

Which state consumer protection provisions could be used to protect kids from junk food marketing?

Michigan's Consumer Protect Act ("MCPA") prohibits "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce" including:

- "Causing a probability of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services." Mich. Comp. Laws Ann. § 445.903(l)(a);
- "Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have" Mich. Comp. Laws Ann. § 445.903(l)(c);
- "Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer." Mich. Comp. Laws Ann. § 445.903(l)(s);
- "Taking advantage of the consumer's inability reasonably to protect his or her interests by reason of disability, illiteracy, or inability to understand the language of an agreement presented by the other party to the transaction who knows or reasonably should know of the consumer's inability." Mich. Comp. Laws Ann. § 445.903(l)(x);
- "Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is." Mich. Comp. Laws Ann. § 445.903(l)(bb); and
- "Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner." Mich. Comp. Laws Ann. § 445.903(l)(cc).

Does Michigan law provide any special protections for child consumers?

The MCPA's provision outlawing knowingly taking advantage of consumers who are reasonably unable to protect their own interests is a potentially powerful protection for child consumers. Mich. Comp. Laws Ann. § 445.903(l)(x). Children, by virtue of their age 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. In addition, food marketing targeted at children typically is blatantly aimed at a certain age group making it easier for a plaintiff to establish that the conduct "knowingly" sought to take advantage of that group's disabilities.

Michigan's provision barring the failure to reveal material facts in light of positive representations of fact also may be beneficial to consumers challenging deceptive food marketing to children and parents. *See* Mich. Comp. Laws Ann. § 445.903(l)(cc). For example, a child's drink product that contains positive representations including "No Artificial Colors or Flavors," "Low Calorie," "Helps Hydrate Kids," and "Flavored with Other Natural Flavor" but makes no mention of the fact that the product is artificially sweetened other than listing the name of the sweetener in the FDA mandated ingredients list may be deceptive to a reasonable parent concerned with making good food purchasing decision for her child. The representations about natural flavors and reduced calories, may be deceptive when made absent a clear disclosure that the product contains artificial sweetener if a parent would not have bought the product had she realized the presence of an artificial sweetener.

**Using State Consumer
Protection Law to Limit
Junk Food
Marketing to Children**

This project conducted a 50-state survey of existing state consumer protection law and the potential role it might play to limit junk food marketing to children. Each State legal summary describes the most relevant existing consumer protection statute and identifies provisions that might be invoked to protect children from junk food marketing. Procedural provisions and criminal penalties are not discussed.

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Who can bring a lawsuit?

The Attorney General, Mich. Comp. Laws Ann. § 445.905(1), individual consumers, Mich. Comp. Laws Ann. § 445.911(1), and classes of individual consumers (class actions), Mich. Comp. Laws Ann. § 445.911(3), may file suit.

What needs to be shown to make out a claim?

A plaintiff seeking damages under the MCPA must allege: (1) the defendant engaged in conduct proscribed by the MCPA, and (2) the plaintiff suffered actual injury or loss, (3) as a result of the prohibited practice. Mich. Comp. Laws Ann. § 445.911(3). Regardless of whether or not a plaintiff seeks damages, he or she may still seek declaratory or injunctive relief for violations of the Act. Mich. Comp. Laws Ann. § 445.911(1)(a)-(b).

The only two provisions of the Consumer Protection Act's thirty-three enumerated unlawful acts that require the consumer to prove some form of reasonable reliance are the provision barring failure to reveal material facts and making representations that a representation of fact or statement of fact material to the transaction such that suggest "a state of affairs to be other than it actually is." *Evans v. Ameriquest Martg. Co.*, 2003 Mich. App. LEXIS 564, at *10 (Mich. Ct. App. 2003) (discussing §§ 445.903(1)(s), (bb)).

What are the powers of the Attorney General to protect kids from junk food marketing?

The Michigan Attorney General may promulgate rules to implement Michigan's Consumer Protection Act under the administrative procedures act of 1969. Mich. Comp. Laws Ann. § 445.903(2). These rules shall not "create an additional unfair trade practice not already enumerated by [section 445.903]." Mich. Comp. Laws Ann. § 445.903(2).

In addition, the Michigan Attorney General may seek injunctive relief and, for persistent and knowing violations, a civil penalty of not more than \$25,000. Mich. Comp. Laws Ann. § 445.905(1). A person who knowingly violates the terms of an injunction, order, decree, or judgment issued pursuant to section 445.905 is subject to a civil penalty of not more than \$5,000 per violation. Mich. Comp. Laws Ann. § 445.905 (4).

How does the law compensate consumers?

Individual plaintiffs who prevail are entitled to actual damages or \$250, whichever is greater and injunctive relief. Mich. Comp. Laws § 445.911(1)-(2). Successful class action plaintiffs are entitled to actual damages. Mich. Comp. Laws Ann. § 445.911(2).

Who is liable for attorney's fees?

Prevailing individual plaintiffs may recover "reasonable attorneys' fees." Mich. Comp. Laws Ann. § 445.911(2).

DISCLAIMER: This legal summary is for informational purposes only. Please consult an attorney for legal advice. All information reflects legal research conducted in 2010.

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