Simpson Thacher

The Ad Standard: Monthly Update

March 2026

At the Federal Trade Commission (FTC), its divided priorities on consumer harm from everyday costs and technology censorship came into full focus this month. FTC activity enforcement on everyday consumer costs continued with an announcement settling litigation with pharmacy benefit managers (PBMs) the FTC alleged were driving up healthcare costs. Later in the month, the FTC issued a letter warning letter that builds on an earlier announcement of its inquiry into "tech censorship" or how technology platforms tailor user access to services based on the content of their speech or affiliations, and how this conduct may violate the law. The warning letter articulated the FTC's argument as to when content moderation may be in violation of the FTC Act.

Class action litigation over false advertising was brisk this month with several new actions attempting to litigate consumer understanding of what is "in" a product in wide variety of product categories including candy, beverages, and even weight loss drugs.

The National Advertising Division (NAD) closed several monitoring cases this month. One investigating advertising for a financial services product evaluated a consumer survey's use of a forced choice, yes-or-no responses without an "I don't know" or "not sure" response option. Another reviewed a skin care product's use of a "health score" given by the Yuka app, a popular independent mobile app that scans food and personal care products and assigns scores based on its criteria for how ingredients impact human health or the environment.

TOPICS

FTC Focus

Settlement With Pharmacy Benefit Managers

The FTC reached a landmark settlement with one of the nation's largest PBMs, Express Scripts, Inc., and its affiliated entities (together, ESI). The proposed consent order resolves a lawsuit alleging that ESI violated Section 5 of the FTC Act by artificially inflating the list price of drugs, including insulin, by using anticompetitive and unfair rebating practices that pushed drug manufacturers to compete for preferred formulary coverage based on the size of rebates off the list price rather than net price. ESI and other PBMs would keep a portion of the inflated rebates and patients would pay more because their out-of-pocket payments are tied to the drugs' list prices. Under the proposed consent order ESI has agreed to, among other things, stop preferring high wholesale acquisition cost versions of a drug over identical low wholesale acquisition cost versions, ensure that out-of-pocket expenses will be based on the drug's net cost, delink drug manufacturers' compensation to ESI from list prices, and increase transparency for plan sponsors with mandatory reporting and disclosing payments to brokers representing plan sponsors.

FTC Secures Landmark Settlement with Express Scripts to Lower Drug Costs for American Patients | Federal Trade Commission

Warning Letter

The FTC sent a letter warning that suppressing or promoting news articles in news aggregators or feeds based on the perceived ideological or political viewpoint of the article or publication may violate the FTC Act. The FTC warned that if that suppression or promotion: (1) is inconsistent with the terms and conditions of service; (2) is contrary to consumers' reasonable expectations such that failure to disclose the ideological favoritism is a material omission; or (3) when those practices cause substantial injury that is neither reasonably avoidable nor outweighed by countervailing benefits to consumers or competition.

Federal Trade Commission Chairman Andrew N. Ferguson Issues Warning Letter | Federal Trade Commission

Class Actions

Product Purity Claims

Ferrara Candy Company was sued in two putative class actions alleging that it markets its various candy products toward children using colorful and cartoonish packaging but that recent testing by the State of Florida revealed that the products contain arsenic.

Anstett v. Ferrara Candy Co., No. 1:26-cv-01304 (N.D. Ill. Feb. 4, 2026) (asserting violation of Florida's Deceptive and Unfair Trade Practices Act)

Chhin v. Ferrara Candy Co., No. 4:26-cv-01186 (N.D. Cal. Feb. 6, 2026) (asserting violations of California's Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law)

Costco Wholesale Corp. was sued in a putative class action alleging that it markets its Kirkland Signature Seasoned Rotisserie Chicken and its Kirkland Signature raw chicken products as safe and high quality but the plaintiff alleges that Costco's poultry operations have Salmonella contamination that exposes consumers to serious health risks.

Taylor v. Costco Wholesale Corp., No. 2:26-cv-00528 (W.D. Wash. Feb. 12, 2026)

"Nothing Artificial" and "Free From" Claims

Reed's Inc. was sued in a putative class action alleging that its Zero Sugar Real Ginger Ale is misbranded and falsely advertised because its label claims that it has "Natural Ingredients," "Nothing Artificial," and "No Artificial Preservatives" but the product in fact contains erythritol, an artificial sweetener, and citric acid, an artificial preservative.

DeHerrera v. Reed's Inc., No. 5:26-cv-00572 (C.D. Cal. Feb. 9, 2026)

Pyure Brands, LLC was sued in a putative class action alleging that it misleadingly labels its Pyure Organic Monk Fruit Sweetener and Pyure Organic Monk Fruit Sweetener Packets as "free from artificial sweeteners" when they are primarily sweetened with erythritol.

Chakravarthy v. Pyure Brands, LLC, No. 2:26-cv-01518 (C.D. Cal. Feb. 12, 2026)

Halfday Tonics Inc. was sued in a putative class action alleging that it falsely and misleadingly claims that its iced tea product has "prebiotic benefits" and is "good for your gut" but that consumers would have to ingest multiple cans of the product every day for weeks to experience these health benefits and that any benefits would be counteracted by the health risks posed by the product's sugar and soluble fiber content.

Vickers v. Halfday Tonics Inc., No. 2:26-cv-00935 (E.D.N.Y. Feb. 17, 2026)

Active Ingredient Claims

Hims & Hers Health, Inc. and Hims, Inc. were sued in a putative class action alleging that they falsely advertise a product as a "compounded semaglutide" that is made with "the same active ingredient" as Ozempic® and Wegovy® but that the product in fact uses a different active ingredient and misleads consumers into believing that its product is just as safe and effective despite having never been evaluated by the FDA.

Donoho v. Hims & Hers Health, Inc., No. 1:26-cv-01954 (N.D. Ill. Feb. 20, 2026)

Material Improvement Claims

Rawlings Sporting Goods Co. was sued in a putative class action alleging that it falsely marketed material and specific improvements to bat components to consumers while simultaneously representing to certifying bodies–whose approval is

required for the bats to be lawfully sold and used in organized leagues and games–that the bats had changed only cosmetically.

Duryea v. Rawlings Sporting Goods Co., No. 1:26-cv-00023 (D. Utah Feb. 20, 2026)

Sports Betting Claims

Blockratize, Inc. d/b/a Polymarket and its related subsidiaries were sued in a putative class action alleging they market and operate an unlicensed online sports and events gambling platform that is "virtually indistinguishable from a traditional casino and sportsbook."

Miro San Diego v. Blockratize, Inc., No. 1:26-cv-00973 (S.D.N.Y. Feb. 4, 2026)

Recent District and State Court Developments

Northern District of Illinois: Class Certification Denied in Almond "Smokehouse" Flavor Suit

The Northern District of Illinois recently denied certification to a proposed class of consumers alleging that Blue Diamond Growers, a cooperative of California almond growers, violated the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA) by deceptively labeling their almonds as "Smokehouse®" when their flavor comes from seasoning and they are not actually smoked in a smokehouse. The court explained that to prevail in an action for deceptive advertising, a plaintiff must plead proximate causation, meaning that the plaintiff was deceived by the advertising and that a plaintiff is an inadequate class representative if she was aware of the alleged defects before she purchased the product. *See, e.g., Sherwin v. Samsung Electronics America, Inc.,* 2019 WL 10854535 (N.D. Ill. Dec. 18, 2019) (class certification denied where it was arguable plaintiff knew of defects before purchase and was, therefore, not deceived). The court concluded that plaintiff's deposition testimony on this point is dispositive because she testified that she learned of the alleged defect from seeing a social media ad from her later counsel reporting the issue, however, plaintiff continued to purchase the product every few months for over a year. The court concluded that plaintiff "is thus inadequate to serve as the class representative because she cannot show proximate causation as required to prevail on her claim."

Clark v. Blue Diamond Growers, No. 1:22-cv-01591, 2026 U.S. Dist. LEXIS 35031 (N.D. Ill. Feb. 20, 2026)

Northern District of Illinois: "Dishwasher Safe" Label Plausibly Alleged To Be Misleading

A federal district court in Illinois denied dismissal in part in a putative class action asserting consumer protection claims against Walgreens, Co., and the manufacturers and distributors of plastic cutlery that plaintiff alleged was misleadingly labeled as "dishwasher safe" and "heavy duty" after it melted into her dishwasher. As to plaintiff's claims under California's Consumer Legal Remedies Act, False Advertising Law, and Unfair Competition Law, the court disagreed with defendants that no reasonable consumer could be misled by the front labeling because the packaging clarified any potential ambiguity with term "dishwasher safe" because it also stated in all caps "dishwasher safe if cleaned on the top rack" on the bottom of the box. On a motion to dismiss, the court noted that it must accept the facts alleged as true and concluded plaintiff plausibly alleged that the front label was unambiguously deceptive and "would have no reason to look at that statement and seek further clarification on whether it was only safe for the top rack."

Simpson v. Walgreen Co., No. 23-cv-16465, 2026 U.S. Dist. LEXIS 30818 (N.D. Ill. Feb. 13, 2026)

Northern District of Illinois: "Boneless Wings" Not Plausibly Alleged To Be Deceptive

A federal district court in Illinois dismissed with leave to amend a putative class action alleging that Buffalo Wild Wings, Inc. (BWW) misleadingly marketing its product as "boneless wings" when they are not real chicken wings with the bones removed but are in fact breast meat, which is cheaper than wing meat. The court concluded that plaintiff failed to plausibly allege that reasonable consumers are deceived by boneless wings, so he failed to state a plausible claim for relief. The court concluded that that a reasonable consumer would not think that boneless wings were made of wing meat. The court noted that the menu lists the boneless wings at a lower price than BWW's traditional wings and that common sense tells consumers that a product made out of the same ingredients, but requiring more time and work to create, would cost more. The court further noted that "boneless wings" is a common term that has existed for over two decades and that they are not a niche product for which a consumer would need to do extensive research to figure out the truth.

Halim v. Buffalo Wild Wings, Inc., No. 23-cv-01495, 2026 U.S. Dist. LEXIS 31583 (N.D. Ill. Feb. 17, 2026)

Northern District of New York: Dismisses Class Action Alleging Beverage Names Were Misleading

A federal district court in New York dismissed with leave to amend a putative class action alleging that Dunkin' Brands, Inc. and Inspire Brands, Inc. misleadingly marketing and advertising their Dunkin' Refreshers fruit-flavored beverages because the product names include specific fruits, *e.g.*, Strawberry Dragonfruit or Mango Pineapple, but the products do not contain any juice from the named fruits. The court concluded that plaintiff failed to plausibly allege false advertising noting that the only marketing or advertising in the complaint is the menu board, which lists the flavor offerings of the products but "gives no indication that the products are made with real fruits, such as 'made with Mango and Pineapple' or any similar conveyance to suggest the drink contains real fruit." The court further pointed out that plaintiff failed to allege that any representation on the menu board runs counter to the actual ingredients in the beverage, and instead noted that plaintiff alleged that "the products are formulated to mimic the taste of the represented fruits."

Daly v. Dunkin' Brands, Inc., No. 3:24-CV-1475, 2026 U.S. Dist. LEXIS 25933 (N.D.N.Y. Feb. 9, 2026)

Western District of Washington: Denies Dismissal in Misleading Email Subject Line Class Action

A federal district court in Washington denied dismissal in a putative class action alleging that FullBeauty Brands Operations, LLC violated Washington's Commercial Electronic Mail Act (CEMA) and Consumer Protection Act by sending emails with false or misleading information in their subject lines by using phrases "today only," "ends tonight," while never intending to terminate the sale by the described deadline. While FullBeauty contended that plaintiff's small number examples of such emails (only five) suggested that it extended its promotions on an ad hoc basis rather than engaged in intentional deception, the court stated that FullBeauty ignores the requirements of Rule 12(b)(6) and declined its invitation to question the truth of the allegations and draw inferences against plaintiff. The court further concluded that CEMA is not preempted by the federal CAN-SPAM Act, noting that this federal preemption theory has already been rejected in two similar cases decided in the Western District of Washington.

Kempf v. FullBeauty Brands Operations, LLC, No. 2:25-cv-01141, 2026 U.S. Dist. LEXIS 29632 (W.D. Wash. Feb. 12, 2026)

Massachusetts Superior Court: Denies Summary Judgment in "Deposit Bonus" Class Action

A Massachusetts trial court denied summary judgment in a putative class action alleging that DraftKings, Inc. violated the Massachusetts Consumer Protection Act by advertising a "$1,000 Deposit Bonus!" to new customers and promising that "you could get a thousand dollars if you made a deposit." DraftKings allegedly told one plaintiff, Scanlon, that she would never receive the $1,000 bonus because she "only made a $25 deposit," while another plaintiff, Harris, did not receive any

bonus or credits because he was not deemed to be a new customer. The court concluded that DraftKings failed to present admissible evidence that would entitle it to judgment as a matter of law that consumers were given reasonable notice of the applicable terms and conditions of the Deposit Bonus. Noting DraftKings' acknowledgment that it did not maintain records of customers' initial deposit userflows during the Deposit Bonus promotion, the court found that its recreations were inadmissible and thus, could not support summary judgment in its favor. As to Harris, DraftKings admitted that he did not receive the Deposit Bonus terms and conditions because he was not deemed to be a new customer because of his prior Daily Fantasy Sports account. The court concluded that genuine disputes of fact exist as to whether the Deposit Bonus ads were misleading, stating that the court could not conclude as a matter of law that the ads could not have misled a reasonable consumer to place successive wagers in pursuit of $1,000 in credits or cash equivalent when, in fact, DraftKings capped Scanlon's potential bonus at one dollar and Harris's at zero.

Scanlon v. DraftKings, Inc., No. 2484CV01099 (Mass. Super. Ct. Feb. 17, 2026)

NAD Focus

Consumer Survey Claims

After opening an inquiry into social media influencer advertising for the Monarch Money app, NAD recommended that personal finance technology company Monarch Money, Inc. discontinue certain express consumer survey-based outcome claims. At issue were claims that "7 in 10 couples say Monarch improved their money conversations with their partner" and "8 in 10 feel more in control of their finances with Monarch," due in part to the survey's use of a forced choice, yes-or-no responses, which did not include an "I don't know" or "not sure" response option. NAD found that, in this context, such survey questions can inflate affirmative responses and undermine the resulting data's reliability. NAD recommended that the claim, "On average, members save $200 per month using Monarch," be discontinued, which was based on question asking respondents to estimate how much they had saved or cut in unnecessary spending per month, which NAD found ambiguous because it combined two distinct behaviors, saving more and reducing spending. NAD also recommended that the claim "80% of members say Monarch gives them a clearer picture of their money," be discontinued as it relied on a survey question asking whether, "as a result of joining Monarch," they had "[l]earned where your money is going better than you understood before." NAD found the claim communicates a broad message about gaining a clearer understanding of one's overall financial situation, including more than just spending but the survey only measured whether users believed they had improved visibility into where their money was going.

Monarch Money, Inc. (Financial Services), Report #7528, *NAD/CARU Case Reports* (Feb. 2026)

Third-Party App Rankings and Before-and-After Photos

NAD opened an inquiry into advertising for PrettyBoy Skincare and recommended that PrettyBoy, Inc. modify or discontinue claims that it received "100/100 Health Score (via the Yuka App) and before and after photographs depicting product efficacy. The Yuka App independently assesses products and assigns products scores based on criteria evaluating ingredients' impact on human health or the environment. The Yuka App rated PrettyBoy's Revival Recovery Gel Moisturizer "100/100" because it does not contain "harmful parabens" or a "harmful UV filter," and listed the product's "risk-free" ingredients. NAD recommended that PrettyBoy modify its advertising to clarify the basis of the ranking (*i.e.*, that it is an independent assessment of the product's ingredients, which Yuka deemed to risk-free due to the absence of

parabens and UV filters). As to the before-and-after photographs, NAD noted that they constitute product performance claims and must be supported by reliable evidence representative of what consumers can expect. The photos at issue depict reductions in redness associated with eczema, and reductions in fine lines and undereye bags. NAD determined that these objectively provable improvements require support, and claims related to eczema require competent and reliable scientific evidence as support. NAD found that PrettyBoy's reliance on the National Eczema Association's Seal of Acceptance for two of its products, without any underlying testing, was not sufficient to support the depictions and recommended that the before-and-after photographs be discontinued. During the inquiry, PrettyBoy also permanently discontinued the claim "Trusted by 20,000 Men (5-star rating)."

PrettyBoy, Inc. (PrettyBoy Skincare), Report #7495, *NAD/CARU Case Reports* (Feb. 2026)

"4K" Resolution Claims

In a Fast-Track SWIFT case, initiated by Digitalis Educational Solutions, a digital planetarium manufacturer, NAD recommended that Science Interactive Group (SIG) discontinue certain advertising claims promoting its StarLab dome and projection system. NAD determined that, in context, the challenged "4K projector" claims reasonably convey the unsupported message that users will see images in 4K quality resolution and may not understand that "4K" is not what is achieved on the actual StarLab dome. NAD further found that SIG's separate disclosure of the dome's actual resolution (3.66 megapixels) was insufficient because it contradicted, rather than qualified, the "4K" claims. NAD recommended that SIG discontinue the claims "State-of-the-art 4k Projector…," "Bring breathtaking clarity, cinematic realism, and stunning dimension to every lesson with the new StarLab 4k projector," and "Our native 4K projector will enable you to bring all your visuals to life in stunning detail whether they're 4K or native resolution." During the inquiry, SIG voluntarily permanently discontinued certain claims, including "Give your students the 4k experience!," "Cutting Edge Technology: 4K projection," and "Using 3840x2160 pixels – that's more than 8 million pixels – Star Lab 4K projection produces unmatched clarity and stunning dimension for any content."

Science Interactive Group (StarLab Dome and Projection System), Report #7538, *NAD/CARU Case Reports* (Dec. 2025)

"#1 Baby Monitor" Claims

In a Fast-Track SWIFT case, initiated by Owlet, Inc. NAD recommended that UdiSense, Inc. (Nanit) discontinue advertising claims that its product is the "#1 smart baby monitor" and the "#1 baby monitor." NAD determined that a "#1 Brand" claim, without qualification, is a sales superiority claim that communicates the product has the most units sold within a particular category. NAD found that the category of "baby monitor" is broad enough to encompass non-video monitors and that "smart baby monitors" is a broad category with advanced feature products, and that both the Nanit baby monitors and the Owlet Dream Sock (an FDA-cleared wearable medical device) may be characterized as "smart" monitoring devices.

UdiSense, Inc. (Nanit Smart Baby Monitors), Report #7544, *NAD/CARU Case Reports* (Feb. 2026)

In-Flight WiFi Claims

In a Fast-Track SWIFT challenge initiated by Verizon Communications Inc., NAD recommended that T-Mobile US, Inc. discontinue or modify advertising claims concerning the cost of its free in-flight Wi-Fi benefit. At issue was T-Mobile's

"savings" calculator stating that, "T-Mobile: In-flight Wi-Fi – Included; Verizon: In-flight Wi-Fi - $ 147.00/mo." NAD found that the T-Mobile did not make clear that access to full-flight texting and free Wi-Fi is available on certain airlines through the T-Mobile plan and that its disclosures do not indicate which major airlines are covered by this benefit. NAD also found that the advertising did not clearly communicate that the cost for Verizon customers was charged by airlines and not Verizon. NAD recommended T-Mobile discontinue the challenged in-flight Wi-Fi claims or modify them to clearly and conspicuously disclose the nature of its in-flight Wi-Fi benefit by communicating that the fees that T-Mobile customers can potentially avoid with their plans are those charged by certain airlines and to avoid communicating that non-T-Mobile customers typically pay the monthly cost of in-flight Wi-Fi set forth by T-Mobile in its advertising.

T-Mobile US, Inc. (In-Flight Wi-Fi), Report #7540, *NAD/CARU Case Reports* (Feb. 2026)

Menopause and Perimenopause Relief Claims

As part of its monitoring program, NAD challenged express and implied advertising claims made by virtual healthcare provider Midi Health, Inc. for its perimenopause and menopause services. At issue was an Instagram post stating "Ready to say goodbye to hot flashes, weight gain, insomnia and mood swings? Join the 91% of patients who find relief within 2 months" and the related implied claim that patients experience significant symptom relief within two months and nearly all patients will see an elimination of key menopausal symptoms. During the inquiry, Midi Health informed NAD that it had permanently discontinued the challenged claims.

Midi Health, Inc. (Midi Health Services), Report #7534, *NAD/CARU Case Reports* (Feb. 2026)

NAD to Refer Laifen to Regulatory Authorities for Fastest Hair Dryer Claims

NAD will refer Shuye Technology Ltd. d/b/a Laifen to the appropriate regulatory authorities, including the relevant state attorneys general, for its failure to comply in good faith with NAD recommendations arising from a January 2024 Fast-Track SWIFT case initiated by competitor Dyson, Inc. Laifen agreed to permanently discontinue claims that its Swift, Swift SE, Swift Special, and Swift Premium hair dryers are the "fastest." Dyson later reported additional, numerous noncompliant advertisements appearing on Laifen's website and on social media. Despite frequent outreach attempts to Laifen and separate unsuccessful attempts to have the ads removed from the platforms with which NAD has a reporting relationship, the noncompliant advertisements remain live and unmodified.

Shuye Technology Ltd. (Swift Hair Dryers), Report #7275-2C, *NAD/CARU Case Reports* (Feb. 2026)

Simpson
Thacher

KEY CONTACTS

Laura Brett
Partner
+1-212-455-2180
laura.brett@stblaw.com

Lynn K. Neuner
Partner
+1-212-455-2696
lneuner@stblaw.com

SIMPSON THACHER WORLDWIDE

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Boston
855 Boylston Street, 9th Floor
Boston, MA 02116
+1-617-778-9200

Houston
1000 Main Street, Suite 2900
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

San Francisco
One Market Plaza
Spear Tower, Suite 3800
San Francisco, CA 94105
+1-415-426-7300

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

Brussels
Square de Meeus 1, Floor 7
B-1000 Brussels
Belgium
+32-2-504-73-00

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

Luxembourg
Espace Monterey
40 Avenue Monterey
L-2163 Luxembourg
Grand Duchy of Luxembourg
+352-27-94-23-00

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000

ASIA

Beijing
6208 China World Tower B
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

**In February 2026, Simpson Thacher announced plans to expand its presence in Texas with an office in Dallas.*