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Larceny by Menu

Abstract

Consumers are being ripped off by the food service industry when menus in establishments serving food misrepresent, substitute, and manipulate portions and the status of foods being served. A billion dollars a year in fraud is involved when menus offer the consumer one thing and deliver another.

Keywords

Anthony G. Marshall, Elio C. Bellucci, Menu fraud, Menu substitution, NRA, Los Angeles Health Department, McDonald's, FIU

Larceny by Menu

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Consumers are being ripped off by the food service industry when menus in establishments serving food misrepresent, substitute, and manipulate portions and the status of foods being served. A billion dollars a year in fraud is involved when menus offer the consumer one thing and deliver another.

What is there about the restaurant business that takes a self-respecting business person who would not normally take a bent pen which did not belong to him and turn him into a veritable Jesse James when it comes to using the restaurant's menu like a gun to rob the customers?

Which restaurants do this? Virtually all of them are guilty. How is the menu used as a gun? When it represents an item as being one thing when something else, invariably of a lesser quality or cost, is served in its stead. The restaurateur is then saying, "Stick 'em up." For example, the menu reads "fresh shrimp" and the house uses frozen shrimp. Fresh costs more than frozen, and yet when the restaurateur substitutes the frozen shrimp for the fresh, the price on the menu is not reduced. The restaurant charges the same as for fresh. They have deceived the customer and have "illegally profited" by the difference between the cost of the frozen shrimp served and what the cost would have been if fresh had been used.

Some of these misrepresentations may not only cost the consumer more money, but they may cause him to eat something which he should consider revolting had he known the truth about the product's origin. For example, would you order "Gulf Coast shrimp" if you knew that it had been netted and frozen in Guyana, or would "fresh natural frog's legs" rest as comfortably in your stomach if you knew that they were from Bangladesh or India?

These menu misrepresentations are larcenous rip-offs no matter how restaurateurs try to verbalize justifications for them; the bottom line is still "Stick 'em up."

"It deals with the reality and the potential to defraud which exists in the food service industry through misrepresentation, substitution, and portion manipulation. The victim of this fraud is you, the con-

sumer," wrote Robert N. Hills in his publication "Truth in Menu," which was commissioned by Emerson Ltd. in the late 1970s. This was an effort to alert the consuming public to the billion-dollar-a-year rip-off which is being perpetrated against them. In it he asserted that darn little, if anything, is being done about it in most parts of the country.

Consumers Are Becoming Restless

There have been scattered attempts from various sectors of the country, mainly by governmental agencies, to deal with the problem, but nothing significant to date has been done to cure it. Perhaps the most significant result of the problem which has been popping up here and there is the fact that there has developed an industry awareness that consumers are starting to become restless, and as public awareness increases, there might very well be demands for some sort of legislative action to curb at least some of the most notorious practices. This awareness has caused the industry to start some action toward cleaning up its act in an effort to avoid the possibility of any future government intervention by regulation or supervision.

It is not just the little restaurant or bar around the corner that is guilty of these frauds. Large, supposedly first-rate places are just as prone to take advantage of patrons' ignorance and trust in what's on the menu. Upon its opening in 1978, the M.G.M. Grand Hotel in Reno, Nevada, was heralded as the ultimate in luxury, a hotel calculated to bend over backwards just to please its guests and patrons. Apparently this was really not the case, for in February 1980, the hotel agreed to pay the U.S. Treasury Department \$125,000 to settle charges brought against it by the Bureau of Alcohol, Tobacco, and Firearms, which alleged that the hotel had illegally refilled liquor bottles with cheaper brands.

The hotel was also charged with reselling unused drinks left by customers at the hotel's Zeigfield Room, the salon where the hotel's top entertainment is presented. It was charged that the price of the show included three unmixed drinks and that after the show if any of the patrons left without consuming their quota of drinks, the unused drinks would be collected and poured back in the bottles and resold at a later time to new customers. This \$125,000 settlement was for the violations which occurred from May 1978, which was shortly after the hotel opened, until July 30, 1979, and represented the amount which the government exacted for the violation. In addition, the hotel could still be liable in civil damages to all persons who were ripped off.

This could be an example of a case where a class action could be brought against the wrongdoer, in this case the hotel, on behalf of all people who had purchased the more expensive liquor and were served the cheaper in its place. Maybe that is the answer: The imposition of huge fines, plus the initiation of civil suits of a class action nature to make it very unprofitable for the perpetrators of these gastronomic frauds to profit by their dishonesty.

Problem Is Prevalent

This problem is so prevalent in the industry that many restaura-

teurs have just about accepted it as a way of doing business; they do not believe that they are doing anything wrong. One wonders if these operators really believe they are not cheating. What else would you say of one who misrepresents that which he sells you? If a party sells a piece of glass for a diamond, he would be called a swindler; then why shouldn't a person be called a swindler who sells a broiler chicken for a "capon," or who advertises a "14-ounce steak" but serves upgraded meat; or who advertises and sells you "Maine lobster" but serves you spiny lobster; or who sells "fresh native" frogs legs but serves frozen ones from Bangladesh or India?

Does it make a difference because the amount of money involved in each transaction is relatively small? Not really. What the person is has been established by what he did: He is a swindler because he tricked the customer. What is the customer going to do about it? This is the million dollar question, the answer to which could ruin an otherwise prosperous restaurateur.

Consumer Is Often Fooled

In most cases, the patron is going to do absolutely nothing. In fact, in most cases there is nothing he can do about it because he doesn't even know it. The reason, of course, is simple: He relies completely on the description of the item on the menu and trusts the restaurateur. He doesn't see the item before it is prepared and has no opportunity to examine the steak to see if it has been stamped "prime" or if indeed he has a live North Atlantic lobster being prepared for him. Food or liquor is ordered completely on the basis of the verbal and pictorial descriptions on the menu, and the consumer relies completely upon the honesty of the restaurateur to deliver what was promised.

Unfortunately, many restaurateurs cannot resist the temptation to increase the profit margin by substitutions and underweights. What are patrons' rights against a restaurateur under these conditions? Obviously, the patron can refuse to accept the order which is served him, but what can he do in addition to that? What he does might be controlled by the amount of the swindle.

In the case of a diamond, where there are thousands of dollars involved, one would not hesitate to go to the authorities. However, in cases where inferior products are substituted for a superior or more costly one, the loss is only a few dollars, so why should the consumer get excited? It is precisely this attitude which the restaurateur takes and which permits these practices to flourish and continue. But let this be known: The amount of money taken by diamond swindlers doesn't begin to approach the annual take of the friendly restaurant host with the "hand gun" menu.

Hills took the following approach to demonstrate the potential for economic fraud presented by dishonest menus. He said that in 1978 he projected annual food and drink sales of \$78,911,190,000. Admittedly, it is extremely difficult to pinpoint the exact number of dollars which would be included in that amount by virtue of fraudulent misrepresentations. One California health official who was involved in Los Angeles County's attack on the problem said, "This fraud accounted for 3-5 percent of the consumer's restaurant tab." Hills said that even

if we were to estimate that only one penny per dollar of sales was the result of either short weight or misrepresentation of advertised products, then the fraud would amount to \$789 million; if it were 2 cents, then it would be "nearly \$1.6 billion annually."

Potential For Fraud Is High

Individually the loss per dinner served might not be much, but, collectively, the potential for economic fraud runs in the billions. What can the consumer do about it and, most important, what will the consumer do about it? There are two possible courses of action. The first is to do exactly what the restaurateur would do if you ate your meal and then refused to pay for it. He would claim you defrauded him and have you arrested. Well, if he sells you a 12-ounce steak and charges you for a 14-ounce one, or if he sells you a spiny lobster and charges you for a North Atlantic lobster, he is defrauding you. Therefore, it follows that you have the right to file a criminal complaint against him. Either way it is a fraud and a larceny. The only problem with this procedure is that if you are a traveler away from home, you might not be inclined to return to the area in order to testify.

The second possible course of action is to start a class action suit against the hotel, motel, restaurant, lunchroom, etc. which ripped you off. As you know, a class action suit is one brought by a particular plaintiff on behalf of himself and all similarly situated people. So-called class action suits are becoming a very lethal consumer weapon in the hospitality industry. They have been brought against hotels for imposing charges for telephone service on people who had not used the phones or who had telephone service charges added to the actual cost of the call. They are also brought, in many instances, on behalf of the many people who may have been damaged by activities in violation of the Sherman Anti-Trust Act or similar legislation. In either of the above cases, the awards were in the millions.

In the case of menu short weights and frauds, such an action could be brought against the restaurant. Upon its being certified as a class action by the courts, the restaurateurs could be compelled to supply you with lists of sales made of various items, as well as copies of menus and records of their orders and deliveries from the various suppliers. By matching the menus and their representations against the purchases and deliveries we can see whether or not the restaurant ever had on hand the items represented on the menu as being served. Then, by comparing what the restaurant had on hand with the sales checks, you can see whether or not they had Maine lobsters on hand when, according to their menu, that was what they were selling.

The same would hold true of all the other specifically-designated items on the menu. All of the research concerning this problem discusses the "potential for economic fraud." The reason why all they can say is the "potential" is because no one does anything about it, so we cannot say that in effect the established economic fraud amounted to "x" number of dollars.

Some Government Agencies Have Investigated

The following represents some results that were compiled when gov-

ernment agencies in certain parts of the country took a sufficient interest in the problem to investigate. However, even they, in their reports, were restrained and reserved in their categorization of what was going on, preferring in most instances to merely refer to the problem as one of the restaurateur being unable to "substantiate" the representations on the menu as to the quality or origin of the product represented rather than to call it an outright fraud.

For example, in the fall of 1978, the State Department of Consumer Protection in Connecticut launched what their commissioner, Mary Heslin, said was a "truth in menus" campaign. In announcing it, she revealed that Connecticut had just completed the nation's most extensive statewide survey of 170 restaurant menus. The results she announced were, or should have been, startling. The examination turned up 405 "unsubstantiated claims." A total of 76 percent of the restaurants had unsubstantiated claims on their menus.

The "Maine" lobsters didn't always come from Maine, and items listed as "fresh" in some instances came from cans. She sent guidelines defining menu terms and notices asking that menus be corrected by March 1, 1979, to the restaurants in Connecticut. But she said she was going to let the industry voluntarily comply with the guidelines. Despite the problem which she seemed to have with semantics, if a restaurateur advertises "Maine" lobster and orders and sells spiny lobster in its place, that is a fraud, not a "unsubstantiated claim." The same would be true for any other similar instances. By announcing she was not pushing for legislation but was relying on voluntary compliance because, in her opinion, "it would have been difficult to prove intentional false statements," it is the equivalent of saying "please don't do it because, if you do, we can't catch you."

Big Stick Approach Can Work

Educators serving the hospitality industry would rather have the big stick approach used: a push for legislation which would come down hard and prosecute all the way if changes are not made. This position is borne out by the posture taken by the Los Angeles Health Department which had embarked on a truth in menu enforcement program and had initiated prosecution against the McDonald's chain because its 50 restaurants in the Los Angeles area had printed on the breakfast place mats used in their trays that the restaurant served "fresh" orange juice and "maple" syrup. In fact, the orange juice was frozen concentrate and the syrup did not contain enough maple syrup to be so identified.

McDonald's did not contest the claims and agreed to pay the maximum fine for each of the two violations, \$2,500, and an additional \$5,500 in court costs. The chain claimed they were not guilty of any wrongdoing, that the printing on the placemats was "an undetected copywriting error." But regardless of the cause, they paid the fines and court costs, removed the placemats from their units, and agreed to a one-time advertising program on their tray liners calling attention to California's strict truth in menu laws. McDonald's paid the fine in July 1978, just about three months before the Connecticut Consumer Protection group announced its position. If it worked in Los Angeles,

couldn't it have worked in Connecticut?

Los Angeles Enforces Policy

The Los Angeles County Department of Health Services took a long, hard look at the deceptive representations in menus and in 1976 published and began to enforce the "Menu Misrepresentation Enforcement Policy." Under the authorization granted them under the state Health and Safety Code, they started to examine menus and cited restaurants for false, misleading statements, levying civil fines up to \$6,500 per violation.

Once this stand was taken, menus began to shape up. For those who want the industry to police itself, one only needs to look at the last 48 years. The National Restaurant Association incorporated standards of menu accuracy in their Standards of Business Practice way back in 1923. Despite this, it wasn't until the Los Angeles movement, which was followed by similar action in Washington, D.C., and then in other areas, that the restaurant operators started to pay some attention to the frauds they were committing through the medium of their menus. This concern was not motivated by a desire to treat the customer fairly, for if this was their motive, there never would have been a problem at all, for the restaurateurs would have seen to it that there would have always been a fair representation of the nature, source, origin and weight of the items listed on the menu.

At this point in time, it would seem that current concern for the accuracy of restaurant menus is not motivated by the operators, but rather by the hot breath of the consumers who are in pursuit of those who are guilty of menu deception. Legislation is forthcoming unless the furor can be stilled. With this in view, many of the state restaurant associations, as well as the National Restaurant Association, have adopted accuracy in menu programs, commonly referred to as AIM. The purpose of these programs is to attempt to ward off mandatory truth in menu laws in those areas which have not already passed them or to try to control the severity of statutes where passage seems inevitable.

New Jersey Deals With Problem

An example of the latter is the bill passed by the New Jersey Legislature in 1980. The New Jersey Restaurant Association actively opposed a truth in menu bill as submitted by the proponents of truth in menus. What came out of the legislature was a watered down version of the original truth in menu bill; it was not encouraging. The restaurant association lobby, armed with the promises of the miracle of AIM and the group's battle cry of "let us clean up our own industry," could take pride in their accomplishments of a job well done. The new law requires restaurants and other eating places to provide accurate food descriptions on their menus and in their advertising. The enforcement of the law is the responsibility of local government, but the penalty for violation makes the restaurant responsible for giving the customer's money back and provides that the customer must bring his or her own action in the courts to recover. In other words, the statute accomplishes absolutely nothing. The consumer had that right all

along.

An earlier version of the bill provided for fines up to \$2,000 per violation, but the governor objected to that version "because of the cost of enforcement." Among other things, the restaurant association was also successful in having eliminated from the original bill a requirement that there be a comment next to each item indicating whether the item had been partially or totally prepared off premises. This was just another noble effort which yielded to the pressures of the lobbies whose interests are contrary to those of the consumer.

A member of the New York City Council introduced a bill before that council in 1978 to make it a violation of the law if any food on the menu is misbranded or described in a misleading way. The executive vice president of the New York State Restaurant Association at that time commented on the fact that the city receives "maybe 40 to 50 complaints a year;" and that was a small number considering the industry did about \$3.5 billion in sales the year before the legislation was introduced. The fact that few complaints are made had no bearing on the problem, and commenting on it is merely a smoke screen to camouflage the magnitude of the problem.

If we apply the percentages estimated by the California sanitarians to each dollar of sales generated by menu fraud or untruth, the potential for fraud and rip-off in the city of New York during the year quoted by the representative of the New York Restaurant Association was between \$105 and \$175 million; that is not a small matter in any man's language. The fact that there were only 40 to 50 complaints again buttresses the need for such legislation because, in most instances, the poor customer doesn't even know he has been had, or if he is aware of it, he doesn't know where to turn for help. Perhaps if general legislation dealt with the problem by imposing heavy criminal sanctions as well as a stiff fine against violators, the problem would cure itself. This legislative cure would only work, however, if the legislation is vigorously enforced.

Industry Is Full of Excuses

The thing that further frustrates a person addressing the problem is the fact that the industry tries to attribute these frauds to misunderstandings and ignorance on the part of the restaurateur. Even those who investigated and reported violations seemed to adopt the same attitude.

It was reported in the July 1978 *Washington Forum* that the Environmental Health Administration had conducted a menu study of 141 restaurants and 350 menus between September 6 and October 20, 1977, in Washington, D.C. The inaccuracies in the menus were attributed to "management's lack of knowledge and understanding of various food identities; the longstanding use of terms that have been in acceptance in describing both a type of food and a specific food item; the desire to make the menu appealing; and the seasonal availability of some foods."

It is difficult to reconcile this attitude exonerating the restaurateur from guilt when one contemplates the results of the investigation as

reported by Hills in his publication "Truth in Menus." As a matter of fact, Hills referred to the Washington metropolitan community as being rather sophisticated in its dining and, by and large, the restaurants involved enjoyed very respectable national reputations. Hills reported the following:

- All, 100 percent, of the shrimp advertised on the surveyed menus as "fresh" were, instead, previously frozen. Other frozen products offered as fresh included vegetables, fruit juices, and other seafood products advertised as "fresh" or "just caught."
- Over 70 percent of the fruit mixtures — salads, cups, cocktails — which were advertised as "fresh" contained some commercially packed and preserved product as an ingredient.
- Over half, 53.9 percent, of the establishments surveyed misrepresented the ground or chopped beef products on the menu as of higher quality or greater freshness ("fresh ground," "we chop," etc.) than that of the product actually served. Of the 141 establishments, 77 simply "added" quality to commercial ground beef through menu descriptions. In all, commercial ground beef was represented in 26 different ways, including "chopped sirloin of beef," "prime ground beef," "chopped prime beefsteak," "choice ground round," "freshly chopped choice sirloin," and "prime chopped steak."
- Over 75 percent of the "baked ham" on the menu was not baked.
- About 50 percent of the restaurants surveyed offered kosher products on their menus — kosher corned beef, kosher pastrami — and served in their place less expensive products which had not been slaughtered or processed according to orthodox Jewish requirements.
- More than 75 percent of the restaurants offering "roquefort cheese" substituted domestic blue cheese for that product.
- More than 75 percent of the menu claims for the origins of seafood entrees either could not be substantiated or were outright falsehoods, i.e., "Colorado" rainbow trout from Japan, "Gulf Coast" shrimp from Guyana, "African" lobster tails from Florida, and "Nova Scotia" halibut packed in Maryland.
- At least one out of four restaurants listed imported products, other than seafoods, and substituted domestic products or ones from a country other than that stated on the menu.
- In more than 75 percent of the establishments in which portions were prepared to meet menu-stated sizes, customers were given meat portions a minimum of 10 to 20 percent below the weight listed on the menu. In one instance, the featured two-pound lobster weighed in at 20 ounces.
- In over 75 percent of the restaurants offering "sliced chicken," "chicken salad," or other dishes representing chicken as the basic ingredient, a commercial cooked turkey product was used in place of chicken.

Other Items Are Also Misrepresented

The Washington survey turned up several other insights into menu misrepresentation. Much of the "prime" beef advertised was not USDA (United States Department of Agriculture) prime. "Club steaks" were really top sirloin butt. "Black Angus" did not come from Black Angus cattle. "Freshly baked" and "homemade" bakery products were frequently from commercial bakeries. "Cream" was really half and half in 9 out of 10 establishments advertising fruit or cereal with "cream." Nowhere could an advertiser of "Maine" lobster prove that the product came from Maine. Though many advertised it on the menu, no restaurant could produce "maple" syrup. Nor could anyone who advertised it produce a "beefsteak tomato," "Idaho potato," "New Jersey pork chop," or a portion of "Maryland milk-fed chicken."

How can someone sell a two-pound lobster and deliver a 20-ounce one? The 12-ounce discrepancy is just a little too much to swallow, or perhaps in this instance, not to swallow. How can a restaurateur buy the less expensive commercially cooked turkey and serve it instead of chicken and not know about it? A restaurateur knows that if he or she orders and receives upgraded or house grades of beef, that the grill, grate, or oven has not yet been developed which will perform the miracle of transforming base beef into golden "prime." The numbers are too great and the patterns too consistent to be afforded the classification of innocent error, and if innocent error is eliminated, that leaves only intentional fraud.

Pictures Also Misrepresent Items

Menu misrepresentations are not limited merely to the words that are printed on a menu. Pictures depict what a restaurateur wants you to envisage and, hopefully, buy. A picture speaks just as clearly as the spoken word, if not clearer. When you look at a picture you expect to be served a meal similar to the one portrayed. If there are five large shrimp shown on a plate, you do not expect to be served four medium ones. If it shows a stack of five large, golden brown, steaming pancakes on a plate with three lean, crisp-looking strips of bacon alongside, then that is what you expect to get when you order, not four burned pancakes with two half-raw slices of bacon. If the consumer sends back the plate and insists on getting served food in the quantity and quality depicted in the picture, he or she will be taking a long step toward curing this type of menu abuse.

If a picture shows one thick slice of roast beef, the consumer should not accept two or three thin ones. If the picture shows vegetables on the plate with the entree and the consumer is served it without vegetables, he or she should insist on getting the vegetables. The restaurateur should be made to live up to his or her representations. If this cannot be done, then the consumer should refuse to accept the order when delivered. The best way is for the consumer to be heard by reporting every misrepresentation he or she comes across. Facts should be jotted down on a piece of paper, along with the date and time, the name of the restaurant, the item which was falsely represented, the price which was being charged, the name of the service person waiting

on you, if possible, and exactly how the misrepresentation was made. Witnesses' names should also be included.

A copy should be sent to state and federal legislators stating that this is a serious problem and that some form of truth in menu protective legislation should be instituted. After a month or so a follow-up inquiry should be sent as to what has been done about the matter, with a request for a response. Consumers can get friends and acquaintances to do the same thing, and soon have a lobby going. Of course, it will not be as well organized as the NRA's, but it will let legislators know that voters are interested in the problem and are looking for results.

Standards Have Been Unheeded

In his publication Hills states that his report "is not meant as a blanket indictment of restaurants or the organizations representing eating establishments." However, it should be, for the guilt falls not only upon those who actively participate in the menu frauds, but also upon those who would permit such practices to be carried on by a major portion of the practitioners of their calling. The standards that the NRA dedicated itself to abide by in 1923 went virtually unheeded until government agencies started dealing with the problem of truth in menus in the mid-'70s. Only then were these standards resurrected from the archives, dusted off, and republished as the *imprimatur* affixed to the menu to proclaim its honesty.

Even with the problems facing the industry, some restaurateurs are apparently reluctant to drop their larcenous habits. Despite a concerted effort by the NRA and various state restaurant associations in the late '70s to get member participation in the AIM program, which includes getting their menus approved and stamped, they were having difficulty obtaining even 50 percent membership participation in inquiries concerning the problem. The fact that the membership constitutes less than 50 percent of those involved in the industry illustrates how little concern the industry has. Initially the New York State Restaurant Association, as well as the National Restaurant Association, set forth ambitious plans whereby members would submit their menus for review and, if acceptable, the AIM seal would be imprinted on the menu. If they were not acceptable, they would be sent back for revision. Participation was so poor that they soon abandoned that approach and wound up sending members approval seals which they themselves would affix to the menus without any third party inspection.

The promises of the NRA and the various state and local restaurant associations that they could clean up their own industry quieted the consumer restlessness of the late 1970s and gave legislative spokespeople some leverage in postponing more direct and serious governmental intervention in the problem. However, the promise is being worn pretty thin by industry inaction, and disbanded consumer drums are starting to gather the "menu vigilantes" together once again. When consumers mount their new attack, the repetition of a previously broken promise by the industry to clean up their own problems will not stop the attack. It won't even slow it down.

Restaurateurs had better holster their "menus" and make peace with the natives or else they had better get the guest room ready, for "big brother" is coming.

Note

The author wishes to mention that Emerson's Ltd., the restaurant chain, financed Hills' research and the publication of his report. They should be exempt from the blanket indictment returned against the restaurant industry for expanding this problem to its billion-dollar potential. Hills reported that the company gave him a specific financial contribution to do his research and to report on the subject, with no strings attached.