Putting the Squeeze on Citrus Hill Orange Juice

By Tom Beauchamp

In April 1991 the U.S. Food and Drug Administration (FDA) charged Procter & Gamble in federal court with fraud and violation of the 1963 Food and Drug Act, alleging that the company had included false and misleading statements on its Citrus Hill orange juice cartons. The FDA particularly criticized Procter & Gamble's use of the word *fresh* on its Citrus Hill label as misleading to consumers, because the company processed and produced Citrus Hill from concentrate. The FDA also objected to advertisements that the juice was "pure," "squeezed," and free of additives. The following are the primary parts of the Citrus Hill label that the FDA found misleading or false:

1. Citrus Hill Fresh Choice
2. Fresh Choice ... Means Fresh Taste
3. We pick our oranges at the peak of ripeness, then we hurry to squeeze them before they lose freshness
4. Pure squeezed 100 orange juice
5. Guaranteed: No additives 100 pure
6. We don't add anything

FDA commissioner determined that the agency must use its expertise in science and food safety to ensure honest labeling of food products, so that consumers are not the victims of fraud and have the opportunity to select foods that promote good health. By statute, the FDA is mandated to eliminate false and misleading advertisements

David Kessler, who headed the FDA during the Citrus Hill controversy, criticized the FDA's past history as slow and ineffective in prosecuting misleading advertising and in enforcing agency regulations. Kessler made enforcement a top priority as commissioner. The Citrus Hill case, brought against a large and prestigious company, was his initial step in making the FDA a more effective.

The FDA believed that the phrases advertised on the Citrus Hill carton label were misleading and perhaps false. For instance, FDA officials maintained that using the word *fresh* on a label for a processed food product constituted false advertising. When used in orange juice advertising, the FDA contended that *fresh* leads consumers to assume erroneously that the product is freshly

squeezed. The FDA also attacked the phrase *no additives* as false, on grounds that Procter & Gamble added water to the orange concentrate.

Procter & Gamble interpreted the advertisements differently, although both parties agreed that Citrus Hill orange juice was processed and made from concentrate. The company believed that the slogans used and the label "made from concentrate" effectively conveyed to the consumer that the orange juice was processed. Procter & Gamble also argued that the brand name “Citrus Hill Fresh Choice” is no more misleading than its former, FDA-approved label, “Citrus Hill Select.” Company executives also pointed to a Procter & Gamble study of the public’s perception of its labels (the study involved four groups of 300 subjects). The following percentages of those studied made an inference from the label listed that the product was fresh squeezed:

Citrus Hill Select	21
Citrus Hill Fresh Choice	22
Minute Maid	34
Tropicana	41

This survey indicated that changing the name from "Select" to "Fresh Choice" had no significant effect on consumer appreciation of whether the product was fresh squeezed; the labels "Citrus Hill Select" and "Citrus Hill Fresh Choice" were perceived as almost identical. However, competitors' brands without the word fresh were more likely to be perceived as fresh squeezed, presumably because of advertising. Procter & Gamble also maintained that fresh never modified the label’s common food name and therefore was never used in a context implying the orange juice was fresh. Procter & Gamble claimed that fresh was not misleading when used in expressions such as "Citrus Hill Fresh Choice," "Fresh Choice .. . Means Fresh Taste," and "we pick our oranges at the peak of ripeness, then we hurry to squeeze them before they lose freshness."

The two sides also disagreed on whether Procter & Gamble’s advertisements violated the law. According to FDA spokesperson Jeff Nesbit, the FDA ruled in 1963 that *fresh* could not be used to describe commercially processed orange juice, including concentrate. In Nesbit’s interpretation, the FDA has had a clear policy since 1969 that *fresh* cannot be applied to heated or chemically processed foods, including food made from concentrate.

However, Procter & Gamble sharply challenged this interpretation, arguing that regulations forbidding the use of the word *fresh* on processed food product labels only apply when fresh modifies a common or usual food name and is written entirely in small letters. Under this interpretation. Citrus Hill’s label could not read "fresh orange juice," but phrases such as "Citrus Hill Fresh Choice" and "Fresh Taste" would be perfectly acceptable. Procter & Gamble also argued that FDA regulations that prohibit the use of the word

fresh with respect to processed foods have never been applied to brand or trade names, "particularly where those words are not used in connection with the common or usual name of the food and are clearly distinguished by size and style of type and appear in a different part of the label." Company lawyers cited a legal opinion holding that using fresh on trademark names of pasteurized orange juice products may be permissible in some cases.

Procter & Gamble also noted some inconsistencies in the food labeling rules and guidelines of various government agencies that contradicted the FDA's policy on the use of the word fresh. Procter & Gamble pointed out that the U.S. Department of Agriculture's (USDA) Food Safety and Inspection Service follows guidelines on the use of the word fresh on labels of processed meat products that support Procter & Gamble's precise labeling practice. The USDA standard is as follows:

> "Fresh" may he used on processed products containing ingredients that could not be labeled "fresh" since the term has acquired acceptance when used to identify products sold in the refrigerated state.... We also recognize that, in many instances, the word "fresh" could be incorporated into the firm name or brand name and used on cured, preserved, and frozen or previously frozen poultry products where it would be highly unlikely that the consumer would be led to believe that he or she was purchasing a fresh product. "

Accordingly, Procter & Gamble's use of the word *fresh* in its brand name is arguably an accepted practice. Procter & Gamble also produced a list of 79 beverages that use the word *fresh* as part of the label's brand or trademark name.

After the FDA notified Procter & Gamble that its Citrus Hill orange juice advertising label was not acceptable, Procter & Gamble did revise the label, to a limited degree, before the FDA prosecuted the company. The company removed the term squeezed from the phrase "pure-squeezed 100 orange juice," enlarged the words "from concentrate," and made them more visible by providing a new background color that contrasted with, and therefore emphasized, the phrase "from concentrate."

However, the FDA remained dissatisfied with the label's other aspects, particularly the use of the word *fresh* in the revised Procter & Gamble label phrases, "Fresh Choice" and "Means Fresh Taste." Procter & Gamble claimed replacement of "New!" and "Fresh Sealed Carton" with "Fresh Choice" and "Means Fresh Taste" accurately described the company's processing changes, which prepared oranges faster after harvest, creating a fresher tasting product. The company contended that consumers who purchase Citrus Hill Orange Juice are in fact choosing a fresher juice. The company also claimed that the label alterations announced to the FDA on October 31, 1990, had been FDA-recommended. However, this recommendation, if it occurred, is inconsistent with long-standing FDA policy; and earlier, on October 19, 1990, the FDA

had informed Procter & Gamble that it considered all uses of the word *fresh* on its Citrus Hill packaging to be misleading and unacceptable.

On April 24, 1991, the FDA charged Procter & Gamble in a Minneapolis federal court with making false and misleading freshness claims on its Citrus Hill label. After a federal judge's authorization, Minneapolis authorities seized all Citrus Hill orange juice products in a local Minneapolis supermarket warehouse.

Procter & Gamble did not cooperate with the FDA because its executives believed that the FDA was applying its policies inconsistently and unfairly. Although Kessler pledged to enforce FDA policies fairly and consistently, Procter & Gamble feared a changed label would shrink its orange juice market share, while other competitors would continue to advertise without FDA criticism and interference. The company noted that some of the criticisms that the FDA received about its Citrus Hill label came from a competitor's law firm. Procter & Gamble accordingly notified the FDA that its research indicated both Tropicana's and Minute Maid's use of the phrase "Florida squeezed" on their pasteurized orange juice products caused 41 percent and 34 percent of consumers respectively to incorrectly assume that these products were freshly squeezed. Having removed the word squeezed from its label, Procter & Gamble wanted the FDA to enforce its regulations consistently and evenly on all industry competitors.

Procter & Gamble also asked the FDA to require that all Citrus Hill competitors print their product statements, such as "made from concentrate," in the same color and on the same colored background as Procter & Gamble, to enforce advertising consistency. The FDA thanked Procter & Gamble for the information on its competitors' labeling practices but reiterated that it merely wished to ensure Procter & Gamble's conformity with the law, and it reminded the company that its complaints about competitors' advertising did not excuse its reluctance to comply with FDA regulations.

This dispute raises the question of whether it is fair for a regulatory agency to direct action against one company, while delaying investigation or prosecution of competitor companies accused of similar legal violations. Did the FDA have the right to prosecute Procter & Gamble, and to later act on Procter & Gamble's claims that 79 different beverage labels and approximately 500 different food products use *fresh* in advertisements? Even a brief delay in FDA action with respect to misleading advertising among other orange juice companies could result in economic losses for Procter & Gamble by reducing its share of the orange juice market.

A related question is whether Procter & Gamble followed advertising regulations according to the law's *letter*, or did the company manipulate consumers to increase profits, while only technically adhering to the law. If

the FDA designed regulations regarding the use of the word *fresh* to ensure that advertisements did not mislead people to believe that processed products are fresh, does an obligation also exist in advertising to comply with the regulation's intent?

Procter & Gamble flatly refused to remove the word fresh throughout 10 months of negotiations with the FDA. The two sides did not resolve the labeling dispute until the FDA filed suit against Procter & Gamble. As mentioned earlier, the company defended its new trademark name "Citrus Hill Fresh Choice" by citing its brand name survey results. Based on the survey results, Procter & Gamble contended that the 22 percent of people misled by Citrus Hill's name constituted an acceptable percentage, on grounds that some people will always believe that frozen orange juice is fresh. However, Procter & Gamble produced no evidence to support its belief in consumer gullibility. The company did not attempt to further reduce the 22 percent survey result through additional label modifications. Procter & Gamble also added the sentence "We pick our oranges at the peak of ripeness, then we hurry to squeeze them before they lose freshness" to its Citrus Hill label, without considering its impact on consumer perceptions.

Recently, some FDA officials have questioned whether this controversy over the use of the words *fresh, squeezed,* and *pure* with respect to orange juice warrants such a large share of the FDA's limited time and resources. The question will prove relevant if the FDA decides to prosecute the companies that produce the 79 beverages and the roughly 500 foods cited by Procter & Gamble for violation of agency advertising regulations. Critics note that orange juice, unlike other falsely or deceptively advertised products, does not cause any immediate or visible harm to consumers. The same critics argue that the FDA should focus its regulatory action on products inimical to the public health. To cite a typical example, Bioplasty Inc., a St. Paul, Minnesota-based company, failed to obtain FDA approval to market manufactured breast implants. After investigation the FDA charged that Bioplasty Inc. marketed its breast implants illegally and also made false and deceptive medical claims on the product labels. The agency charged that the label information led consumers to assume that the product had passed safety tests and that information on the risks associated with breast implantation (including information on the potential causal link between breast implantations and breast cancer, and the implant's interference with mammographies). The FDA eventually seized these illegal and fraudulently advertised breast implant products.

However, not all false advertising cases clearly violate agency regulations. Moreover, misleading advertisements that are technically free of false statements can often prove as harmful to the public as those containing false statements. Misleading advertisements may cause people to purchase a product without proper information. For example, some people develop heart

problems and high cholesterol or triglyceride counts from regularly consuming products advertised as "low cholesterol" or "no cholesterol." Though these products have no or low cholesterol, their labels often do not document their high fat or high sugar content, which can contribute to a cholesterol or triglyceride problem.

In comparison to these cases, the Citrus Hill case may appear less important, because Procter & Gamble's false and deceptive advertising claims do not conceal a health threat to consumers. Many government officials believe that the FDA should concentrate on regulating advertising that endangers the public health by not adequately explaining the health risks associated with the product. However, if the FDA prosecuted the Citrus Hill case to enforce rules of unambiguous advertising, consistent and fair policy implementation may be the agency's only viable alternative.

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