



ISSUE BRIEF:
Reining In
Pester Power
Food and Beverage
Marketing



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Introduction

This legal issue brief focuses on “pester power” marketing that enlists young children as third parties to influence adult parents to purchase unhealthy food and beverage products. Pester power marketing will be defined and then analyzed under existing state consumer protection laws. Two primary legal theories to challenge pester power marketing of unhealthy foods are described: (1) pester power marketing as unfair “indirect” marketing to parents; and (2) pester power marketing as unlawful direct marketing to children. This issue brief is written from the perspective of private litigants, but the theories presented are equally applicable to actions initiated by state attorneys general to protect the public interest.

Pester Power Defined

Pester power marketing targets children who, unable to purchase products for themselves, nag, pester and beleaguer their parents into purchasing unhealthy food products for them. In 2004, it was estimated that children between the ages of four and twelve directly influenced \$330 billion of adult purchasing.¹ To capitalize on this market, the marketing industry has “developed an entire set of strategies for enhancing . . . kidfluence, the nag factor, or pester power.”² As noted by Story and French “[a] child’s first request for a product occurs at about 24 months of age and 75% of the time this request occurs in a supermarket.”³ This is no accident. In 2007, the U.S. Federal Trade Commission (FTC) used its compulsory process authority to obtain food industry “marketing research regarding the appeal to individuals under the age of 18 of any particular types of advertising or promotional techniques.”⁴ Internal food industry marketing research indicated that “[m]arketers recognize[] that children’s requests to parents to buy a product, sometimes called the ‘nag’ factor, are important in driving purchases.”⁵

Independent scientific research bears this out.⁶ One study found “three fourths of all parent-child exchanges about products were child demands for merchandise advertised on television.”⁷ Research has shown that “children’s

exposure to food television advertising increases the number of attempts children make to influence food purchases their parents buy,”⁸ and “children’s purchase-influence attempts have a relatively high degree of success.”⁹ For example, in one study parents self-reported honoring children’s requests for soft drinks 60% of the time, cookies 50% of the time and candy 45% of the time.¹⁰

The use of premiums or “giveaways” such as small toys with food products is a powerful pester power marketing tactic. An observational study of parents and children food shopping together “found that almost half of the children making product purchase requests in the cereal aisle were influenced by premium offers.”¹¹ Food companies tailor premiums to appeal to children by age group. According to the FTC, “one company indicated that very young children tend to prefer a small item in the package, whereas older children tend to prefer a large item that they might obtain by collecting and sending in proofs of purchase.”¹²

McDonald’s Happy Meal toys are an example of a pester power premium used by the quick service restaurant industry. In the 1990s, McDonald’s reported distributing five hundred million toys a year, or about 20 percent of the total annual toy sales in the country at that time.¹³ In a 2005 case before the Massachusetts Appellate Tax Board, Karlin Linhardt, then head of the National Marketing Group for McDonald’s, described how Happy Meal toy campaigns are developed and implemented.¹⁴ McDonald’s first researches trends in children’s entertainment and develops Happy Meal promotions to coincide with these trends. Virtually all Happy Meal Toys involve pre-existing characters, e.g., a character from a motion picture showing in movie theaters contemporaneously with that Happy Meal promotion. McDonald’s advertises each Happy Meal promotion. McDonald’s then further promotes the sale of Happy Meals through advertising posters and in-store display cases located within the restaurants. The tax court found that these elements of the Happy Meal marketing

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campaign devote primary attention to the Happy Meal toy as opposed to the Happy Meal food.

Perhaps most importantly, according to cost information presented into evidence by McDonald’s in 2005, its cost for the Happy Meal toy and paper packaging (the non-edible elements of the meal) was greater than its cost for the Happy Meal food:¹⁵

Happy Meal Type	Food & Condiment Cost	Toy (43¢ for all meals) & Packaging Cost	Retail Happy Meal Price
Hamburger	33¢	47¢	\$1.99
Cheeseburger	37¢	47¢	\$2.39
Chicken McNuggets	46¢	48¢	\$2.69

In short, the Happy Meal toy and the resulting pester power is so crucial to McDonald’s business model that McDonald’s historically has paid more for the inedible packaging and Happy Meal toy than for the food contained in the Happy Meal.

The Center for Science in the Public Interest recently filed a lawsuit against McDonald’s Corporation on behalf of a class of parents and children under California’s consumer protection laws. The complaint alleges that McDonald’s unfairly and deceptively markets its unhealthy Happy Meals to young children by baiting them with toys.¹⁶ Such alleged practices, if proven, would be prohibited under most states’ consumer protection laws.

Key elements of the typical Happy Meal toy campaign also were reflected in pester power marketing tactics reported to the FTC. The FTC noted that “[a]nimated characters – whether third-party licensed characters or characters created by a company for a brand – seem to be an important factor in getting children to ask their parents to buy a product.”¹⁷ Food makers also reported that “[i]n-store marketing techniques, such as floor decals and shelf-takers, can be successful in drawing children’s attention and getting them to request the product....”¹⁸

Pester power marketing tactics are intentionally designed to get children to request products by exploiting age-related vulnerabilities. For example, industry research submitted to the FTC indicated that “licensed characters are particularly appealing to children from

pre-school age to eight or nine years-old, at which point children will request fewer foods based solely on the licensed character.”¹⁹ This corresponds to consistent scientific research findings that children under the age of eight are developmentally unable to understand the persuasive intent of advertising.²⁰ Companies like McDonald’s use licensed characters because they have an established appeal and are effective with young children who are unable to even recognize advertising. Pester power marketing is a highly effective, highly sophisticated, and well-funded marketing tactic that enlists children as third parties to induce parents to purchase unhealthy food products.

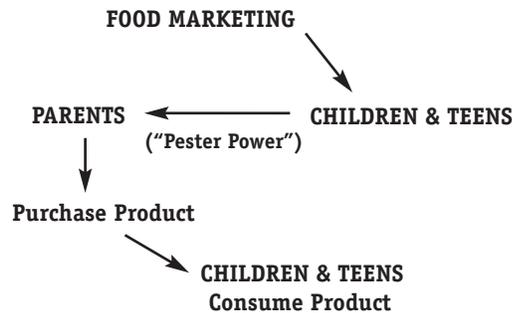
Use of State Consumer Protection Laws to Challenge Pester Power Marketing

All states and the District of Columbia have consumer protection statutes that can encompass a wide range of trade practices. The majority of state laws to protect consumers from unfair and deceptive marketing are modeled after the law establishing the FTC, known as the “Federal Trade Commission Act” and/or a model statute called, the “Uniform Deceptive Trade Practices Act.”²¹ 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. These typically are not criminal laws but rather allow consumers and state attorneys general to seek payment or to end prohibited 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. In some states, private plaintiffs may also pursue injunctive relief to stop future use of an unlawful trade practice. Consumer protection cases are 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.

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The following chart describes a typical pester power transaction:



As illustrated above, pester power marketing is unique because the marketing targets children, but the ultimate purchasers of the products are adult parents or caregivers.

In a typical 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 circumstances would have been misled or deceived.²² When children are the target audience, courts often analyze the marketing from the perspective of the vulnerable target audience (the “vulnerable audience” test) to determine “the effect of the practice on a reasonable member of that group.”²³ Pester power marketing may be challenged under existing state consumer protection laws as (1) unfair indirect marketing to parents; and (2) unlawful direct marketing to children.

Unfair Indirect Marketing to Parents

The private bar and state attorneys general may be reluctant to challenge pester power marketing because, while children are targets, parents frequently are the ones who decide to buy the product. There is a widespread perception that parents, as reasonable, responsible consumers, should just say “No” when faced with a pestering child. The intended outcome of the pester power marketing strategy, however, is to produce actual child-influenced purchases. Pester power marketing of unhealthy food products may be vulnerable to challenges under existing state consumer protection laws as unfair indirect advertising to adult parents or caregivers.

Indirect Advertising

Many states include indirect attempts to induce consumers to purchase products in statutory definitions of “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 Indirect attempts to induce a purchase may also appear in statutory definitions of “trade practices.” Arguably, even state consumer protection statutes that do not expressly reference indirect trade practices are to be broadly construed to capture the widest range of trade practices harmful to consumers.

Courts in New Jersey and Minnesota interpreted “indirect advertising” under their state consumer protection laws to include medical device maker marketing of products to physicians as an indirect advertisement to the public.²⁵ The cases analyzed indirect marketing of IUDs (a medical device used for contraception) to physicians who, in turn, prescribed the devices to patients and eventually injured the patients. A New Jersey court found that that “the provision of an IUD to a gynecologist essentially constitutes, at the very least, an indirect attempt to sell the IUD to a wanting patient with the concomitant expectation of monetary return.”²⁶ A Minnesota court found that such medical device advertising “to a physician is an ‘indirect’ advertisement to the public as contemplated by Minn. Stat. § 325F.67.”²⁷

In these cases, the defendant sought to increase sales by enlisting a third party (the doctor) who was in the position to exert influence over a prospective consumer (the patient). While doctors as experts exert a very powerful influence over patients, the same basic logic holds true with marketing to children to produce “pester power.” Instead of marketing directly to parents, the food marketer directs the advertising to children in order to influence parents as the ultimate purchasers.

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 they could purchase the ball on its own for \$11.00. Kevin Krause, Chief Marketing Offi-

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cer 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.”²⁸ One can imagine that most adult consumers do not enter their local convenience store planning to purchase 26 drinks. The soccer ball campaign, however, was highly successful with Kum & Go reporting that between June and July of 2010, Coke sales increased 18% and Powerade increased 52 %.²⁹

These states prohibit unfair business conduct and define “trade practices” or “advertising” to include indirect attempts to affect or influence consumers:

Alaska	Massachusetts	Pennsylvania
Colorado	Mississippi	Rhode Island
Delaware	Missouri	South Carolina
Georgia	Montana	South Dakota
Idaho	Nevada	Washington
Iowa	New Hampshire	West Virginia
Kentucky	New Mexico	Wisconsin
Louisiana	Oregon	Wyoming ³⁰

California’s false advertising law does not reference “unfair” trade practices, but does prohibit false and misleading advertising when made with the “intent directly or indirectly... to induce the public to enter into any obligation....” CAL. BUS. & PROF. CODE § 17500.

Applying State Unfairness Standards

Thirty-eight states prohibit unfair trade practices and many of those states apply a three-factor test for unfairness.³¹ The test requires a court to determine:

- (1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise— whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness;
- (2) whether it is immoral, unethical, oppressive, or unscrupulous;
- (3) whether it causes substantial injury to consumers (or competitors or other businessmen).³²

Variations in other states may require a plaintiff to establish some but not all parts of the test. The current federal unfairness legal standard focuses on substantial injury to consumers and makes violation of an established policy a mere consideration.³³ Because many states still use some form of the three-factor test, the following analysis applies it to pester power marketing.

Pester Power Marketing Offends the Concept of Unfairness Embodied in Tort Law’s Prohibition on Fraudulent Representations to Third Parties

The common law of torts recognizes fraudulent representations made to third parties as a form of common law fraud when the maker of the fraudulent 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.”³⁴ Pester power marketing incorporates elements such as animated characters, premiums, television advertisements, and retail displays to generate product requests by children to influence parents to buy unhealthy food products. These tactics are particularly effective with children under the age of eight years old who cannot recognize marketing and accept advertising as factual. The marketing communicated to children is fundamentally deceptive and unfair because it exploits young children’s inability to even recognize that the representation made to them is advertising for an unhealthy food product. The intended purpose of the marketing is to get children to repeat the substance of the marketing to the parent, e.g., “I want the one with the toy!” in order to influence adult food purchases. By enlisting children as third parties with unfair and deceptive marketing tactics in order to influence adult food purchases, pester power marketing offends the core concept of unfairness embodied in tort law’s prohibition of fraudulent representations to third parties.

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*Pester Power Marketing as an
Oppressive High Pressure Sales Tactic*

Some argue that adult parents should just say “No” to pestering children if they do not want to purchase an unhealthy food product for them. Yet pester power marketing is highly effective. The question then becomes, why is it so effective? And how should that inform a court’s analysis of whether or not parents are acting “reasonably under the circumstances” when they succumb to pester power marketing? While one certainly could argue that it is immoral and unethical to market to young children in general, the key line of inquiry is whether or not the trade practice at issue is immoral, unethical, oppressive, or unscrupulous to adult consumers.

Pester power marketing tactics are similar to oppressive and unscrupulous “high pressure” sales tactics. For example, the case of *Commonwealth v. Tolleson* (“*Tolleson*”) involved a scheme to swindle people into joining the “Exciting Life Club” by inviting them to “carnival like” group promotional meetings “with contrived applause, laughter, shouting and singing, all led by the Tolleson personnel in the audience.”³⁵ At the meetings:

prospects are shown motivation movies. By way of cleverly designed innuendo, they are led to believe that if they join the organization, they can earn anywhere from \$25,000 to \$ 50,000 per year.... After [more] meetings...at which the prospects are once again exposed to contrived applause, laughter, singing and excitement, the prospects are pressured into signing contracts and paying money for their memberships.³⁶

One could argue that a reasonable consumer should be suspicious of a vague promise to earn easy money. A key factor noted by the court, however, was that all of the witnesses described “peer pressure, embarrassment and great expectations, all of which caused many people to pay money to join something which was never fully explained to them.”³⁷ In short, “[t]he atmosphere was intended by the defendants, their agents and associates to break down sales resistance through mesmerization and peer group pressure.”³⁸

Children are targeted with pester power marketing at home via television advertisements designed to increase the number of times the child will request the product.³⁹ Initial product requests may occur at home, and the actual purchase-influence attempt occurs in a public place such as a supermarket, restaurant or other retail establishment that sells food. When the product request occurs in a public place, the adult parent is not only pressured by her child, but may also be concerned about disturbing or otherwise drawing unfavorable attention of other shoppers if her child’s pestering grows into a tantrum. Studies of parent-child shopping interactions have found that conflict occurred 65% of the time when a parent denied a child’s cereal request.⁴⁰ Children argued with their mothers 50% of the time after a toy request was denied.⁴¹ Parents of children ages 5-7 self-reported that 15% of the time their children “really pleaded over and over” for a product.⁴² Research has also shown that faced with child product requests parents may simply acquiesce because the item is cheap,⁴³ to make the child happy,⁴⁴ or to reward good behavior.⁴⁵

In light of child reactions when parents deny a child’s request, parents may also seek to avoid the embarrassment caused by their child having a tantrum if they ultimately deny the request.⁴⁶ The desired result of the pester power marketing, much like in oppressive high pressure sales tactics, is to break down the parent’s sales resistance to purchasing unhealthy foods for her children through repeated requests from the child and possible embarrassment in the public food retail environment.

Substantial Injury to Parents and Children

An injury alleged by consumers in a lawsuit based on unfairness “must be substantial; it must not be outweighed by a countervailing benefit to consumers or competitors that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.”⁴⁷ When analyzed as unfair indirect advertising to adult parents, the substantial injury caused by pester power marketing of unhealthy foods for children encompasses the economic harm to adults who, faced with relentless requests from their children and fear of embarrassment in public places, purchase products *that they would not otherwise purchase* for their children, and the potential health harm to their children associated with unhealthy food.

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Pester power marketing tactics are substantially injurious to child health because they are designed to break down parental sales resistance to unhealthy food products for their children, thus increasing children’s exposure to unhealthy foods. Obesity is now the second most prevalent “actual cause of death” behind tobacco use,⁴⁸ and the prevalence of food marketing to children has been found to be a significant contributor to obesity.⁴⁹ 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. No countervailing benefits to consumers of pester power marketing are readily apparent, especially in light of the McDonald’s Happy Meal toy cost data which indicates the premium adds a substantial cost to the Happy Meal that could otherwise be spent to improve the nutritional quality of the food itself. Pester power food marketing cannot be reasonably avoided by adults or children as it would essentially mean exposing one’s child to no commercial children’s television and never taking one’s child to certain restaurants or to the supermarket or other retail establishments that sell food.

Unlawful Direct Marketing to Children

Pester power marketing may also be challenged as unfair, deceptive or unconscionable direct marketing to children. As discussed above, children do not make the actual product purchase in a typical pester power transaction. For private plaintiffs, a key issue will be how each particular state defines “consumers” or “consumer transactions.” As noted by Pridgen, in many states, for a private plaintiff to have standing “there must be a completed transaction,” but “[i]f the statute specifically covers one who ‘seeks’ to purchase goods, or those who ‘solicit’ the sale of goods, the transaction need not be completed for the act or practice to be within the scope of the act.”⁵⁰ For example, the California Consumer Legal Remedies Act (Act) defines a “consumer” as “an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purpose.”⁵¹ Thus, children who “seek” unhealthy food products by pestering their parents are covered by the Act.

Assuming that the named plaintiff is not required to have made an actual purchase, pester power may be susceptible to challenges as unlawful direct marketing to children under a range of theories including deception, unfairness and unconscionability. In each case, the allegedly unlawful trade practice is analyzed from the perspective of a reasonable member of the vulnerable child target audience — as opposed to the perspective of a reasonable adult consumer. This is a lesser standard and will be a key factor when framing the allegedly unlawful food marketing in legal filings.

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Conclusion

Consumer advocates should take pester power marketing as seriously as the food industry does. In light of the growing public health crisis of childhood obesity, the private bar and state attorneys general must play a more vigorous role to protect consumers under existing state consumer protection laws. As was self-reported to the FTC, the food industry takes pester power seriously and values it as an important tool to sell food and beverage products to children. When placed in this context, the idea that parents should “Just say no” loses much of its power.

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

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ENDNOTES

¹ JULIET B. SCHOR, BORN TO BUY: THE COMMERCIALIZED CHILD & THE NEW CONSUMER CULTURE 23 (2004).

² Jeff Chester & Kathryn Montgomery, *Interactive Food & Beverage Marketing: Targeting Children and Youth in the Digital Age* 17 (May 2007), <http://digitalads.org/documents/digiMarketingFull.pdf> (internal citations omitted).

³ Mary Story & Simone French, 1 *Food Advertising and Marketing Directed at Children and Adolescents in the US*, INT. J. BEHAV. NUTR. PHYS. ACT 3 (2004), available at <http://www.ijbnpa.org/content/pdf/1479-5868-1-3.pdf>.

⁴ FEDERAL TRADE COMMISSION, MARKETING FOOD TO CHILDREN AND ADOLESCENTS: A REVIEW OF INDUSTRY ACTIVITIES, EXPENDITURES, AND SELF-REGULATION 5 (2008), <http://www.ftc.gov/os/2008/07/P064504foodmktngreport.pdf>.

⁵ *Id.* at 54.

⁶ See Story & French, *supra* note 3, at 10 (noting that “[a]most all of the studies on the impact of food advertising on children’s food preferences and behaviors were conducted in the mid-1970s and the 1980s.”).

⁷ Dale Kunkel, *Children and Television Advertising* in HANDBOOK OF CHILDREN AND THE MEDIA 375-93, 383 (Dorothy Singer & Jerome Singer, eds., 2001).

⁸ Story & French, *supra* note 3, at 11.

⁹ Kunkel, *supra* note 7, at 383.

¹⁰ Story & French, *supra* note 3, at 3.

¹¹ Kunkel, *supra* note 7, at 383.

¹² FEDERAL TRADE COMMISSION, *supra* note 4, at 55.

¹³ *In re E-M Food Corp. T/A McDonald’s Restaurant*, 1993 WL 98470, at *3 (N.Y.Div.Tax.App., March 18 1993).

¹⁴ See *McDonald’s Restaurants of Massachusetts, Inc. v. Commissioner of Revenue*, Docket No. C262528, at 192-193 (Mass. App. Tax Bd., April 22, 2005).

¹⁵ *Id.* at 195-197 (Table reflects Happy Meals offered during time relevant to the Board’s decision. Menu items and prices may have changed.).

¹⁶ Center for Science in the Public Interest, *Class Action Lawsuit Targets McDonald’s Use of Toys to Market to Children*, Dec. 15, 2010, <http://www.cspinet.org/new/201012151.html>.

¹⁷ FEDERAL TRADE COMMISSION, *supra* note 4, at 54-55.

¹⁸ *Id.* at 55.

¹⁹ *Id.* at 90 n. 84.

²⁰ Story & French, *supra* note 3, at 14.

²¹ See DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 2:10 (2003).

²² See FEDERAL TRADE COMMISSION, DECEPTION POLICY STATEMENT, appended to *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 177 (1984), available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm> (stating “we examine the practice from the perspective of a consumer acting reasonably in the circumstances.”)

²³ *Id.*; see also *Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496 (Cal. Ct. App. 2003) (*cert. denied* 2003 Cal. LEXIS 4724 (Cal. 2003)); *Committee on Children’s Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197 (Cal. 1983).

²⁴ Ariz. Rev. Stat. § 44-1521.

²⁵ See *Jones v. Sportelli*, 166 N.J. Super. 383 (Law Div. 1979); *Kociemba v. G.D. Searle & Co.*, 680 F. Supp. 1293 (D. Minn. 1988).

²⁶ *Jones*, 166 N.J. Super. at 390.

²⁷ *Kociemba*, 680 F. Supp. at 1305.

²⁸ 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.

²⁹ *Id.*

³⁰ ALASKA STAT. § 45.50.561(A)(1) (2011); COLO. REV. STAT. § 6-1-102(1) (2010); DEL. CODE ANN. TIT. 6, §2511(1) (2011); GA. CODE ANN. § 10-1-392(A)(28) (WEST 2011); IDAHO CODE ANN. § 48-602(2) (2011); IOWA CODE §§ 714.16(1)(A), (2)(G) (2011); KY. REV. STAT. ANN. § § 367.110(2) (WEST 2011); LA. REV. STAT. ANN. § 51:1402(9) (2011); MASS. GEN. LAWS CH. 93A, § 1(B) (2011); MISS. CODE ANN. § 75-24-3(B) (2011); MO. REV. STAT. §§ 407.010(1), (7) (2011); MONT. CODE ANN. § 30-14-102(8) (2010); NEV. REV. STAT. ANN. § 598.0905 (2011); N.H. REV. STAT. ANN. § 358-A:1(II) (2011); N.M. STAT. § 57-12-2(C) (2011); OR. REV. STAT. § 646.605(8) (2011); 73 PA. CONS. STAT. ANN. § 201-2(3) (WEST 2011); R.I. GEN. LAWS § 6-13.1-1(5) (2011); S.C. CODE ANN. § 39-5-10(B) (2010); S.D. CODIFIED LAWS §§ 37-24-1(1), (13) (2011); WASH. REV. CODE § 19.86.010 (2011); W. VA. CODE §§ 46A-6-102(1), (6) (2011); WIS. STAT. § 100.18(1) (2011); WYO. STAT. ANN. § 40-12-102(A)(v) (2011).

³¹ See PRIDGEN, *supra* note 21, at 171-173 (summarizing substantive state consumer protection provisions); David L. Belt, *The Standard for Determining “Unfair Acts or Practices” Under State Unfair Trade Practices Acts*, 80 CONN. B.J. 247, 303-304 (2006) (citing eleven jurisdictions that still apply the three factor “Cigarette Rule”).

³² *Id.* at 257.

³³ *Id.* at 307-311; 15 U.S.C.S. § 45(n).

³⁴ RESTATEMENT (SECOND) OF TORTS § 533.

³⁵ *Commonwealth v. Tolleson*, 14 Pa. Commw. 72, 80 (Pa. Commw. Ct. 1974), *aff’d* 462 Pa. 193 (Pa. 1975).

³⁶ *Id.*

³⁷ *Id.* at 81.

³⁸ *Id.* at 107.

³⁹ Story & French, *supra* note 3, at 11.

⁴⁰ Leslie Isler et al., *Children’s Purchase Requests and Parental Responses: Results from a Diary Study*, J. Advertising Res. 29 (Oct/Nov 1987).

⁴¹ *Id.*

⁴² *Id.* at 34.

⁴³ *Id.* at 29.

⁴⁴ *Id.* at 38.

⁴⁵ *Id.* at 29.

⁴⁶ Isler et al. were careful to note that they did not include a category for parents to denote when they purchased a product even when they did not want to due to concerns about accuracy in self-reporting.

⁴⁷ Belt, *supra* note 31, at 11 (citing the FTC’s Unfairness Policy Statement).

⁴⁸ Ali H. Mokdad et al, *Actual Causes of Death in the United States, 2000*, 291 JAMA 1238 (2004).

⁴⁹ See 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).

⁵⁰ PRIDGEN, *supra* note 21, at § 4:15.

⁵¹ CAL. CIV. CODE § 1761(d).