

Which state consumer protection laws may protect kids from junk food marketing?

The Texas Deceptive Trade Practices-Consumer Protection Act ("Act") prohibits false, misleading, or deceptive acts and unconscionable trade practices. Tex. Bus. & Com. Code Ann. § 17.46(a); Tex. Bus. & Com. Code § 17.50 (a)(3). "False, misleading, or deceptive" trade practices include:

- "[C]ausing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services." Tex. Bus. & Com. Code Ann. § 17.46(b)(2)
- "[C]ausing confusion or misunderstanding as to affiliation, connection, or association with, or certification by, another." Tex. Bus. & Com. Code Ann. § 17.46(b)(3D)
- "[R]epresenting that goods . . . have sponsorship, approval, characteristics, ingredients, uses, benefits . . . which they do not have," Tex. Bus. & Com. Code Ann. § 17.46(b)(5)"[A]dvertising goods . . . with intent not to sell them as advertised." Tex. Bus. & Com. Code Ann. § 17.46(b)(9) and
- Failing to disclose information about goods if intended to induce the consumer when the consumer would not have entered into the transaction had the information been disclosed. Tex. Bus. & Com. Code Ann. § 17.46(b)(24).

The Act also prohibits "any unconscionable action or course of action by any person" Tex. Bus. & Com. Code § 17.50 (a)(3). An "unconscionable action or course of action" means "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree." Tex. Bus. & Com. Code § 17.45(5).

When construing the Act, courts are to be guided by interpretations given by the Federal Trade Commission and federal courts to the Federal Trade Commission Act. Tex. Bus. & Com. Code Ann. § 17.46(c)(1).

Does Texas law have any special protections for child consumers?

The Act directs state 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.

The Act's prohibition of unconscionable trade practices where the seller of a good takes advantage of a consumer's "lack of knowledge, ability, experience, or capacity" to a grossly unfair degree may be a useful tool to protect children from food marketing. 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, research has shown that very young children are especially vulnerable to marketing rendering such marketing grossly unfair.

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, individual consumers and classes of consumers may file suit. Tex. Bus. & Com. Code Ann. § 17.47(a); Tex. Bus. & Com. Code Ann. § 17.50(a); Tex. Bus. & Com. Code Ann. § 17.501(a).

What needs to be shown to make out a claim?

With respect to false, misleading and deceptive acts, a consumer must show that 1) he suffered economic damages or damages from mental anguish from a false, misleading, or deceptive act enumerated in the statute and 2) that he relied on the false, misleading, or deceptive act. Tex. Bus. & Com. Code Ann. § 17.50(a)(1). With respect to unconscionable trade practices, a consumer needs to allege conduct meeting the definition of an unconscionable action or course of action, and that the conduct was that "producing cause" of economic damages or damages for mental anguish. Tex. Bus. & Com. Code Ann. § 17.50(a)(3).

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

The Act empowers the Attorney General's office to conduct investigations and seek restraining orders or injunctions if the proceeding would be in the public interest, and to pursue civil penalties of up to \$20,000. Tex. Bus. & Com. Code Ann. §17.60; Tex. Bus. & Com. Code Ann. § 17.47(a); Tex. Bus. & Com. Code Ann. § 17.47(c)(1). In actions brought by the Attorney General, the court also may order any judgment necessary to compensate identifiable consumers for their actual loss. Tex. Bus. & Com. Code Ann. § 17.47(d). If a defendant violates the terms of an injunction, he may be liable for \$10,000 per violation of the injunction, but penalties cannot exceed a total of \$50,000. Tex. Bus. & Com. Code § 17.47(e).

How does the law compensate consumers?

In general, prevailing consumers are entitled to economic damages. Tex. Bus. & Com. Code Ann. § 17.50(b)(1). If a court finds that the violation was committed knowingly, it may award additional damages for mental anguish, and treble economic damages. Tex. Bus. & Com. Code Ann. § 17.50(b)(1). If a court finds that the violation was committed intentionally, it may award additional damages for mental anguish, and up to three times the amount of economic damages and the damages for mental anguish. Tex. Bus. & Com. Code Ann. § 17.50(b)(1).

Who is liable for attorney's fees?

Prevailing consumers are to be awarded reasonable attorney's fees and court costs. Tex. Bus. & Com. Code Ann. §17.50(d). However, if the court finds that the consumer brought a groundless action or brought an action in bad faith or to harass, the court will award the defendant attorney's fees. Tex. Bus. & Com. Code Ann. §17.50(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.

THANKS: Many thanks for research assistance provided by Northeastern University School of Law Public Health Legal Clinic students Bill Mostyn, Alexandra Geiger and Jordan Barringer. Thanks also to Jennifer Roberston.

FUNDING: This Project is funded by the Robert Wood Johnson Foundation's Healthy Eating Research Program.

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