

# LITIGATION AS A TOOL IN FOOD ADVERTISING: A CONSUMER ADVOCACY VIEWPOINT

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## I. INTRODUCTION

This Article is a counterpoint to the piece by two defense lawyers that also appears in this Symposium issue.<sup>1</sup>

First, however, it is essential to know the consumer needs and the knowledge that companies depend on to market food products deceptively. In addition, it is important to know why organizations like the Center for Science in the Public Interest (CSPI), for which the author is Director of Litigation, and private lawyers as well, have started considering private lawsuits based on deceptive and unfair food marketing practices, including those aimed at children.

## II. CONSUMER CONFUSION—LOST IN THE SUPERMARKET

Before discussing the current state of food-advertising regulation, it is first appropriate to start with the person who is the target of concern of consumer advocates and consumer products companies alike—the consumer herself.

After all, consumer advocates advocate for consumers; consumer-products companies produce for the consumers; Congress congregates for consumers. This continues through the whole feeding chain of interests that have been involved in these issues

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1. Joseph M. Price & Rachel F. Bond, *Litigation as a Tool in Food Advertising: Consumer Protection Statutes*, 39 LOY. L.A. L. REV. 277 (2006).

over the past decades.

Consumers repeatedly express preferences for healthful foods and their concerns with nutrition remain high.<sup>2</sup>

One problem with predicting actual consumer behavior based on polls of their expressed needs and desires is that sometimes consumers give in to the natural tendency (familiar to priests, psychiatrists, and police) to admit to somewhat higher aspirations than they in fact have.<sup>3</sup> For example, consumers may indicate a preference for a low-sodium, non-fat hamburger in response to a mall-intercept pollster with a clipboard. But when subjected to a continuous onslaught of ads, commercials, and other marketing tools that urge the consumer to “have it your way,” sometimes the spirit may be willing, but the flesh is weak. And there is too much flesh as a result. This problem is compounded many times over with children. One study conducted by the American Psychological Association demonstrated a link between children’s advertising and obesity,<sup>4</sup> in common with findings of the American Association of Pediatrics and the World Health Organization. In late 2005, the National Academies’ Institute of Medicine (IOM) detailed how food and beverage marketing adversely affects young Americans’ diets and health. The IOM, which undertook the most comprehensive review to date of the influence of food marketing on children, found that the “prevailing pattern of food and beverage marketing to children in America represents . . . a direct threat to the health of the next generation.”<sup>5</sup> The IOM report also found that television food

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2. See *Consumer’s Health and Nutrition Concerns Don’t Always Translate into Action, Res. Alert* (EPM Commc’n, New York, NY), Feb. 6, 2004, at 1.

3. See ROBERT B. SETTLE & PAMELA L. ALRECK, *WHY THEY BUY: AMERICAN CONSUMERS INSIDE AND OUT* 34–35 (1989).

4. DALE KUNKEL ET AL., *REPORT OF THE APA TASK FORCE ON ADVERTISING AND CHILDREN: PSYCHOLOGICAL ISSUES IN THE INCREASING COMMERCIALIZATION OF CHILDHOOD* 12 (2004), available at <http://www.apa.org/monitor/jun04/protecting.html> (follow “Read the task force’s report” hyperlink). Alan S. Levy et al., *Food & Drug Admin., Knowledge Levels about Dietary Fats and Cholesterol: 1983–1988*, 25 *J. NUTRITION EDUC.* 60, 60 (1993) (“Recent surveys show that many consumers are confused about fats and cholesterol, even though they express high levels of concern about these food components.”).

5. *INST. OF MED., FOOD MARKETING TO CHILDREN: THREAT OR OPPORTUNITY?* xiv (J. Michael McGinnis et al. eds., The National Academies Press 2006).



































