Taking orders from the Food Police

By David Joy, Contributing Editor

The Center for Science in the Public Interest (CSPI), along with some allies, recently announced plans to sue Kellogg Co. and Viacom in Massachusetts for advertising certain food products to children.

Narrowly speaking, the aim of CSPI’s lawsuit is an injunction that would bar the defendants from advertising food to children under 8 in Massachusetts unless the food meets nutritional criteria dictated by CSPI. CSPI also seeks roughly $1 billion from each defendant as statutory damages. Or a settlement.

CSPI proposes nutritional criteria that are a bit arbitrary and unscientific. “Bad foods” off limits to children’s advertising would include any food for which 35 percent or more of its caloric content is attributable to total fat. An exception is made for peanut butter, but not for olive oil.

Any food containing more than 35 percent added sugars by weight would be off limits. This would mean grape jelly could not be advertised to children, but a sugarcane snack would be fine. Even 2 percent milk does not make the cut. Got that? Peanut butter OK, 2 percent milk not OK. Diet soft drinks are also not alright, for reasons that are unexplained and, no doubt, unscientific.

Apart from these specifics, CSPI’s approach is flawed in a more fundamental way. It assumes incorrectly there is no room in a healthy diet for enjoyable foods. The objective of a healthy diet is to consume adequate amounts of macronutrients and micronutrients without exceeding an appropriate total calorie intake. There is room in any good diet for foods CSPI disapproves of.

CSPI has turned to a Massachusetts consumer protection statute to accomplish its goals. The statute prohibits “unfair or deceptive acts or practices.” CSPI apparently intends to rely on a legal theory that advertising to children is inherently unfair or deceptive.

Of course, it would not be possible to document any actual harm to children or adults in Massachusetts. This would require CSPI to establish a connection between children’s advertising and children’s overall diets. Most food advertisements, including those on children’s television, are national in scope. Anyone wanting to blame advertising for childhood obesity or any other ill would need to explain why rates of childhood obesity vary from state to state and vary over time while the advertising practices remain fairly constant.

In Sweden, for example, television advertising aimed at children is prohibited altogether. Yet, the children of Sweden are no healthier than those of neighboring countries. A truly science-based organization might spend some time contemplating these issues.

CSPI’s approach raises a few interesting questions.

For example, what types of advertising would CSPI accept on television intended for children under 8? If advertising geared toward young children is inherently misleading, all of it would need to be banned, not just those ads that promote foods CSPI disapproves of. If there can be no advertising geared toward children under 8 (this is the apparent objective of one of CSPI’s co-plaintiffs, the Campaign for a Commercial-Free Childhood), or if children’s advertising is limited to skim milk and carrots, then there will be significantly less television geared toward children under 8.

Apart from killing children’s television, what exactly would happen if CSPI were to succeed? Does anyone believe kids will happily eat a CSPI-approved diet if advertising disappears? Is advertising that kids prefer sweetened breakfast cereals over shredded wheat with skim milk? More fundamentally, who appointed CSPI to act as national dietician? CSPI has tried and failed to have the federal government regulate children’s advertising. Particularly given this history, it would be grossly inappropriate for a state court to step in and enforce CSPI’s demands. Imagine a world in which food manufacturers must take instructions from CSPI’s web site as to the nutritional content of their foods.

And how could a court legitimately read Massachusetts’ consumer protection statute as outlawing advertising geared toward children? Food advertising geared toward children is at least as old as children’s television. Certainly, if the Massachusetts legislature wanted to outlaw or severely restrict children’s advertising, under penalty of a $1 billion fine, it would have said so more directly and more specifically.

Of course, many of these questions may have occurred to CSPI. More than likely, the true objectives of CSPI’s threatened litigation are obtaining publicity for CSPI and obtaining a settlement with the defendants out of court. Let’s hope neither plays out like a win.

David Joy is a partner at the Washington, D.C., law firm of Keller and Heckman LLP. He specializes in food and drug law, is a member of the District of Columbia Bar and holds a bachelor’s degree in chemistry. For more information about Keller and Heckman, visit the firm’s web site at www.khlaw.com.