Officials have [previously](#) used Yelp to curate reports of foodborne illness.

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