

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

Ohio's Consumer Sales Practices Act ("OCSA") prohibits an "unfair or deceptive act or practice in connection with a consumer transaction." Ohio Rev. Code Ann. § 1345.02. Deceptive acts include representing:

- "That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have." Ohio Rev. Code Ann. § 1345.02(1);
- "That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not." Ohio Rev. Code Ann. § 1345.02(2); or
- "That the supplier has a sponsorship, approval, or affiliation that the supplier does not have." Ohio Rev. Code Ann. § 1345.02(9).

The OCSA also prohibits "unconscionable" acts and practices. Ohio Rev. Code Ann § 1345.03(A). To determine whether an act or practice is "unconscionable" a court shall take into consideration whether the defendant:

- Knowingly took advantage of "the inability of the consumer reasonably to protect the consumer's interests because of the consumer's physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement." Ohio Rev. Code Ann § 1345.03(B)(1);
- "[K]new . . . of the inability of the consumer to receive a substantial benefit from the subject of the consumer transaction." Ohio Rev. Code Ann § 1345.03(B)(3);
- "[K]nowingly made a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment." Ohio Rev. Code Ann § 1345.03(B)(6).

When presiding over a case involving claims of unfair or deceptive trade practices, Ohio courts are to give "due consideration and great weight" to Federal Trade Commission and federal court interpretations of the Federal Trade Commission Act. Ohio Rev. Code Ann. § 1345.02(C). The OCSA permits claims against unfair, deceptive and unconscionable acts or practices that occur before, during or after a consumer transaction. Ohio Rev. Code Ann. § 1345.02(A); Ohio Rev. Code Ann. § 1345.03(A).

Does Ohio law provide any special protections for child consumers?

With respect to unfair and deceptive trade practices, the OCSA instructs courts to give due consideration and great weight to the FTC and federal court interpretations of the Federal Trade Commission Act ("FTCA"). The Federal Trade Commission has recognized an exception from the general "reasonable person" standard for FTCA actions when advertising is aimed at a vulnerable or particularly susceptible audience. Federal Trade Commission, *See* Deception Policy Statement, appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 177 (1984), <http://www.ftc.gov/bcp/policystmt/ad-decept.htm>. This lesser standard should be applied when children, who by their very nature are particularly susceptible, are the target audience of food advertising.

**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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With respect to unconscionable trade practices, the ODCSPA'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. 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. 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 inabilities. The ODCSPA also permits actions for deceptive, unfair or unconscionable acts occurring before, during or after the actual consumer transaction. Many child food product packaging contains marketing material directing children to visit a website or participate in a contest after the purchase. If such post sale activity is deceptive, unfair or unconscionable then it should be actionable under the ODCSPA.

Who can bring a lawsuit?

The Attorney General, Ohio Rev. Code Ann. § 1345.07(A), individual consumers, Ohio Rev. Code Ann. § 1345.09(A), and classes of consumers may file suit. Ohio Rev. Code Ann. § 1345.09(B).

What needs to be shown to make out a claim?

To make out a claim under the ODCSPA, a plaintiff consumer must show that the defendant engaged in an act or practice declared unlawful under the Act. The issue of whether or not a consumer must establish reliance is not addressed in the statute and has not been decided by the courts. Claims alleging that an act or practice was unconscionable typically require a showing that the defendant acted "knowingly."

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

If the Ohio Attorney General has the power to investigate violations of the ODCSPA, bring actions against suppliers engaging in trade practices prohibited by the ODCSPA, and may pursue injunctive relief, civil penalties ranging from \$5,000 - \$25,000 and restitution for consumers. See Ohio Rev. Code Ann. § 1345.07. The ODCSPA grants the Attorney General substantive rulemaking authority. Ohio Rev. Code Ann. § 1345.05(B).

How does the law compensate consumers?

State law allows a court to award consumers "actual economic damages plus an amount not exceeding five thousand dollars in non-economic damages." Ohio Rev. Code Ann. § 1345.09(A). A consumer may also seek injunctive relief. Ohio Rev. Code Ann. § 1345.09(D). The ODCSPA also entitles consumers under certain circumstances and depending on whether they are brought as individual actions or class actions up to three times their actual damages plus up to \$5,000 in non-economic damages. Ohio Rev. Code Ann. § 1345.09(B). This damage provision is complex and has been the subject of litigation.

Who is liable for attorney's fees?

Plaintiffs may recover a reasonable attorney's fee if the defendant committed the unlawful act knowingly. Ohio Rev. Code Ann. § 1345.09(F). A court may award a defendant a reasonable attorney's fee if an action filed was "groundless." *Id.*

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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