

RIGHTS

WITHOUT

The historic Superior Court of Justice
ruling on food advertising
directed at children

NOISE

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ruling on food advertising
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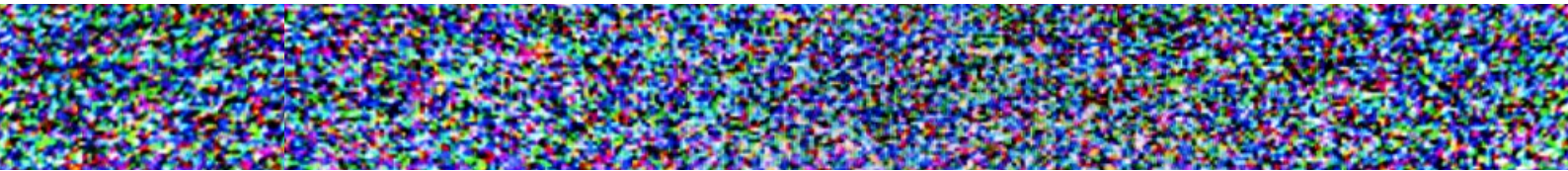


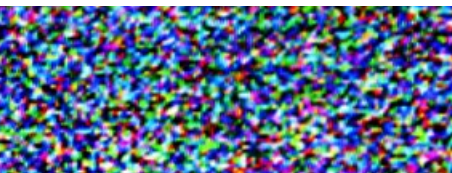
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1 PRESENTATION

On the afternoon of 10 March 2016, Justice Assusete Magalhães calls Special Appeal No. 1.558.086 onto the agenda of the Second Panel of the Superior Court of Justice. The reporting judge, Justice Humberto Martins, reads his report and informs the judicial panel about the controversy: the relationship between advertising ultra-processed foods, toy characters and children.

Justice Mauro Campbell Marques and the visiting appellate judge from the 3rd Region of the Regional Federal Court, Judge Diva Malerbi, vote in line with the reporting judge, who addresses the rise in obesity in Brazil and the world and the need for parents to decide on their children's food consumption. The other justices do the same.

In a unanimous vote, the Superior Court of Justice sets the precedent that food advertising directed at children, either directly or indirectly, is abusive. When giving his vote, Justice Herman Benjamin emphasizes that this is a historic ruling given its importance for the protection of children and the defense of consumers.

The establishment of this precedent emerged from a long challenge of Brazilian society to recognize the vulnerability of children and to protect them from abusive advertising practices that promote a culture of consumption, which is present worldwide.

The position of the Second Panel is in line with the UN Declaration on the Rights of the Child and with international recommendations that are gaining more prominence on account of the rising consumption of ultra-processed foods - which is known to be linked to the occurrence of obesity-related diseases.

According to the World Health Organization (WHO), excess weight and obesity are considered risk factors for hypertension, diabetes and cancer. The organization has expressed concern with the increase in the number of overweight and obese children and adolescents, which rose from 32 million in 1990 to 42 million in 2013.

The epidemic has spread to countries all over the world. In Brazil, things are no different: more than 30% of children aged from 5 to 9 are overweight. Of these, more than 15% of boys and 10% of girls are considered obese.

On account of this situation, the Pan American Health Organization (PAHO) in 2014 published a plan of action for the prevention of childhood obesity, which was approved by member states and recommended the reduction of children's exposure to advertising of unhealthy foods. According to the organization, this type of advertising encourages the consumption of ultra-processed foods, which are not recommended as part of a balanced and healthy diet that could reverse the trend of rising childhood obesity rates.

The court ruling is also in line with the second edition of the Dietary Guidelines for the Brazilian Population, prepared by the Ministry of Health in partnership with the Center for Epidemiological Research in Nutrition and Health of the University of São Paulo (NUPENS/USP) and with the support of PAHO.

The publication is intended to provide Brazilians with information on how to maintain a nutritionally balanced diet that is tasty, culturally appropriate and that supports a socially and environmentally sustainable food system. The guidelines recognize that advertising is an obstacle in the way of recommendations on healthy eating being followed, and it emphasized that advertising of ultra-processed foods directed at children has a major influence on the purchasing decisions of households and on the consumption habits of children - which may last their whole life.

The challenge is even greater on account of children's new experiences and ways they interact with the real and virtual world. In this regard, the role of public policies and the courts is essential to put international, constitutional and legal protections into effect and to ensure a childhood free of advertising.

As we can see, the court ruling was exemplary and deserves broad disclosure. And it is for the purpose of paying homage to the role of the court in the protection of children and the defense of the consumer that the Brazilian Institute for Consumer Defense (Idec) and Bloomberg Philanthropies have produced this publication. It has also been translated into English and Spanish to ensure that this precedent receives the broad national and international circulation that it deserves.



2 JUDICIAL PANEL

HUMBERTO MARTINS

Justice and Vice-President of the Superior Court of Justice

The Superior Court of Justice is a national appellate court whose primary function is to harmonize legal understandings resulting from the interpretative dissonance that emerges from the various state and federal courts. It is the appropriate court for interpreting federal law, so as to avoid that the same article of a given law is applied differently. It also has original jurisdiction (writ of mandamus, habeas corpus, conflict of jurisdiction, criminal case) and can hear ordinary appeals (appeal in writ of mandamus and habeas corpus).

The court denied Special Appeal No. 1.558.086/SP in which a company from the food industry was convicted for engaging in tie-in sales through abusive advertising directed at children. It was determined that the advertising encourages children to buy kid's cookies, since 5 (five) packs of the product plus the amount of R\$5.00 (five Brazilian reals) in cash could be exchanged for "gifts", in this case wristwatches. The court considered the publicity to be doubly abusive, since it was an advertisement to sell food directed at children in a playful context.

The law needs to be understood as part of life in society. As such, the Judicial Branch has to be an instrument of society, which has always entrusted us with the settlement of its conflicts of interest. This is why the case must be settled as quickly as possible, so as not to legitimize injustice and to comply with the constitutional mission it has been assigned. Without justice there is no citizenship and without citizenship there is no rule of law. The Superior Court of Justice is the court of citizenship.



ASSUSETE MAGALHÃES

Justice on the Superior Court of Justice and President of the Second Panel

In Special Appeal No. 1.558.086/SP, the Second Panel of the Superior Court of Justice - presided over by myself - issued a historic ruling on 10 March 2016 in a case overseen by the reporting judge, Justice Humberto Martins, on the protection of children and the defense of consumers - both guaranteed by the Brazilian Constitution. The court concluded that the defendant company was guilty of doubly abusive advertising for a publicity campaign that took advantage of the immature judgement and experience of children, as well as for making tie-in sales, two marketing strategies that are forbidden by article 37, paragraph 2, and article 39, item I, of the Consumer Protection Code - Law No. 8,078/90 - and also by article 37 of the Brazilian Code of Advertising Self-Regulation.



The advertisement informed that wristwatches with the picture of Shrek and other cartoon characters could be purchased with 5 packs of "Gulosos" (cakes and cookies) produced by the defendant plus R\$5.00 (five Brazilian reais), thereby encouraging children to collect the 4 different types of watches, which would ultimately require the acquisition of 20 food products.

Law No. 8,078/90 recognizes, as a principle, the vulnerability of the consumer in the consumer market (article 4, item I), in which children are especially vulnerable, and the Brazilian Constitution enshrines, as an absolute priority, State protection of children, safeguarding them from any form of exploitation (article 227).

The same Constitution also establishes, as a fundamental right, the duty of the State to provide, under the terms of the law, for the defense of the consumer, and therefore the legal provisions applied in this ruling are the corollary of the constitutionally enshrined protection of the child and the consumer.

MAURO CAMPBELL

Justice on the Superior Court of Justice

The lawsuit involving the SÃO PAULO PUBLIC PROSECUTOR'S OFFICE v. EMPRESA PANDURATA ALIMENTOS LTDA (Special Appeal No. 1.558.086/SP) sets limits on advertising to children in Brazil. In this precedent, the Superior Court of Justice established the understanding that advertisements directed at children must safeguard them from commercial practices that abuse their limited discernment.

On the one hand, the Brazilian Constitution gives those in the advertising market freedom of expression to increase the sales of their products and services with broad creativity. On the other, the Constitution also guarantees children protection against acts that exploit their fragility (Constitutional Amendment No. 65/2010).

Faced with these two important constitutional values, it was determined more appropriate for commercial advertising to suffer legal restrictions in some cases. One such case is to consider illegal the marketing strategy that, exploiting the poor discernment of children, conditioned the purchase of a thematic watch to the acquisition of a given quantity of food products.

The Superior Court of Justice has the last word on the application of federal laws in Brazil. Guided by the Federal Constitution, the precedent established the correct interpretation of article 37, paragraph 2, of Law No. 8,078/1990 (the law known as the "Consumer Protection Code").





HERMAN BENJAMIN

Justice on the Superior Court of Justice

“This is a case of abusive advertising, as the reporting judge stated in the part of the vote that he did not read, since it was directed at children regarding food products. And here, unlike what was said from the rostrum, this is not about an overpowering paternalism or being overly moralistic. It is just the opposite; it is about recognizing that the authority to decide on a child’s diet lies with the parents. And that no commercial business, or any other that does not have a direct commercial interest, has the legal constitutional right to impair the authority and good sense of the parents.

Therefore, this ruling restores parental authority and in this sense it could be considered

paternalistic, since it puts parents in their rightful place in relation to things and also in relation to the future. So this is the first point that I wanted to make.

Decisions about food, just as with medicine, should not be taken by suppliers. They can offer products, but without removing the autonomy of the parents, and primarily without directing these advertisements at children and, through the back door, once again impairing the autonomy of parents.

I am not convinced by another argument, also on this first point, that there are thousands of advertisements being made. Indeed there are, and this is why the Superior Court of Justice needs to tell not only Bauducco, but the whole food industry: that’s enough, no more.

Neither am I convinced by another argument that not a single complaint was made about the advertisement. This is not necessary. The Consumer Protection Code, when it comes to the regulation of advertising, does not establish a system of crime of result; all that is required is the crime itself, in other words the act itself characterizes a crime. And finally, the argument that there was no risk to health and safety, which is not the only criterion of the Consumer Protection Code. It is not the only value protected by the Consumer Protection Code, which protects primarily autonomy of will. And where is a child’s autonomy of will?”

[excerpt from the vote]



3 JUDGMENT

SPECIAL APPEAL NUMBER 1.558.086-SP

SUPERIOR COURT JUDGE: MINISTER HUMBERTO MARTINS

APPELLANT: PANDURATA ALIMENTOS LTDA.

ATTORNEYS: NELSON HANADA, FABIO HANADA, ALEXANDER HIDEMITSU
KATSUYAMA

APPELLEE: SÃO PAULO STATE ATTORNEY

INTERESTED PARTY: INSTITUTO ALANA - AMICUS CURIAE

ATTORNEY: DANIELA RODRIGUES TEIXEIRAS, FELIPE ADJUTO MELO

ABSTRACT

CIVIL PROCEDURE LAW. CONSUMER LAW. CLASS ACTION. VIOLATION OF SECTION 535 OF CIVIL PROCEDURE ACT. LOWER COURT DECISION THAT DOES NOT NEED CLARIFICATION. ESTABLISHED LEGAL PRECEDENT NO. 284/STF. FOOD ADVERTISING DIRECTED TO CHILDREN. DECEPTIVENESS. TYING ARRANGEMENT. SECTION 37, § 2º AND SECTION 39, I OF CONSUMERS RIGHTS ACT.

1. The violation of section 535 of the Civil Procedure Act is challenged. There is a lack of substantiation in the appellate brief. The established Legal Precedent is No. 284/STF.

2. The case reflects deceptive advertising in two forms. First, because it concerns food advertising that is directed at children. Second, since an illegal tying agreement made between two adults is void, an illegal tying agreement that involves a marketing strategy that is intended to manipulate perceptions of children represents deception of a reprovable nature.

3. In casu, there is an illegal tying arrangement, because, in order to purchase the subject watch from the cited seller, the consumer had to purchase five additional products that were not needed or desired by the consumer.

Special appeal denied.

JUDGMENT

After examination, analysis and discussion of the case litigated by the above cited parties, in accordance with the opinion of The Honorable Justice Humberto Martins, the Honorable Justices of The Second Chamber/Panel of the Superior Court of Justice deny the special appeal. The Honorable Justices Herman Benjamin, Mauro Campbell Marques, Assusete Margalhães (Chief Justice) and Diva Malerbi (appellate judge from the Federal Appeal Court, Third Region) concur in the opinion.

Attorney DURVAL AMARAL SANTOS PACE
representing APPELLANT PANDURATA ALIMENTOS LTDA
Attorney MARIO LUIZ BONALGIA representing FEDERAL STATE ATTORNEY
Attorney DANIELA RODRIGUES TEIXEIRA representing
INTERESTED PARTY INSTITUTO ALANA

Brasília (DF), Mach 10th 2016 (Judgment day).

REPORT

THE HONORABLE JUSTICE HUMBERTO MARTINS (Reporting Justice):

PANDURATA ALIMENTOS LTDA. herein presents a Special Appeal based on the Constitution of the Federative Republic of Brazil (Section 105, III, a and c), that asks for a new hearing of the case before The State Court of Justice of São Paulo. The Opinion of The Lower Court (pages 1.230, e-STJ) was as follows:

Class Action. Advertising directed at children. Illegal tying agreement. Purchase of watches conditioned on the purchase of five unwanted and unneeded products. Advertising that disregards Article 37 of the Brazilian Advertising Self-Regulation Code concerning the use of imperative verbs that are not allowed. This CONAR provision prohibits the use of such language in advertising directed at children. Deceptive advertising that takes advantage of children's lack of maturity must be excluded from ordinary practice. Appeal Sustained. Decision reversed. Legal costs and attorney fees to be paid by Pandurata Alimentos.

The Appellant presented an appeal requesting clarification of the decision. The request was denied (page 1.270, e-STJ):

Appeal requesting the clarification of the decision. Clarification of the decision is not necessary. Appellant sought a new hearing of legal questions already held. Appeal denied.

In the special appeal brief, the appellant claims that the decision disregards Section 535 of Civil Procedure Act in that, although there was a request of clarification, the Lower Court did not consider the primary questions of the case.

The appellant also claims that the decision of the Lower Court violates section 6 (IV and VI), section 37, § 2° and section 39 (I and IV) of Law No. 9078/90 and sections 15 and 17 of Law No. 8069/90.

The appellant further claims that the incontrovertible facts of the case should be examined by the Superior Court of Justice in terms of the provisions of sections 6 (IV and VI), 37, § 2° and 39 (I and IV) of Law No. 9078/90 (Consumer Rights Act) and sections 15 and 17 of Law No. 8069/90 (Children Protection Act). The Lower Court made no legal determination that considered the illegally deceptive advertisement of cookies normally consumed by children (page 1195).

Additionally, the defendant claims in this case, there is no illegal tying agreement because the purchase of the watch was not conditioned on the purchase of the cookies. Rather, the purchase of five products for R\$ 5,00 (five reais), an amount that is much less than the original price of the product, gave the consumer an opportunity to receive a gift in the form of a watch. This represents a very different perspective (page 1286 e-STJ).

The appellant claims that there is an applicable dissent opinion from the Superior Court regarding the legal question herein under consideration.

After the appellant's brief was presented (pages 1309-1317), the special appeal was dismissed by the Lower Court (pages 1319 - 1320 e-STJ). This was based on a new requirement concerning the admissibility of the special appeal.

A new brief was presented by the appellant (pages 1334-1337 e-STJ). The admissibility of the Special Appeal was sustained (pages 1412-1413 e-STJ). The Federal Public Attorney recommended denial of the special appeal, according to the following quote (page 1444):

- "1. Civil Procedure law. Public Law. Special Appeal.*
- 2. Instituto Alana. Amicus Curiae. Possibility. Facts examination. Established Precedent No7. 7/STJ.*
- 3. Legal opinion for the denying of the special appeal."*

This is the report.

SPECIAL APPEAL NUMBER 1.558.086-SP

ABSTRACT

CIVIL PROCEDURE LAW. CONSUMER LAW. CLASS ACTION. VIOLATION OF SECTION 535 OF CIVIL PROCEDURE ACT. LOWER COURT DECISION THAT DOES NOT NEED CLARIFICATION. ESTABLISHED LEGAL PRECEDENT NO. 284/STF. FOOD ADVERTISING DIRECTED AT CHILDREN. DECEPTIVENESS. TYING ARRANGEMENT. SECTION 37, § 2° AND SECTION 39, I OF CONSUMER RIGHTS ACT.

1. The assertion of a violation of section 535 of the Civil Procedure Act is not accepted. The appellant brief includes insufficient evidence to support the asserted claims. No. 284/STF provides established precedent.

2. The case reflects deceptive advertising in two ways. First, in that it involves food advertising that is directed at children. Second, due to a tying agreement that must be considered illegal, even if the agreement is between two adults. If the tying agreement involves a marketing strategy that manipulates the capacity of children to make choices, the deception must be considered to be more reprobable.

3. In casu, there is an illegal tying agreement, because, in order to purchase the watch from the seller, the consumer was required to purchase five of the products that the consumer did not want or need.

Special appeal is denied.

OPINION

THE HONORABLE JUSTICE HUMBERTO MARTINS (Reporting Justice):

VIOLATION OF SECTION 535 OF THE CIVIL PROCEDURE ACT: The claim of violation of section 535 of Civil Procedure Act cannot be accepted because the appellant's brief does not present sufficient reasons.

In that it did not demonstrate which error the Superior Court should hold, the appellant's brief did not substantiate the claimed violation of section 535 of the Civil Procedure Act. This case is similar to the established legal precedent, No. 284/STF: The extraordinary appeal to the Supreme Court cannot be admitted when the appellant's brief does not provide substantiation of the allegations presented in the case.

Precedents:

"PROCEDURAL LAW. FAILURE TO ADHERE TO SECTION 535 OF CIVIL PROCEDURE ACT. NOT ACCEPTED. LACK OF SUBSTANTIATION OF THE APPELLANT'S BRIEF. ESTABLISHED LEGAL PRECEDENT NO. 284/STF. INSTALLMENT PAYMENT AGREEMENT. COURT GUARANTEE. INTERPRETATION OF LOCAL ACTS (STATE ACT NO. 6734/89). ESTABLISHED LEGAL PRECEDENT NO. 280/STF. PRECEDENTS.

1. In that it only claims a failure to adhere to section 535 of Civil Procedure Act, the appellant's brief does not provide necessary substantiation and does not demonstrate an error in the Lower Court decision according to the terms of the established legal precedent No. 284/STF.

(...)

3. Special Appeal denied."

(Special Appeal 1203052/SP, Justice Eliana Calmon, Second Chamber, judged in 5/7/2013, DJe 5/15/2013).

"PROCEDURAL LAW. FAILURE TO ADHERE TO TO SECTION 535 OF CIVIL PROCEDURE ACT. APPEAL DID NOT CITE INDIVIDUAL BRIEFS. ESTABLISHED LEGAL PRECEDENT No. 284/STF. UNREASONABLE ATTORNEY FEE. ATTORNEY FEE THAT CAN BE INCREASED BY THE SUPERIOR COURT OF JUSTICE. ESTABLISHED LEGAL PRECEDENT No. 7/STJ NOT APPLIED.

1. In that the appellant's brief does include necessary substantiation regarding a failure to meet the requirements of section 535 of Civil Procedure Act as a reason, the appeal must be dismissed. Omissions of fact, contradictions in arguments, and obscurity of the lower court decision are reasons why the decision must be clarified. The established precedent is No. 284/STF.

(...)

6. Special Appeal denied."

(Special Appeal 1349013/DF, Justice Castro Meira, Second Chamber, judged in 5/2/2013, DJe 5/10/2013).

Any marketing (advertisement or other actions that promote selling of a product or service) directed at children is deceptive. Decisions that involve purchasing food must be taken by the parents. In that obesity is a matter of national concern, this issue is heightened. Therefore, prima facie, a marketing and advertising strategy directed at children must be deemed deceptive (section 37, 2º, Consumer Law Act).

ILLEGAL TYING AGREEMENT

The current area of contention involves whether the appellant's marketing strategy represents an illegal tying arrangement. In the present case, can a consumer be compelled to present 5 (five) labels of unneeded and unwanted products in order to purchase a watch for R\$ 5,00 (five reais)?

Acknowledging the facts and arguments offered, in that the consumer was compelled to present 5 (five) labels of unneeded and unwanted products in order to purchase a watch for R\$ 5,00 (five reais), the Lower Court judged that the subject transaction must be considered to be an illegal tying agreement.

The decision of the Lower Court states (page 1233/1231, e-STJ):

"The advertising of unneeded and unwanted products uses the established strategy of tying a "gift" to the purchase of other products.

The word "gift", in this situation, should mean "prize". Often, this approach is used to advertise products, brands or stores. Therefore, the "gift" should be given to consumers for free. Therefore, in that the consumer was required to pay for the "gift," in the present case this did not occur.

An illegal tying agreement occurs, when, in order to obtain another desired product, a consumer is forced to purchase a product that is similar or different to a desired product. In other words, a consumer only can purchase a desired product if the consumer purchases another unneeded or unwanted product.

In the present case, the consumer, in order to purchase the desired watch, must buy 5 unneeded or unwanted products and pay the amount of R\$ 5,00. The purchase of the watch, therefore, was conditioned on the purchase of small cakes and cookies. Without the unneeded or unwanted products, the consumer could not purchase the watch.

This practice is forbidden by Brazilian Laws. A consumer cannot be forced to purchase a product that is not desired."

The relevant legal literature establishes that, according to Section 39, I, of The Consumer Law Act, a tying agreement is illegal when "the seller refuses to sell a product or service if the consumer does not agree to buy another product or service." The tying agreement is not limited to selling or buying; it also happens in other kinds of agreements, because relevant law refers to the word "supply." (BENJAMIN,

Antonio Herman, in Manual do Direito do Consumidor. São Paulo: Editora Revista dos Tribunais, 2010).

In this case, in that the purchase of the watch is conditioned on the purchase of 5 (five) unneeded or unwanted products, the tying agreement is illegal.

Therefore, since it forbids that children's parents be forced to purchase products that are not desired, the Lower Court decision must be maintained. In addition, it is important to rewrite the opinion of the Federal Public Attorney, in verbis: The participation of the INSTITUTO ALANA and of the State Public Attorney is recommended to protect children's rights and to avoid undesired consequences for the personality development of children resulting from lessons learned from the selling of products under the circumstances described in the present case.

Special Appeal Denied. That is the opinion.

JUSTICE HUMBERTO MARTINS
Reporting Justice

OPINION

THE HONORABLE JUSTICE ASSUSETE MAGALHÃES: I want to greet the Attorneys and The Federal Public Attorney for their statements concerning the question on discussion regarding a notable case before the Superior Court of Justice.

There is no doubt that the case concerns deceptive advertising that is forbidden by section 37 of the Brazilian Advertising Self-Regulation Statute. It also is a case of an illegal tying agreement that is forbidden by section 39, I, of the Consumer Law Act, as described by Consumer Law Professor, Justice Herman Benjamin.

My opinion is that, as described in the amicus curiae petition, in this case the deceptive advertising is more substantial because the advertising is directed at children. Furthermore, although children are not mature, they still have enormous capacity to persuade their parents or families to buy desired products.

Although the opinion of Justice Humberto Martins does not need revision, I must say that the Special Appeal is based on Section 105, III, a and b of the Federal Constitution. Furthermore, the appellant does not explain what section is involved in the dissent opinion from the Superior Court. As such, the Superior Court of Justice cannot examine the special appeal according to the established Precedent No. 284/STJ. In addition, the similarity between the cited comparative precedents was not demonstrated.

Therefore, I concur in the opinion of Justice Humberto Martins, as also concurred in by Justice Herman Benjamin and Justice Mauro Campbell Marques. I have no doubt in agreeing with the opinion and I congratulate Justice Humberto Martins for his vote and for the excellence of this judgement. I also recommend that the R.P. of the Superior Court of Justice publicize this judgment for its importance.

I concur in the opinion.

