



**Major Findings
from 50-State Survey
of State Consumer
Protection Law to
Limit Junk Food
Marketing to Children**



Major Findings from 50-State Survey of State Consumer Protection Law to Limit Junk Food Marketing to Children

by Cara Wilking, J.D. and Mark Gottlieb, J.D.

Overview

This report summarizes major findings from the Public Health Advocacy Institute's 50-state survey of state consumer protection law. We identified the leading or most likely to be invoked consumer protection statute for each state including the District of Columbia and summarized key provisions relevant to future claims alleging unfair, deceptive or unconscionable food marketing to children in individual state legal profiles that are available at www.phaionline.org. The purpose of this report is to share key findings that hold promise to protect children when they are the targets of marketing for unhealthy food and beverage products.

Executive Summary

For the purposes of applying a consumer protection legal framework it is useful to divide child food and beverage marketing into three categories:

- (1) marketing that targets parents in an effort to get them to purchase products to serve to their children;
- (2) “pester power” marketing that targets children in an effort to get them to persuade their parents into buying products for them; and
- (3) direct marketing to children and teens in an effort to get them to use their own spending money to purchase food products for themselves.

Categories two and three exploit the vulnerabilities of children and adolescents.

When children are the target audience of allegedly deceptive food marketing, courts analyze the marketing from the perspective of whether or not it tends to mislead children as a *vulnerable target audience*. The “vulnerable audience” test is a lesser standard than the “reasonable person” test applied to food marketing that targets adults.

Federal Trade Commission (FTC) guidelines to determine whether or not online marketing targets children under the age of 13 may prove useful in future child marketing consumer protection cases when the defendant’s intent or knowledge must be established. The FTC looks to child targeting factors such as “the subject matter; visual or audio content; the age of models on the site; language; whether advertising on the web site is directed to children; information regarding the age of the actual or intended audience; and whether a site uses animated characters or other child-oriented features.”¹

Many states define “trade practices” and “advertising” to include indirect attempts to induce a person to purchase merchandise. Pester power marketing that enlists children to request unhealthy food products from their parents is an indirect attempt to induce parents to purchase products subject to substantive provisions limiting false, deceptive, misleading, unfair or unconscionable marketing. Because this form of marketing targets children but relies on purchases made by adults, legal challenges to pester power campaigns may face hurdles that campaigns targeting the ultimate purchaser do not.

An unconscionable trade practice occurs when a seller knowingly takes advantage of a consumer reasonably unable to protect his interest because of physical infirmity, ignorance, illiteracy, inability to understand the language of the agreement or a similar factor. Nine states have “unconscionable” provisions that can apply to children who, due to age, illiteracy, and lack of sophistication, are reasonably unable to protect their own interests.

Children have considerable purchasing power themselves and their largest spending categories are for sweets, snacks and beverages. From a legal perspective, cases involving children as the primary targets of food marketing *and* the ultimate food purchasers may hold the most promise because the “vulnerable audience” test will apply and, unlike in pester power marketing cases, the role of the parent as an intermediary is not an issue.

Visit <http://phaionline.org/cpmap.htm> for a map of state consumer protection law profiles.

Major Findings from 50-State Survey of State Consumer Protection Law to Limit Junk Food Marketing to Children

Overarching Consumer Protection Principles

All states and the District of Columbia have consumer protection statutes. The majority of state laws to protect consumers from unfair and deceptive marketing are modeled after the Federal Trade Commission Act or the Uniform Deceptive Trade Practices Act.² These laws generally consist of a broad provision prohibiting false, deceptive or unfair trade practices alone or in conjunction with a list of enumerated prohibited acts. Some states also prohibit “unconscionable” trade practices. Under a consumer protection legal framework, the harm done is the purchase of the product itself, which, for practical purposes, means a minimum monetary award will equal the amount of money a consumer spent as a result of the illegal trade practice. This is distinct from other civil lawsuits where the primary harm is a physical or emotional injury to a person. Because most consumer goods, including food, are relatively inexpensive, private consumer protection actions are more economically feasible when filed as class actions to recover the cumulative economic harm done to multiple consumers. State attorneys general may also take action under state consumer protection statutes.³

Children as the Target Audience

Whether or not children are the intended audience of a particular food marketing tactic may be a key factual issue in consumer protection cases involving child consumers, because some states may require a showing that the defendant acted knowingly when engaging in the allegedly unlawful conduct. The passage of the federal Children's Online Privacy Protection Act,⁴ prompted the FTC to issue guidance into how it determines whether or not online marketing is directed to children under the age of 13. The FTC looks to “several factors, including the subject matter; visual or audio content; the age of models on the site; language; whether advertising on the web site is directed to children; information regarding the age of the actual or intended audience; and whether a site uses animated characters or other child-oriented features.”⁵

For example, in a series of complaints against food companies, the FTC cited content on sections of food marketing websites such as “cartoon characters in the shape of candies introducing...various children's

activities;”⁶ “mazes, hidden words, simple crossword puzzles and coloring activities,”⁷ “child-oriented activities such as simple games and crafts projects”⁸ and the use of language like “cool,for-kids-only stuff”⁹ as evidence that the sites at issue were directed to children under the age of 13. These child-targeting factors may be useful beyond digital marketing in cases where marketing appears in television programming with a mixed viewing audience or on food packaging that features a variety of marketing tactics such as health claims aimed at parents combined with cartoon characters, contests and activities aimed at children.

Tendency to Mislead

As a general rule, state consumer protection statutes apply the basic legal standard of whether an act or practice tends to mislead consumers as opposed to the standard of actual deception required in common law fraud cases.¹⁰ Some states specifically prohibit certain trade practices if the practice has the “capacity” or “tendency” to mislead consumers.¹¹ For example, New Mexico's consumer protection statute contains a catch-all provision broadly prohibiting any false or misleading representation “that *may, tends to or does deceive or mislead* any person.”¹² Whether or not marketing has the “tendency to mislead” a consumer protection analysis requires an examination of the marketing practice and the particular target audience.

The Vulnerable Audience Test

In a consumer protection action where an adult is the target of allegedly deceptive marketing, a court will apply what is referred to as the “reasonable person” standard to determine whether or not a person acting reasonably under the circumstance would have been misled or deceived.¹³ The FTC and some state courts, however, have recognized an exception to the “reasonable person” standard when the target audience of deceptive marketing is an especially vulnerable or susceptible subset of the population: “When representations or sales practices are targeted to a specific audience, such as children, the elderly, or the terminally ill, the Commission determines the effect of the practice on a reasonable member of that group.”¹⁴ In future state consumer protection cases, plaintiffs should argue that food marketing should be analyzed from the perspective of a reasonable member of

Major Findings from 50-State Survey of State Consumer Protection Law to Limit Junk Food Marketing to Children

the vulnerable target audience. This will be referred to as the “vulnerable audience” test. The vulnerable audience test is particularly important because research has shown that: a) very young children cannot distinguish marketing from regular content; b) children under 12 years old are extremely susceptible to marketing; and c) adolescents also may be particularly vulnerable.¹⁵ The development and relative sophistication of the child or adolescent audience targeted by food marketing are key factors to determine whether or not marketing tends to mislead a reasonable member of the target group.

Three Types of Children’s Food Marketing and Key Consumer Protection Provisions

Food marketing can be directed at parents or children or both. For the purposes of applying a consumer protection legal framework, it is useful to divide the marketing of child food products into three categories: (1) marketing that targets parents in an effort to get them to purchase products to serve to their children; (2) pester power marketing that targets children in an effort to get them to pester their parents into buying products for them; and (3) direct marketing to children and teens in an effort to get them to use their own spending money to purchase food products for themselves. The chart below summarizes the different paths food marketing can take:

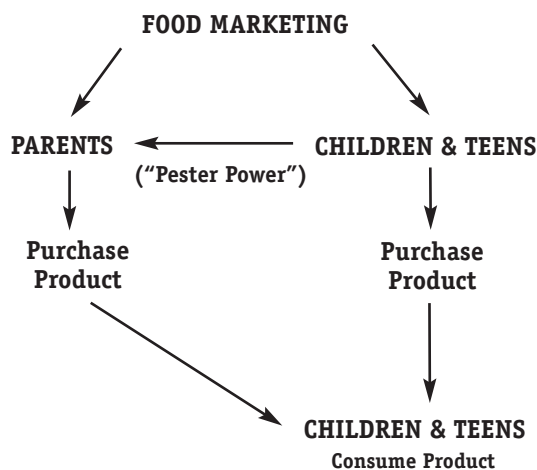


Figure 1 - Food Marketing Path

The focus of the consumer protection inquiry for food marketing is whether or not an unlawful trade practice was employed to induce the consumer to purchase the product.

Parents

In deception cases involving parents as the targets of food marketing, the parent is the “consumer” and courts will apply the “reasonable person” standard to determine whether or not the marketing at issue tends to mislead a reasonable adult consumer. In recent years, food companies have been challenged by the FTC, state attorneys general, and local city attorneys for their use of unsubstantiated or misleading health claims to market children's food products to parents.¹⁶ Kellogg's use of the marketing claim “Now Helps Support Your Child's IMMUNITY” on packages of its highly sugared cereal, *Cocoa Krispies*, is a leading example.¹⁷ The use of health-related marketing claims on children's food products is widespread and poorly regulated. A study released by the Prevention Institute in January of 2011, found 84% of children's food products with a front of package label identifying them as a healthier or “better for you” product failed to meet basic nutritional standards.¹⁸ While not the focus of this report, deceptive marketing to parents warrants more rigorous intervention.



Major Findings from 50-State Survey of State Consumer Protection Law to Limit Junk Food Marketing to Children

Pester Power

Pester power marketing targets children who, unable to purchase products for themselves, nag their parents into buying unhealthy food products for them. The following chart illustrates the transaction:

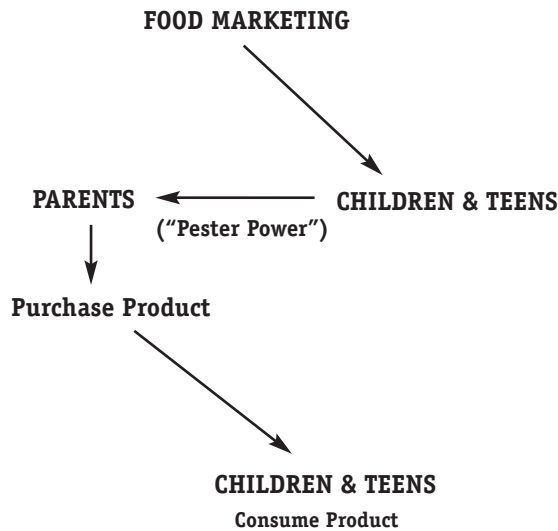


Figure 2 - Pester Power Transactions

The private bar and state attorneys general may be reluctant to challenge pester power marketing because, while children are targets, parents make the ultimate purchase and there is a widespread perception that parents as reasonable consumers should make rational and nutritionally responsible purchasing decisions when faced with a pestering child.

As noted by the Supreme Court of California, however, “parents do not exercise a totally independent judgment, but are influenced by the desires of their children. If such were not the case, [[food companies] would not spend millions to advertise...on children’s programs watched by very few adult purchasers.”¹⁹ This common sense approach is supported by research finding that “children’s purchase-influence attempts have a relatively high degree of success.”²⁰ In 2004, it was estimated that children between four and twelve directly influenced \$330 billion of adult purchasing.²¹ To capitalize on this market, the marketing industry has “developed an entire set of strategies for enhancing . . . kidfluence, the nag factor, or pester power.”²²

Tort law has long recognized fraudulent representations made to third parties as a form of common law fraud when the maker of the representation “intends or has reason to expect that its...[representation] will be repeated or its substance communicated to...[another], and that it will influence his conduct in the transaction.”²³ State consumer protection law parallels tort law’s prohibition on fraudulent representations to a third party by including indirect attempts to induce consumers to purchase products in statutory definitions of “trade practices” and “advertising.” For example, Arizona defines advertising to include attempts “to induce directly or indirectly any person to enter into any obligation or acquire any title or interest in any merchandise.”²⁴ Courts have interpreted “indirect advertising” under state consumer protection laws to include medical device maker marketing of products to physicians as an indirect advertisement to the public.²⁵ One could argue that just as medical device makers market to doctors in the hopes that they will “influence” patients, food makers use pester power marketing to children in order to influence parents.

Food companies openly admit as much. In 2010, the U.S. convenience store chain Kum & Go conducted a promotion whereby customers who purchased two 12-packs of Coca-Cola and two Powerade beverages received a free soccer ball or could purchase the ball on its own for \$11.00. Kevin Krause, Chief Marketing Officer for Kum & Go, explained, “[o]ur thinking was that kids would come in with their parents and want the soccer ball leading the parents to purchase the special.”²⁶

Future legal actions to address pester power should frame such marketing as a highly effective, highly sophisticated and well-funded indirect marketing tactic that deceptively or unfairly enlists children as third parties to induce parents to purchase unhealthy food products that they otherwise would not buy.

FOR A MORE DETAILED LEGAL ANALYSIS OF PESTER POWER MARKETING SEE **PHAI’s Pester Power Marketing Legal Issue Brief.**

Major Findings from 50-State Survey of State Consumer Protection Law to Limit Junk Food Marketing to Children

Children as Ultimate Consumers

Children and adolescents have significant spending power and are targets of food marketing to get them to purchase food products with their own spending money. In 2004, adolescents spent \$140 billion, children under 12 years of age spent an additional \$25 billion.²⁷ The largest spending categories for children are for sweets, snacks and beverages.²⁸ A case alleging deceptive, unfair or unconscionable food marketing targeting children or teens would allege that as a result of the deceptive, unfair or unconscionable marketing, children purchased products for themselves using their own spending money. From a legal perspective, such claims are more straightforward because, unlike in peer power marketing cases, the vulnerable audience test clearly applies and there is no issue of a parent as an intermediary when the ultimate purchase is made by the teen or child. In cases alleging deceptive marketing, the primary question will be: Did the allegedly false, misleading or deceptive marketing tactic tend to mislead a reasonable member of the vulnerable target audience of children or adolescents?

Unconscionable Marketing

Provisions barring unconscionable trade practices provide a potential avenue to challenge food marketing designed to induce children and teens to purchase unhealthy food products for themselves. An unconscionable trade practice occurs when a seller knowingly takes advantage of a consumer reasonably unable to protect his interest because of physical infirmity, ignorance, illiteracy, inability to understand the language of the agreement or a similar factor. Nine states have “unconscionable” provisions that can apply to children who due to age, illiteracy, and lack of sophistication are reasonably unable to protect their interests. In Arkansas and Michigan, the provision appears as an enumerated prohibited trade practice amongst a list of others.²⁹ Idaho, Kansas, New Mexico, Ohio, Oregon and Texas contain a separate provision barring “unconscionable” trade practices that take advantage of vulnerable consumers.³⁰ And Oklahoma has a special damage provision allowing for additional penalties when vulnerable consumers are victimized.³¹ Courts in other states may provide additional protection to children based on prior court decisions rather than specific statutory provisions.

The case of *In re Wiggins* provides some insight into how an unconscionability provision might apply to children. Wiggins was a young adult man with a frontal lobe brain injury who, in response to a television advertisement, cashed in an annuity he was awarded as part of a personal injury settlement to his financial detriment.³² Evidence was presented that while of average intelligence, due to his brain injury, Wiggins was “easily manipulated in his decision-making, especially when he desires a certain result;” and overall he “could not be expected to weight the prospects for immediate gratification of his perceived needs...against any long-term potentially adverse consequences of his decision.”³³ The court concluded the defendant’s conduct was unconscionable because due to his injury the plaintiff could not protect his own financial interests.³⁴

The limitations suffered by Wiggins are very similar to common child and adolescent behavior traits. Children and adolescents may be ignorant of the distinction between advertising and non-commercial content, they may be fully or partially illiterate and unable to understand disclaimers and terms of contests and promotions. Their immediate desire to get a toy or to participate in a game of chance can override any critical examination of the food it accompanies.

Marketing targeted at young children that blurs editorial and commercial content may be subject to unconscionability challenges. For example, the Children’s Advertising Review Unit (“CARU”), a self-regulatory body, investigated a candy maker’s website containing advertising content “including games, activities, downloadable wallpapers, screensavers and videos” that were Dum Dum lollipop themed and/or integrated Dum Dum lolly-pops into the actual activity of the game.³⁵ CARU “questioned whether children would understand that the games and activities on the website promote the sale of Dum Dum lollipops and therefore should be clearly denoted as advertising...”³⁶ When analyzed as a potentially unconscionable trade practice, a plaintiff could argue that by designing a website intended for children that blurred the lines between editorial and commercial content, the candy maker knowingly took advantage of young children’s inability to distinguish commercial content from non-commercial content in order to boost sales of its unhealthy candy products.

Major Findings from 50-State Survey of State Consumer Protection Law to Limit Junk Food Marketing to Children

Unfair Marketing

Thirty-eight states prohibit “unfair” trade practices.³⁷ While the FTC has authority to challenge individual unfair trade practices that target children, in 1980 Congress stripped the FTC of its authority to issue rules to limit or ban unfair marketing to children.³⁸ It is therefore up to the private bar and state attorneys general to fill the gap under state laws.

Interpretations of unfairness vary from state to state.³⁹ Federal consumer protection law currently defines an unfair act as a trade practice that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”⁴⁰ And when determining whether an act or practice is unfair one “may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.”⁴¹

In *Mangini v. R.J. Reynolds*, a California appellate court analyzed R.J. Reynolds’ use of the “Joe Camel” cartoon to target market tobacco products to children under California consumer protection law prohibiting unfair advertising.⁴² The *Mangini* case was subsequently dismissed on preemption grounds. It is discussed here because the lower appellate court decision is one of the few written opinions applying the elements of unfairness to marketing that targets children.

California’s unfairness doctrine has since evolved, but the *Mangini* court applied the three factor “Cigarette Rule” to determine: (1) whether the marketing offends public policy as established by statutes, the common law, or otherwise; (2) whether it is immoral, unethical, oppressive or unscrupulous; and (3) whether it causes substantial injury to consumers.⁴³ The court found the use of Joe Camel offended California’s “statutory policy of keeping children from starting on the road to tobacco addiction” including bans on tobacco sales to minors and free tobacco sampling.⁴⁴ It found “the targeting of minors is oppressive and unscrupulous, in that it exploits minors by luring them into an unhealthy and potentially life-threatening addiction before they have achieved the maturity necessary to make an informed decision whether to take up smoking

despite its health risks.”⁴⁵ The court also found “a persuasive argument can be made that the targeting of minors causes substantial physical injury to them” supported by the State Legislature’s finding that tobacco advertising was an important contributor to smoking by children.⁴⁶

Obesity is now the second most prevalent “actual cause of death” behind tobacco.⁴⁷ In a future unfairness action involving food marketing to children, the substantial injury element would be that such marketing triggers purchases of unhealthy foods and beverages associated with obesity and overweight that would not otherwise be made. There is evidence that food marketing is a significant contributor to obesity.⁴⁸ The link between marketing of unhealthy foods to children and obesity parallels the same links between the marketing of tobacco products to children and smoking-related disease later in life. Food marketing cannot be reasonably avoided by children as it pervades virtually every aspect of life at home via the television and internet, at school via vending machines and in their communities via signs and billboards.

With respect to established public policy, plaintiffs can look to their state’s child nutrition bills issuing findings about the health consequences of childhood obesity and setting out nutritional standards for foods served to children in schools, daycares and after school programs. The purpose of child nutrition bills, similar to bans on tobacco sales to minors, is to put children on a path of lifelong health by reducing their exposure to unhealthy foods. Plaintiffs can also point to the important ethical questions implicated by an emerging body of research about the profound impact of food marketing tactics on children’s food preferences. Published studies have found that marketing is powerful enough to lead young children to believe that branded food products or products with cartoon characters on their packaging actually taste better.⁴⁹

For example, in 2010, CARU determined Tyson Foods Inc. should modify its television advertising for Tyson Chicken Nuggets “to avoid discouraging or disparaging healthy lifestyles and to better depict foods in the context of a balanced meal.”⁵⁰ The ad at issue aired during the Nick Jr. programming block on the children’s network Nick (formerly Nickelodeon), and depicted a child rejecting a

Major Findings from 50-State Survey of State Consumer Protection Law to Limit Junk Food Marketing to Children

series of balanced meals such as “salmon, carrots, spinach and apple juice” and concluded with a mother giving her daughter a plate of chicken nuggets, ketchup and green beans with a glass of milk blurred in the background. CARU determined that the ad should be discontinued because it was directed to children under 12 years old, it did not depict a “nutritionally balanced meal,” and that it “discouraged and disparaged healthy lifestyle choices.”⁵¹

Under a consumer protection unfairness analysis one could argue that the ads cause substantial injury to child consumers by encouraging them to demand chicken nuggets over healthier food options and thereby increasing their risk of becoming overweight or obese. The ad is not reasonably avoided by young children watching children television programming. The ad may offend recognized child nutrition standards as contained in state and federal childhood nutrition legislation. And the ad is arguably unethical in that it “disparages” healthy food choices and seeks to interfere with the parental role to provide healthy food to children by depicting a child rejecting healthy meals in order to get a less healthy meal.

Conclusion

Children are vulnerable consumers who deserve more rigorous protection from deceptive, unfair and unconscionable marketing of unhealthy foods under existing state consumer protection law. To truly protect children, state consumer protection law-based interventions by children's health advocates and state attorneys general should take care to focus on marketing that targets children in order to get them influence their parents or to spend their own spending money on unhealthy food products. Both types of marketing exploit the vulnerabilities of children and adolescents and have a profound influence on their eating habits and lifelong health.

Acknowledgements

Many thanks to readers Richard A. Daynard, J.D., Lissy C. Friedman, J.D., and Megan Skillman. Thanks to Jennifer Robertson for reseach support. A special thanks to Northeastern University School of Law Public Health Legal Clinic students Jordan Barringer, Alexandra Geiger and Bill Moystin for thier research assistance.

USING STATE CONSUMER PROTECTION LAW TO LIMIT JUNK FOOD MARKETING TO CHILDREN

Supported by the Robert Wood Johnson Foundation's Healthy Eating Research Program (#66968).

Major Findings from 50-State Survey of State Consumer Protection Law to Limit Junk Food Marketing to Children

ENDNOTES

- ¹ FEDERAL TRADE COMMISSION, HOW TO COMPLY WITH THE CHILDREN'S ONLINE PRIVACY PROTECTION RULE (2006), <http://business.ftc.gov/documents/bus45-how-comply-childrens-online-privacy-protection-rule>.
- ² See DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 2:10 (2003).
- ³ See Julie Ralston Aoki, *State AG Enforcement of Food Marketing Laws: A Brief History*, National Policy & Legal Network to Prevent Childhood Obesity (2010), <http://www.nplanonline.org>.
- ⁴ 15 U.S.C. §§ 6501-6506 (2011).
- ⁵ FEDERAL TRADE COMMISSION, *supra* note 1.
- ⁶ Complaint for Civil Penalties, Injunctive and Other Relief, United States v. Hershey Foods Corp (Feb. 27, 2003), <http://www.ftc.gov/os/2003/02/hersheycmp.htm>.
- ⁷ *Id.*
- ⁸ Complaint for Civil Penalties, Injunctive and Other Relief, United States v. American Pop Corn Company (Feb. 12, 2002), <http://www.ftc.gov/os/2002/02/popcornmpnt.pdf>.
- ⁹ *Id.*
- ¹⁰ PRIDGEN, *supra* note 2, at § 3:1.
- ¹¹ See, e.g., IOWA CODE ANN. § 714.16(1)(f); MD. CODE ANN. COM. LAW § 12-301(1); MICH. COMP. LAWS ANN. § 445.903(1)(s); N.M. STAT. ANN. § 57-12-2; D.C. CODE § 28-3904 (e)-(f); Richardson v. Bank of America, 643 S.E.2d 410, 416 (N.C. App. 2007) (interpreting North Carolina's consumer protection statute). See also PRIDGEN, *supra* note 2, at 171-173 (summarizing substantive state consumer protection provisions).
- ¹² N.M. STAT. ANN. § 57-12-2 (emphasis added).
- ¹³ See FEDERAL TRADE COMMISSION, DECEPTION POLICY STATEMENT, appended to In re Cliffdale Assocs., Inc., 103 F.T.C. 110, 177 (1984) ("we examine the practice from the perspective of a consumer acting reasonably in the circumstances.")
- ¹⁴ *Id.* (emphasis added). See also Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal. 3d 197 (Cal. 1983); Lavie v. Procter & Gamble Co., 105 Cal. App. 4th 496 (Cal. Ct. App. 2003) (*cert. denied* 2003 Cal. LEXIS 4724 (Cal. 2003)); and Jennifer L. Pomeranz, *Television Food Marketing to Children Revisited: The Federal Trade Commission Has the Constitutional and Statutory Authority to Regulate*, 38 J. L. MED. & ETHICS 98, 104-105 (2010) (discussing Supreme Court jurisprudence with respect to vulnerable populations).
- ¹⁵ Mary Story & Simone French, 1 *Food Advertising and Marketing Directed at Children and Adolescents in the U.S.*, INT. J. BEHAV. NUTR. PHYS. ACT 3 (2004).
- ¹⁶ See Aoki, *supra* note 3.
- ¹⁷ *Id.*
- ¹⁸ Prevention Institute, *Claiming Health: Front-of-Package Labeling of Children's Food* (January 2011), <http://www.preventioninstitute.org>.
- ¹⁹ Committee on Children's Television, 35 Cal. 3d 219 (Cal. 1983).
- ²⁰ Dale Kunkel, *Children and Television Advertising* in HANDBOOK OF CHILDREN AND THE MEDIA 383, 375-93 (Dorothy Singer & Gerome Singer, eds., 2001)
- ²¹ JULIE B. SCHOR, BORN TO BUY: THE COMMERCIALIZED CHILD & THE NEW CONSUMER CULTURE 23 (2004).
- ²² Jeff Chester & Kathryn Montgomery, *Interactive Food & Beverage Marketing: Targeting Children and Youth in the Digital Age* 17 (2007), <http://digitalads.org> (internal citations omitted).
- ²³ RESTATEMENT (SECOND) OF TORTS § 533.
- ²⁴ ARIZ. REV. STAT. § 44-1521.
- ²⁵ See Kociemba v. G.D. Searle & Co., 680 F. Supp. 1293 (D. Minn. 1988); Jones v. Sportelli, 166 N.J. Super. 383 (Law Div. 1979).
- ²⁶ Linda Lisanti, *Marketing to a Multicultural Nation*, Convenience Store News, Oct. 4, 2010, http://www.csnews.com/article-marketing_to_a_multicultural_nation-1185.html.
- ²⁷ Story & French, *supra* note 15, at 2.
- ²⁸ SCHOR, *supra* note 21, at 23.
- ²⁹ ARK. CODE § 4-88-107(8); MICH. COMP. LAWS ANN. § 445.903(1)(x).
- ³⁰ IDAHO CODE ANN. § 48-603C(2)(a); KAN. STAT. ANN. § 50-627(b)(1); N.M. STAT. ANN. § 57-12-2(E); OHIO REV. CODE ANN § 1345.03(A) & OHIO REV. CODE ANN § 1345.03(B)(1); OR. REV. STAT. § 646.605(9); TEX. BUS. & COM. CODE § 17.45(5).
- ³¹ OKLA. STAT. ANN. tit. 15, § 761.1(B).
- ³² *In re* Joshua Wiggins, 273 B.R. 839 (Bankr. Idaho 2001).
- ³³ *Id.* at 860. Wiggins's injury limited his "executive function"—the ability to plan, reason, be flexible and conduct strategic problem solving in service of a future goal. Child development research has found that children's executive function is still developing up until the age of twelve. See also KATHLEEN MCCARTNEY & DEBORAH PHILLIPS, BLACKWELL HANDBOOK OF EARLY CHILD DEVELOPMENT 176 (2006).
- ³⁴ *Wiggins*, 273 B.R. at 862.
- ³⁵ Press Release, Children's Advertising Review Unit, CARU Recommends Spangler Revise 'Dum Dum' Website to Clearly Disclose That Games, Activities are Advertising; Company Agrees to Do So (Dec. 17, 2010), <http://www.caru.org/news/2010/CARUDumDumPR.pdf>.
- ³⁶ *Id.*
- ³⁷ See PRIDGEN, *supra* note 2, at 171-173 (summarizing substantive state consumer protection provisions).
- ³⁸ 15 U.S.C. § 57a(h) ("The Commission shall not have any authority to promulgate any rule in the children's advertising proceeding pending on the date of the enactment of the Federal Trade Commission Improvements Act of 1980...or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce.")
- ³⁹ See David L. Belt, *The Standard for Determining "Unfair Acts or Practices" Under State Unfair Trade Practices Acts*, 80 CONN. BAR J. 247 (2006).
- ⁴⁰ 15 U.S.C.S. § 45(n).
- ⁴¹ *Id.*
- ⁴² Mangini v. R.J. Reynolds Tobacco Co., 22 Cal. App. 4th 628 (Cal. App. 1st Dist. 1993), *superseded by* Mangini v. R. J. Reynolds Tobacco Co., 7 Cal. 4th 1057 (Cal. 1994), *overruled by* *In re* Tobacco Cases II, 41 Cal. 4th 1257 (Cal. 2007).
- ⁴³ *Id.* at 640.
- ⁴⁴ *Id.* at 641.
- ⁴⁵ *Id.*
- ⁴⁶ *Id.*
- ⁴⁷ Ali H. Mokdad, et al, *Actual Causes of Death in the United States, 2000*, 291 JAMA 1238 (2004).
- ⁴⁸ See Story & French, *supra* note 15; COMMITTEE ON FOOD MARKETING AND THE DIETS OF CHILDREN AND YOUTH, INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, FOOD MARKETING TO CHILDREN AND YOUTH: THREAT OR OPPORTUNITY? (J. Michael McGinnis, et al. eds., 2005).
- ⁴⁹ See Matthew A. Lapierre, et al., *Influence of Licensed Spokescharacters and Health Cues on Children's Ratings of Cereal Taste*, 165 ARCH. PEDIATR. ADOLESC. MED. 229-234 (2011); Christina A. Roberto, et al., *Influence of Licensed Characters on Children's Taste and Snack Preference*, 126 PEDIATRICS 88 (2010); Thomas N. Robinson, et al., *Effect of fast food branding on young children's taste*, 161 ARCH. PEDIATR. ADOLESC. MED. 792 (2007).
- ⁵⁰ Press Release, Children's Advertising Review Unit, CARU Recommends Tyson Modify Certain Advertising for Chicken Nuggets, (May 19, 2010), <http://www.caru.org/news/2010/5172PR.pdf>.
- ⁵¹ *Id.*