

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

New Mexico's Unfair Practices Act ("UPA") prohibits "a false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale . . . of goods . . . that may, tends to or does deceive or mislead any person" including:

- "[C]ausing confusion or misunderstanding as to the source, sponsorship, approval or certification of goods or services." N.M. Stat. Ann. § 57-12-2(D)(2);
- "[R]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation or connection that the person does not have." N.M. Stat. Ann. § 57-12-2(D)(5);
- "[R]epresenting that goods or services are of a particular standard, quality or grade or that goods are of a particular style or model if they are of another. N.M. Stat. Ann. § 57-12-2(D)(7); and
- "[U]sing exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if doing so deceives or tends to deceive." N.M. Stat. Ann. § 57-12-2(D)(14) (internal quotations omitted).

"Unconscionable trade practice[s]" are also prohibited, and are defined as an act or practice that "(1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) results in a gross disparity between the value received by a person and the price paid." N.M. Stat. Ann. § 57-12-2(E). In addition, the legislature intends that, in construing N.M. Stat. Ann. § 57-12-3, "the courts to the extent possible will be guided by the interpretations given by the federal trade commission and the federal courts." N.M. Stat. Ann. § 57-12-4.

Does New Mexico law provide any special protections for child consumers?

The UPA's prohibition of "unconscionable trade practices" where a defendant "takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree" may be a useful tool to protect children from food marketing. N.M. Stat. Ann § 57-12-2(E). 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 defendant "knowingly" sought to take advantage of that group. The UPA also directs New Mexico courts to be guided by interpretations given by the FTC and the federal courts. 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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Who can bring a lawsuit?

The Attorney General, N.M. Stat. Ann. § 57-12-8(A), and individual consumers, N.M. Stat. Ann § 57-12-10 (B), may file suit. There is nothing in the statute that prohibits class actions and the UPA suggests that they are allowed. *See* N.M. Stat. Ann at § 57-12-10(E) (“In any class action filed under this section, the court may award damages to the named plaintiffs . . .”). In addition, several UDAP class actions have been allowed. *See, e.g., In re N.M. Indirect Purchasers Microsoft Corp.*, 149 P.3d 976 (N.M. App. 2006).

What needs to be shown to make out a claim?

Under the UPA, a plaintiff must establish: (1) “that the party charged made an ‘oral or written statement, visual description or other representation’ that was either false or misleading;” (2) “the false or misleading representation must have been knowingly made in connection with the sale, lease, rental or loan of goods or services in the extension of credit or ... collection of debts”; (3) “the conduct complained of must have occurred in the regular course of the representers trade or commerce”; and (4) “the representation must have been of the type that ‘may, tends to or does, deceive or mislead any person.” *Stevenson v. Louis Dreyfus Corp.*, 811 P.2d 1308, 1311 (N.M. 1991) (internal citations omitted).

“The ‘knowingly made’ requirement is met if a party was actually aware that the statement was false or misleading when made, or in the exercise of reasonable diligence should have been aware that the statement was false or misleading.” *Stevenson v. Louis Dreyfus Corp.*, 811 P.2d 1308, 1311-1312 (N.M. 1991).

The UPA “does not require that the defendant’s conduct actually deceive a consumer; it permits recovery even if the conduct only tends to deceive. Accordingly, a claimant need not prove reliance upon a defendant’s deceptive conduct in this context.” *Lahman v. Daimler-Chrysler Corp.*, 166 P.3d 1091, 1098 (N.M. App. 2007) (citing *Smoot v. Physicians Life Ins. Co.*, 87 P.3d 545 (N.M. App. 2003)).

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

The UPA provides that “the attorney general is to be responsible for its enforcement, but he may in appropriate cases delegate this authority to the district attorneys of the state and when this is done, the district attorneys shall have every power conferred upon the attorney general by the Unfair Practices Act.” N.M. Stat. Ann. § 57-12-15. The New Mexico Attorney General is “empowered to issue and file as required by law all regulations necessary to implement and enforce any provision of the Unfair Practices Act.” N.M. Stat. Ann § 57-12-13. The New Mexico Attorney General may seek injunctive relief and restitution for consumers. N.M. Stat. Ann § 57-12-8(B). In addition, “if the court finds that a person is willfully using or has willfully used a method, act or practice declared unlawful by the Unfair Practices Act . . . the attorney general, upon petition to the court, may recover, on behalf of the state of New Mexico, a civil penalty of not exceeding [\$ 5,000] per violation.” N.M. Stat. Ann § 57-12-11.

How does the law compensate consumers?

State law allows a court to award consumers actual damages or \$100, whichever is greater. N.M. Stat. Ann. § 57-12-10(B). And a court may award the greater of up to three times actual damages or \$ 300 for willful violations of the UPA. N.M. Stat. Ann. § 57-12-10(B). Consumers also may seek injunctive relief. N.M. Stat. Ann. § 57-12-10(A).

Who is liable for attorney’s fees?

A defendant is liable for a prevailing plaintiff’s “attorney fees and costs.” N.M. Stat. Ann. § 57-12-10(C). The UPA requires courts to award a defendant attorney fees and costs upon a finding that a consumer’s action was “groundless.” N.M. Stat. Ann. § 57-12-10(C).

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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