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## Live for Now: Teens, Soda Marketing, and the Law

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LIVE FOR NOW: TEENS, SODA MARKETING, AND THE LAW

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I. INTRODUCTION

The alarming rate of overweight and obesity in U.S. children, adolescents, and adults has focused attention on the marketing of unhealthy

foods and beverages.<sup>1</sup> Adolescents are heavily targeted in marketing for beverages, including sugary drinks like soda.<sup>2</sup> They have higher rates of overweight and obesity than children less than five years of age, and are on a path to have a shorter life expectancy than their parents.<sup>3</sup> This article analyzes soda marketing through the lens of teen biological and psychological development, marketing tactics commonly used with teen audiences, and consumer protection law principles.

## II. TEENS AND THE OBESITY CRISIS

The prevalence of obesity among U.S. adolescents from twelve to nineteen years of age has increased steadily from 5% in 1980 to 18% in 2008.<sup>4</sup> Researchers have identified sugary drink consumption as a particularly important driver of the epidemic.<sup>5</sup> Obese adolescents are more likely to have high cholesterol or high blood pressure, putting them at greater risk for cardiovascular disease.<sup>6</sup> Obesity also puts adolescents at greater risk for diabetes,<sup>7</sup> and the percentage of teenagers testing positive for diabetes or pre-diabetes more than doubled from 9% in 1999-2000 to

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1. Cornelia Pechmann et al., *Impulsive and Self-Conscious: Adolescents' Vulnerability to Advertising and Promotion*, 24 J. PUB. POL'Y & MKTG. 202, 202 (2005).

2. *Id.*

3. Amir Tirosh et al., *Adolescent BMI Trajectory and Risk of Diabetes Versus Coronary Disease*, 364 NEW ENG. J. MED. 1315, 1316 (2011); Cynthia Ogden & Margaret Carroll, *Prevalence of Obesity Among Children and Adolescents: United States, Trends 1963-1965 Through 2007-2008*, NAT'L CTR. FOR HEALTH STATISTICS 1,1(2010), available at [http://www.cdc.gov/nchs/data/hestat/obesity\\_child\\_07\\_08/obesity\\_child\\_07\\_08.pdf](http://www.cdc.gov/nchs/data/hestat/obesity_child_07_08/obesity_child_07_08.pdf).

4. Ogden & Carroll, *supra* note 3, at 1.

5. David S. Ludwig et al., *Relation Between Consumption of Sugar-Sweetened Drinks and Childhood Obesity: A Prospective, Observational Analysis*, 357 THE LANCET 505, 507 (2001), available at <http://nepc.colorado.edu/files/lancet.pdf>.

6. David S. Freedman et al., *Cardiovascular Risk Factors and Excess Adiposity Among Overweight Children and Adolescents: The Bogalusa Heart Study*, 150 J. PEDIATRICS 12, 13-15 (2007).

7. Tirosh et al., *supra* note 3, at 1319-20.

23% in 2007-2008.<sup>8</sup> Over their life spans, children and adolescents who are obese are likely to be obese as adults.<sup>9</sup> This means these adolescents are more at risk for health problems such as heart disease, type 2 diabetes, stroke, certain cancers, osteoarthritis,<sup>10</sup> and end-stage renal disease.<sup>11</sup>

### III. THE ADOLESCENT BRAIN AND PSYCHOSOCIAL DEVELOPMENT

Compared to adults, adolescents' judgment and decision-making abilities are characterized by developmentally-specific attributes including neurological, psychosocial, and cognitive, which render them vulnerable to risky-decision making.<sup>12</sup> Developmental differences make it more difficult for adolescents to make decisions in their best long-term interests, thereby making them more vulnerable targets for marketers.<sup>13</sup> Research shows that adolescents may be particularly drawn to products that provide "immediate gratification, thrills, and/or social status."<sup>14</sup> Marketers craft advertising campaigns to capitalize on adolescent characteristics such as their susceptibility to peer influence, impulsive behavior, and their focus on the short-term.<sup>15</sup> The marketing of addictive products and substances like alcohol and cigarettes, and foods and beverages high in sugar, fat, salt, and caffeine to adolescents raises special public health concerns because of the potential for adverse long-term health effects.<sup>16</sup>

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8. Roni C. Rabin, *Diabetes on the Rise Among Teenagers*, N.Y. TIMES (May 21, 2012), <http://well.blogs.nytimes.com/2012/05/21/diabetes-on-the-rise-among-teenagers/>.

9. Shumei S. Guo & William C. Chumlea, *Tracking of Body Mass Index in Children in Relation to Overweight in Adulthood*, 70 AM. J. CLINICAL NUTRITION 145S, 146S (1999).

10. OFFICE OF THE SURGEON GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS, THE SURGEON GENERAL'S VISION FOR A HEALTHY AND FIT NATION: 2010 2-4 (2010), available at [http://www.surgeongeneral.gov/initiatives/healthy-fit-nation/obesity\\_vision2010.pdf](http://www.surgeongeneral.gov/initiatives/healthy-fit-nation/obesity_vision2010.pdf).

11. Asaf Vivante et al., *Body Mass Index in 1.2 Million Adolescents and Risk for End-Stage Renal Disease*, 172 ARCH. INTERN. MED. 1644, 1647 (2012).

12. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCH. 1009, 1012-13 (2003), available at [http://humanservices.vermont.gov/boards-committees/cfcpp/publications/publications-2007/macarthur/publications/Less\\_Guilty\\_by\\_Reason\\_of\\_Adolescence.pdf](http://humanservices.vermont.gov/boards-committees/cfcpp/publications/publications-2007/macarthur/publications/Less_Guilty_by_Reason_of_Adolescence.pdf).

13. *Id.*

14. Pechmann et al., *supra* note 1, at 202.

15. See DAVID A. KESSLER, THE END OF OVEREATING: TAKING CONTROL OF THE INSATIABLE AMERICAN APPETITE 240 (2009). See generally FOOD AND ADDICTION: A COMPREHENSIVE HANDBOOK (Kelly D. Brownell & Mark S. Gold eds., 2012).

16. *Id.*

### A. Brain Development

Brain development and hormonal changes have a profound effect on adolescent behavioral patterns and decision-making.<sup>17</sup> Changes to the adolescent brain occur due to age and experience, and are independent of puberty.<sup>18</sup> The prefrontal cortex acts in a decision-making capacity using prior experience to guide behaviors;<sup>19</sup> specifically, it plays an important role in inhibiting responses to stimuli so as to promote planned behavior.<sup>20</sup> Importantly, the prefrontal cortex does not fully develop until late adolescence or early adulthood.<sup>21</sup> When fully developed, the inhibitory effect of the prefrontal cortex helps control emotional responses to external stimuli, and thus regulates impulsive behavior.<sup>22</sup>

Adolescents also experience an increased level of circulating hormones.<sup>23</sup> These hormones act on the amygdala, the part of the brain responsible for transforming experience into emotion.<sup>24</sup> Elevated levels of hormones in the body have a number of excitatory effects on adolescents, including hypersensitivity to stressors and strong emotional responses to their environments.<sup>25</sup> The combination of elevated hormone levels and an underdeveloped prefrontal cortex make it harder for adolescents to override the excitatory emotional responses of the amygdala, resulting in poor impulse control.<sup>26</sup> “The mismatch in excitatory drive and inhibitory control during early adolescence has been likened to ‘starting the engine with an unskilled driver.’”<sup>27</sup> An inability to exercise inhibitory control of their emotions leads adolescents to exhibit reckless and risky behavior more frequently than either adults or children.<sup>28</sup> This means that adolescents are much less likely than adults to engage in responsible decision-making.<sup>29</sup> At

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17. See Pechmann et al., *supra* note 1, at 203.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 206.

22. *Id.* at 203.

23. *Id.* at 205.

24. *Id.* at 203.

25. *Id.* at 205.

26. *Id.*

27. *Id.* (quoting Ronald E. Dahl, *Adolescent Brain Development: A Period of Vulnerabilities and Opportunities – Keynote Address*, 1021 ANNALS N.Y. ACAD. SCI. 1, 17 (2004)).

28. *Id.* at 207.

29. *Id.*

the same time they are more likely to experience greater emotional volatility, further disrupting their ability to control their impulses.<sup>30</sup>

### *B. Psychosocial Development*

Adolescents also face psychosocial challenges, because psychosocial maturity continues to develop into adulthood.<sup>31</sup> Social immaturity most often leads to feelings of self-consciousness and embarrassment.<sup>32</sup> These feelings occur at the same time that adolescents face the challenges of forming a personal identity and fitting in socially with their peers.<sup>33</sup> Thus, adolescents are very susceptible to peer influences.<sup>34</sup> Two of the primary processes implicated in peer influence are social comparison and social conformity.<sup>35</sup> Social comparison is the process through which adolescents use the behavior of others to measure their own behavior.<sup>36</sup> Upward social comparisons, that is, comparisons with targets who are perceived to be superior role models (for example, more popular adolescents), can be thought of as a means of finding ways for self-improvement.<sup>37</sup> Social conformity is a group process through which adolescents tend to adapt their behavior and attitudes to that of their peers so as to earn acceptance.<sup>38</sup> Direct peer influence and the desire for peer approval may lead adolescents to rely on the consumption of particular brands to project a positive image to their peers.<sup>39</sup>

### *C. Characteristic Teen Decision-Making*

The notion of a “rational teenager” may seem laughable to many. Teen decision-making behavior, however, makes perfect, rational sense when viewed from the perspective of a teen. Adolescents do perform risk to reward calculations when they make decisions; it’s just that due to their

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30. *Id.* at 207-08.

31. LAURENCE STEINBERG, JUVENILES IN THE JUSTICE SYSTEM: NEW EVIDENCE FROM RESEARCH ON ADOLESCENT DEVELOPMENT, 4 (2007), available at [http://www.familyimpactseminars.org/s\\_wifis25c01.pdf](http://www.familyimpactseminars.org/s_wifis25c01.pdf).

32. Pechmann et al., *supra* note 1, at 209.

33. *Id.*

34. *Id.*

35. Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 L. & HUM. BEHAV. 221, 230 (1995).

36. *Id.*

37. Jerry Suls et al., *Social Comparison: Why, With Whom, and With What Effect*, 11 CURRENT DIRECTIONS IN PSYCHOL. SCI. 159, 161 (2002).

38. Scott et al., *supra* note 35, at 230.

39. Pechmann et al., *supra* note 1, at 210.

psychological and psychosocial immaturity, their ideas of risks and rewards may sharply differ from those of adults.<sup>40</sup> For example, adolescents focus less on protection against losses than on opportunities for gains, meaning they are driven by rewards and not by risks.<sup>41</sup> In addition, adolescents' temporal perspective<sup>42</sup> tends to put more weight on short-term consequences than on future outcomes<sup>43</sup> leading to impulsive and risky behavior.<sup>44</sup> Heightened susceptibility to peer influence, the need for social acceptance, and the focus on short-term rewards makes it more difficult for an adolescent to make responsible choices. This is especially true when the full negative consequences of their choices may not manifest themselves until later in life.<sup>45</sup> As a result, youth engage in more frequent risky behavior such as unprotected sex, drunk driving, and criminal conduct.<sup>46</sup>

#### IV. TEEN SUSCEPTIBILITY TO MARKETING

Adolescents are vulnerable targets for marketers. Protecting youth from marketing of harmful products is a public health strategy because "adolescents may be especially tempted to use heavily advertised, popular brands of alcohol and cigarettes because these brands may fulfill their needs for immediate gratification and thrill seeking and their need for high-status consumption symbols."<sup>47</sup> Adolescence also is an important age because teens have a higher likelihood of developing an addiction than adults.<sup>48</sup> Unhealthy foods, similar to alcohol and cigarettes, put teens at great risk for chronic disease later in life.<sup>49</sup> By the time adolescents reach an age of mature decision-making, they may have formed unhealthy food preferences and eating habits that will be extremely difficult to change.

A popular text about marketing to youth notes that "[e]motions are driving tweens – and so are brands."<sup>50</sup> Marketers craft advertising

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40. Scott et al., *supra* note 35, at 233.

41. *Id.* at 231.

42. Steinberg & Scott, *supra* note 12, at 1012.

43. Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Development Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 164 (1997).

44. *Id.* at 164-65.

45. *Id.* at 164.

46. *Id.* at 162-63.

47. Pechmann et al., *supra* note 1, at 212.

48. *Id.* at 202.

49. Freedman et al., *supra* note 6, at 13-15.

50. MARTIN LINDSTROM & PATRICIA B. SEYBOLD, BRANDCHILD: REMARKABLE INSIGHTS INTO THE MINDS OF TODAY'S GLOBAL KIDS AND THEIR RELATIONSHIPS WITH BRANDS 279 (2003).

campaigns to capitalize on emotional desires for “immediate gratification, thrills, and/or social status.”<sup>51</sup> Food and beverage marketers tailor their campaigns to maximize adolescent consumption of unhealthy foods and beverages.

### A. Soda Marketing to Teens

Beverage companies put their money where their mouths are when it comes to marketing to teens. Companies invest heavily in developing specialized campaigns to capture the teen market and talk openly about their teen focus. As Sarah Robb O’Hagan, Chief Marketing Officer for PepsiCo’s Gatorade products stated during an interview, “[w]hen you’re in your teen years is when you develop your sort of deep emotional connection with things . . . So it’s such an important time for us [PepsiCo] to begin the brand relationship with the consumer. We’ve always seen [teens] as our focus.”<sup>52</sup>

Soda industry self-regulation does not cover marketing to teens. The American Beverage Association, the trade association for the non-alcoholic beverage industry, has pledged to abide by a Global Policy on Marketing to Children, but it only applies to children twelve and under.<sup>53</sup> This remains the case despite skyrocketing rates of adolescent overweight and obesity and scientific literature demonstrating that adolescents’ judgment and decision-making abilities are underdeveloped compared to adults.<sup>54</sup>

In 2006, the food and beverage industry reported \$1.08 billion spent marketing to adolescents.<sup>55</sup> That figure decreased slightly to \$1.01 billion in 2009.<sup>56</sup> In 2006, carbonated beverage companies spent a total of \$508 million promoting their products to adolescents, making them the most

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51. Pechmann et al., *supra* note 1, at 202.

52. Jennifer Zegler, *Primed for Performance: Gatorade Refocuses on Sports Performance Innovation*, BEVERAGE INDUSTRY, June 11, 2010, <http://www.bevindustry.com/articles/cover-story-gatorade-refocuses-on-sports-performance-innovation?v=preview>.

53. INT’L COUNCIL OF BEVERAGES ASS’NS, GUIDELINES ON MARKETING TO CHILDREN (2008), available at <http://www.icba-net.org/files/resources/icba-marketing-to-children-guidelines.pdf> (last visited Sept. 23, 2013); Press Release, Am. Beverage Ass’n, ABA Reaffirms Commitment to Reduce Marketing to Children (July 29, 2008), <http://www.ameribev.org/news—media/news-releases—statements/more/106/>.

54. See Pechmann et al., *supra* note 1, at 202; INT’L COUNCIL OF BEVERAGES ASS’NS, *supra* note 53.

55. FED. TRADE COMM’N, A REVIEW OF FOOD MARKETING TO CHILDREN AND ADOLESCENTS: FOLLOW-UP REPORT 5 (2012), available at <http://www.ftc.gov/os/2012/12/121221foodmarketingreport.pdf>.

56. *Id.*



aggressive food or beverage marketers to teens.<sup>57</sup> Fast-food restaurants came in second, spending approximately \$140 million on advertising to teens.<sup>58</sup> In 2009, carbonated beverage companies were still the most aggressive marketers to adolescents, despite a decrease in spending to \$382 million in advertising to that group.<sup>59</sup> Fast-food restaurants increased their advertising targeting teens in 2009, spending \$185 million.<sup>60</sup> To put this into perspective, less than 1% of expenditures on advertising all food and beverage to children and teens during the same period were for fruits and vegetables.<sup>61</sup>

Part of the reason for the decline in food and beverage advertising expenditures is that companies rely more heavily on less expensive, new media channels, such as the Internet.<sup>62</sup> For example, in 2006, new media accounted for only 4% of youth-directed marketing by food companies.<sup>63</sup> In 2009, that number increased to 7%.<sup>64</sup> Carbonated beverage companies spent the most of any food category on new media targeted at teens, spending \$22.6 million in 2009, a 3.4% increase from 2006.<sup>65</sup>

Multi-layered digital campaigns combining social networks, mobile services, and online videos<sup>66</sup> allow food companies to seamlessly weave advertisements in with content “in an interactive digital environment that pervades [teens’] personal and social lives.”<sup>67</sup> Food and beverage marketers use stealth or viral marketing techniques to mask the commercial origin of marketing messages created by companies.<sup>68</sup> And more and more, marketers rely upon user-generated content whereby teen consumers are encouraged to create videos, “like” a product on Facebook, or create content on other social media platforms that integrates food and beverage brands and can be circulated to their peers.<sup>69</sup>

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57. *Id.* at 8.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 10

63. *Id.* at 10.

64. *Id.*

65. *Id.* at 16.

66. Kathryn C. Montgomery & Jeff Chester, *Interactive Food and Beverage Marketing: Targeting Adolescents in the Digital Age*, 45 J. ADOLESCENT HEALTH S18, S19 (2009).

67. *Id.* at S23.

68. *Id.* at S22.

69. *Id.* at S21.

In 2006, Internet food and beverage advertisements produced 9 billion impressions on teen-oriented websites.<sup>70</sup> Further, “two-thirds of carbonated beverage ad impressions and one-third of [fast-food restaurant] ad impressions appeared to have been teen-directed.”<sup>71</sup> In 2009, teen-oriented websites generated more than 2.3 billion display ad impressions for food products.<sup>72</sup> The reason for the decrease appears to be the categorization of MySpace, which ceased qualifying as a teen-oriented website in 2007.<sup>73</sup> Regardless, some food companies view general-audience websites such as Facebook and MySpace as an important medium to target teens.<sup>74</sup>

Food retailers that sell candy, beverages, snacks, and ready-to-eat foods, such as convenience stores, also are keen to capture the teen market. A 2005 report by Coca-Cola called “Convenience Teens” encouraged convenience store owners to cultivate teen customers.<sup>75</sup> The report found that while teens differ from older shoppers by spending less per visit, they tend to make more frequent convenience store visits thereby making up for the lower amount spent per visit.<sup>76</sup> The report noted that by encouraging teenagers to shop at convenience stores now, those stores (and by extension brands like Coca-Cola) will gain the teens’ loyalty for future years.<sup>77</sup> Soon those teenagers will be in their twenties, and they will have more disposable income and will continue to be valuable convenience store customers.<sup>78</sup>

### B. PepsiCo Tells Teens to “Live for Now”

While examples of food and beverage campaigns targeting adolescents abound,<sup>79</sup> PepsiCo’s 2012 global marketing campaign “Live

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70. FED. TRADE COMM’N, *MARKETING FOOD TO CHILDREN AND ADOLESCENTS: A REVIEW OF INDUSTRY EXPENDITURES, ACTIVITIES, AND SELF-REGULATION D-4* (2008), available at <http://www.ftc.gov/sites/default/files/documents/reports/marketing-food-children-and-adolescents-review-industry-expenditures-activities-and-self-regulation/p064504foodmktgreportappendices.pdf>.

71. *Id.*

72. FED. TRADE COMM’N, *supra* note 71, at D-8.

73. *Id.*

74. *Id.*

75. CLICKIN RESEARCH, *CONVENIENCE TEENS: BUILDING LOYALTY WITH THE NEXT GENERATION 1-2* (2005), available at [https://www.ccrcc.org/wp-content/uploads/2012/09/Convenience\\_Teens\\_Study\\_2005.pdf](https://www.ccrcc.org/wp-content/uploads/2012/09/Convenience_Teens_Study_2005.pdf).

76. *Id.* at 4-5.

77. *Id.* at 38.

78. *Id.* at 5.

79. *See, e.g.* DEWMOCRACY, <http://digitalads.org/how-youre-targeted/case-studies/dewmocracy/> (last visited Oct. 5, 2013); DORITOS 626, <http://digitalads.org>

for Now” is emblematic. Faced with declining sales of its traditional cola drink in the U.S., the campaign seeks to make PepsiCo’s full sugar cola beverages more relevant by tying them to music and entertainment trends.<sup>80</sup> When asked about the Live for Now campaign, Brad Jakeman, President of Global Enjoyment and Chief Creative Officer for PepsiCo stated that “[t]he category [carbonated soft drinks] is in decline in this country . . . It lost the cool quotient. If there’s any brand that can inspire the category again, it’s Pepsi.”<sup>81</sup>

Al Carey, CEO of PepsiCo Americas Beverages, made the adolescent focus of the Live for Now campaign clear to investors when he stated that “it’s about sports and music, excitement and youth, and I think it is the right kind of feel for this Pepsi business.”<sup>82</sup> The campaign emphasizes pop culture and entertainment by partnering with celebrities from sports and music, including pop singer Beyonce, and sponsoring major events like the National Football League’s Super Bowl halftime show. The campaign also uses “Pepsi Pulse,” a dedicated webpage that serves as the social media nexus for the campaign.<sup>83</sup> The Live for Now campaign is so teen-focused that it has had to be decoded for older investors.<sup>84</sup> At one symposium, after investors were shown a Live for Now commercial the moderator told the audience, “for those of you who are not in tune with popular culture, that was [pop singer] Nicki Minaj.”<sup>85</sup> PepsiCo’s CFO then shared that he too had to be told who Nicki Minaj was because he doesn’t “have teenage girls.”<sup>86</sup>

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/how-youre-targeted/case-studies/doritos-626 (last visited Oct. 5, 2013); MCDONALD’S AVATAR, <http://digitalads.org/how-youre-targeted/case-studies/mcdonalds-avatar/> (last visited Oct. 5, 2013); MYCOKE, <http://digitalads.org/how-youre-targeted/case-studies/mycoke> (last visited Oct. 5, 2013).

80. Natalie Zmuda, *Pepsi Tackles Identity Crisis; After Fielding Biggest Consumer-Research Push in Decades, Brand Settles on ‘Now’ Global Positioning*, ADVERTISING AGE, May 7, 2012, <http://adage.com/article/news/pepsi-tackles-identity-crisis/234586/>.

81. *Id.*

82. Edited Transcript of PEP-Deutsche Bank Global Consumer Conference (June 20, 2012) 4, available at <http://www.pepsico.com/Download/PEP-Transcript-2012-06-20.pdf> [hereinafter *Al Carey Transcript*].

83. PEPSI PULSE, <http://www.pepsico.com/> (last visited Oct. 5, 2013).

84. Edited Transcript of PEP - PepsiCo at Goldman Sachs Consumer Products Symposium (May 10, 2012) 4, available at [http://www.pepsico.com/Download/PEP-Transcript-2012-05-10T15\\_35.pdf](http://www.pepsico.com/Download/PEP-Transcript-2012-05-10T15_35.pdf).

85. *Id.*

86. *Id.*

## V. CONSUMER PROTECTION CASES INVOLVING TEENS AND BRANDING

State and federal consumer protection laws outlaw deceptive and unfair marketing. Marketing campaigns can focus on the qualities, characteristics, or benefits of a product or seek to create associations between a product and a consumer's desire to be happy, wealthy, healthy, popular, etc.<sup>87</sup> These two approaches to advertising were described at the turn of the twentieth century as "reason-why advertising" and "atmosphere advertising," respectively.<sup>88</sup> Atmosphere advertising is now commonly referred to simply as "branding," and is grounded in the basic principle that consumers generally define themselves by their possessions.<sup>89</sup>

Consumer protection law actions may be necessary to denormalize and discontinue soda marketing to minors. The current consumer protection legal framework is somewhat ill-suited to protect vulnerable consumers from branding with a focus on building positive associations and developing attachment with a brand as opposed to marketing that focuses on factual characteristics like taste, quality of ingredients, price, or volume. In the 2000's, alcohol marketing with appeal to minors was unsuccessfully challenged as a deceptive trade practice in a number of states.<sup>90</sup> In the 1990's, R.J. Reynolds' Joe Camel campaign for tobacco was challenged as an unfair trade practice under state and federal consumer protection law and subsequently outlawed by the Master Settlement Agreement (MSA).<sup>91</sup> In this section we summarize existing consumer protection case law concerning brand-awareness style marketing campaigns for harmful products targeting minors.

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87. MICHAEL BLANDING, *THE COKE MACHINE: THE DIRTY TRUTH BEHIND THE WORLD'S FAVORITE SOFT DRINK* 41 (2010).

88. *Id.*

89. BRAND IMAGE, <http://www.asiamarketresearch.com/glossary/brand-image.htm> (last visited Oct. 5, 2013).

90. *See generally* Alston v. Advanced Brands & Importing Co., 494 F.3d 562 (6th Cir. 2007).

91. MASTER SETTLEMENT AGREEMENT 14 (1998), *available* at [http://www.naag.org/backpages/naag/tobacco/msa/msapdf/MSA%20with%20Sig%20Pages%20and%20Exhibits.pdf/file\\_view](http://www.naag.org/backpages/naag/tobacco/msa/msapdf/MSA%20with%20Sig%20Pages%20and%20Exhibits.pdf/file_view) (follow "Click here to get the file" hyperlink) (last visited Dec. 23, 2013).

### A. Branding with Appeal to Minors as a Deceptive Trade Practice

In general, a deceptive trade practice is a practice that is likely to mislead a reasonable consumer in a way that is material to a transaction.<sup>92</sup> Deception can involve an affirmative misrepresentation or a material omission of facts.<sup>93</sup> When analyzing a potentially deceptive trade practice, courts typically view the allegedly illegal conduct from the perspective of a reasonable member of the target audience.<sup>94</sup> A wide range of alcohol industry players, including the Beer Institute and major brewers and distillers like Coors and Bacardi, were the subject of a series of private lawsuits by parents alleging that the industry had unlawfully marketed its products to appeal to their minor children.<sup>95</sup> As the result of this marketing, youths allegedly spent family funds to purchase alcoholic beverages.<sup>96</sup> In short, plaintiffs argued that the alcohol industry's "advertising [wa]s responsible for the illegal (underage) purchase of alcoholic beverages by minor children."<sup>97</sup> The suits sought restitution for family funds spent by underage youth to purchase alcohol and injunctive relief barring the industry from using marketing tactics with appeal to minors.<sup>98</sup>

Plaintiffs alleged that the alcohol industry engaged in a marketing scheme designed to increase underage drinking including: a) developing and promoting beverages specifically designed to appeal to new and underage drinkers, often called "alcopops"; b) advertising in media that minors read, see, or use in disproportionate numbers; c) developing promotional themes specifically tailored to appeal to minors, including the portrayal of children flouting authority, and alcohol-enhanced sexual prowess; d) market research to target promotional and advertising efforts at children; e) internet marketing designed to attract and target children, including maintaining web sites that offer games, contests, and other content designed to appeal to children; f) using cartoons, logos, and promotional items such as apparel and toys, and using actors, models, and

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92. *Matter of Cliffdale Assocs., Inc.*, 1984 WL 565319, at \*46 app. (F.T.C. Mar. 23, 1984).

93. *Id.*

94. *Id.*

95. *See generally Alston*, 494 F.3d at 562; *Goodwin v. Anheuser-Busch Cos., Inc.*, No. BC310105, 2005 WL 280330 (Cal. Super. Ct. Jan. 28, 2005); *Hakki v. Zima Co.*, No. 03-9183, 2006 WL 852126 (D.C. Super. Ct. Mar. 28, 2006); *Tomberlin v. Adolph Coors Co.*, 742 N.W.2d 74 (Wis. Ct. App. Oct. 25, 2007).

96. *See generally Tomberlin*, 742 N.W.2d at 74.

97. *Alston*, 494 F.3d at 564.

98. *See generally Tomberlin*, 742 N.W.2d at 74; *Goodwin*, 2005 WL 280330; *Hakki*, WL 852126.

spokespersons who appear younger than the legal drinking age so that the promotions appeal to minors; and g) sponsoring promotional events designed to appeal to minors, including beach and spring break “parties.”<sup>99</sup>

These complaints were all ultimately dismissed either for lack of standing or for failure to state a claim.<sup>100</sup>

While standing varies from jurisdiction to jurisdiction, at its most basic standing requires that a plaintiff suffered an injury to a legally protected interest.<sup>101</sup> The primary injury alleged by parent plaintiffs was the loss of family funds incurred when their children made illegal purchases of alcohol.<sup>102</sup> Courts rejected the theory that a loss of family funds could provide a form of economic injury which would give the parents standing to sue.<sup>103</sup> As one judge noted, “the Court is not aware of any legal doctrine that would recognize a parent’s legal possessory interest in the monies given to and spent by their children. Once the Plaintiffs gave money to their children, that money is viewed as a gift and thereby a possession of the children.”<sup>104</sup> Therefore, only the children themselves could have had standing—not their parents. The Sixth Circuit took its standing analysis even further, opining that in order for the parents to have standing they would have to seek to recover “from their children the money those children converted from . . . [them] in order to violate the law prohibiting underage purchase of alcohol.”<sup>105</sup> In other words, under the theory presented in the complaints, possible defendants included the underage children who illegally purchased alcohol, but not the alcohol industry.

All of the cases were dismissed without leave to amend.<sup>106</sup> Plaintiffs were not granted leave to amend any of the complaints because courts

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99. *Alston v. Advanced Brands & Importing Co.*, No. Civ. 05-72629, 2006 WL 1374514 at \*1 (E.D. Mich. May 19, 2006), *vacated and remanded*, 494 F.3d 562 (6th Cir. 2007).

100. *See, e.g., Alston*, 494 F.3d at 562 (denying standing for lack of causation or redressability); *Goodwin*, 2005 WL 280330 (denying standing for lack of injury and failing to allege a violation of the California consumer protection law); *Hakki*, 2006 WL 852126 (denying standing for lack of injury); *Tomberlin v. Adolph Coors Co.*, No. 05-CV-545, 2006 WL 4808298 (Wis. Cir. Feb. 16, 2006) (trial order) (denying standing for lack of injury or causation).

101. *Tomberlin*, 2006 WL 4808298.

102. *Id.*

103. *Id.*

104. *Eisenberg v. Anheuser-Busch, Inc.*, 2006 WL 290308 at \*3 (N.D. Ohio Feb. 2, 2006), *vacated and remanded sub nom. Alston*, 494 F.3d at 562.

105. *Alston*, 494 F.3d at 565.

106. *Alston*, 494 F.3d 562, 566; *Goodwin v. Anheuser-Busch Cos., Inc.*, No. BC310105, 2005 WL 280330 at \*5 (Cal. Super. Ct. Jan. 28, 2005); *Hakki v. Zima Co.*,

found that even if teens were named as plaintiffs, they could not maintain claims for violations of state consumer protection laws.<sup>107</sup> Plaintiffs alleged that alcohol marketing with appeal to minors was unfair and deceptive and that it violated certain enumerated deceptive trade practices.<sup>108</sup> The two enumerated practices plaintiffs alleged in the various cases were “representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have” and that the marketing contained omissions of material facts that tended to mislead or deceive teen consumers.<sup>109</sup>

With respect to representing that certain alcohol marketing tactics conveyed benefits that alcohol does not have, one judge reasoned that there exists “no duty . . . to disclose . . . either [the] inherent dangers of consuming alcoholic beverages, or that alcohol would not make fantasies come to life.”<sup>110</sup> Courts found that “qualities that are not affirmations of fact such as the fun, sexiness, popularity, social acceptance, athleticism, etc. that drinking alcohol can bring” amounted to mere puffery and therefore were not actionable as deceptive trade practices.<sup>111</sup> The fact that it is illegal to sell alcohol to minors also entered into the analysis.<sup>112</sup> The court reasoned that the illegality of underage drinking makes it common knowledge that alcohol is a dangerous product.<sup>113</sup>

The crux of plaintiff’s material omission claim was that “because of their age, minors are unable to appreciate or understand the deleterious effects of alcohol, or that Defendant’s ads that show ‘unrestricted merriment’ after consuming alcohol are not true.”<sup>114</sup> This argument also was rejected. One judge reasoned that:

[t]o assert that minors, because of their age, cannot understand that alcohol does not, in fact, make everyone

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No. 03-9183, 2006 WL 852126 at \*5 (D.C. Super. Ct. Mar. 28, 2006); *Tomberlin*, 2006 WL 4808298 at \*5.

107. *Goodwin*, 2005 WL 280330 at \*4; *Hakki*, 2006 WL 852126 at \*3; *Tomberlin*, 2006 WL 4808298 at \*5.

108. *Alston*, 2006 WL 1374514 at \*5.

109. *Id.*

110. *Id.* at \*6.

111. *Id.* (citing *Overton v. Anheuser-Busch Co.*, 517 N.W.2d 308, 309 (Mich. Ct. App. 1994)); see also *Goodwin*, 2005 WL 280330 at \*5.

112. *Alston*, 2006 WL 1374514 at \*6; *Goodwin*, 2005 WL 280330 at \*4.

113. *Alston*, 494 F.3d. at 565; *Goodwin*, 2005 WL 280330 at \*5; *Hakki v. Zima Co.*, No. 03-9183, 2006 WL 852126 at \*3 (D.C. Super. Ct. Mar. 28, 2006); *Tomberlin v. Adolph Coors Co.*, No. 05-CV-545, 2006 WL 4808298 (Wis. Cir. Feb. 16, 2006) (trial order).

114. *Alston*, 2006 WL 1374514 at \*6.

more attractive, transport them to a tropical paradise, or other similar scenarios that are common themes in alcohol ads is ridiculous at best. Moreover, while minors may be considered incompetent to handle the effects of the intoxication, there is no presumption that minors are incompetent to watch advertising, handle the messages included therein, or that they are incompetent to understand that underage drinking is illegal.<sup>115</sup>

Minors, in this case, were thus deemed competent to handle alcohol marketing with appeal to their demographic.<sup>116</sup>

The Sixth Circuit also expressed a deep skepticism about the impact of the alcohol marketing at issue on actual consumer behavior.<sup>117</sup> When denying plaintiffs standing, the court discussed the lack of a viable remedy for plaintiff parents in light of the fact that it is already illegal to sell alcohol to minors when it stated that “if outlawing the actual sale and purchase [of alcoholic beverages to minors] is insufficient to remedy the alleged injuries . . . , then outlawing mere advertising must be insufficient as well.”<sup>118</sup> This reasoning denies the practical reality of underage drinking. Despite its illegality, underage alcohol consumption is an important segment of the market for alcoholic beverages.<sup>119</sup> Underage alcohol consumption is estimated to account for between 11% and 20% of all U.S. alcohol sales.<sup>120</sup> Researchers who study alcohol marketing to youth have found that “[b]randing plays an essential role in alcohol marketing and the relationship of youth to individual alcohol products. Developing brand capital—that is, the meaning and emotion associated with a brand—is perhaps the most important function of alcohol advertising.”<sup>121</sup> An evolving body of research about actual underage alcohol consumption patterns has found that exposure to alcohol marketing

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115. *Id.*

116. *Id.*

117. *Alston*, 494 F.3d at 564-65.

118. *Id.* at 565-66.

119. See generally PAC. INST. FOR RESEARCH & EVALUATION, DRINKING IN AMERICA: MYTHS, REALITIES, & PREVENTION POLICY (2005), available at <http://www.lhc.ca.gov/lhc/drug/DrinkinginAmericaMosherSep26.pdf>.

120. *Id.*; Susan E. Foster et al., *Alcohol Consumption and Expenditures for Underage Drinking and Adult Excessive Drinking*, 289:8 JAMA 989, 994 (2003).

121. Michael Siegel et al., *Brand-Specific Consumption of Alcohol Among Underage Youth in the United States*, ALCOHOLISM: CLINICAL & EXPERIMENTAL RES. 1, 1 (2013).



increases teen alcohol consumption<sup>122</sup>, and that the top twenty-five alcohol brands in the U.S. account for about one-half of all underage alcohol consumption by volume.<sup>123</sup> This research demonstrates the effectiveness of atmosphere advertising or branding of alcohol to minors in terms of its impact on actual underage drinking patterns.

Current standards for deceptive practices are designed to address misleading “reason-why” advertising and are ill-equipped to protect vulnerable populations from branding that seeks to build positive associations with harmful products. The various courts’ discussions of teenagers’ abilities to process marketing messages and act in their own best interest is in sharp contrast with what is known about teen decision-making abilities. Moreover, courts’ conceptions of teen “reasonableness” seems to be rooted in societal expectations for teen behavior as opposed to how teens actually make decisions, given their brain and psychosocial development. In order to truly analyze potentially deceptive marketing from the perspective of a target audience of teens, additional insight into teen decision-making capabilities and how marketers intentionally exploit their emotionality and desires is needed.

#### *B. Branding with Appeal to Minors as an Unfair Trade Practice*

Unfairness focuses on preventing substantial injury to consumers that is not otherwise avoidable or beneficial to competition, or on preventing marketing that offends established public policy. Actions challenging branding campaigns with appeal to minors for cigarettes have fared better in the courts than the subsequent alcohol litigation. In the late 1990’s, litigation was embraced as an affirmative public health strategy to combat smoking-related disease. Tobacco litigation continues today on behalf of injured smokers, but state-led litigation efforts culminated with the MSA negotiated between forty-six states and four of the largest tobacco companies in 1998.<sup>124</sup> Prior to the MSA, state Attorneys General (AGs)

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122. Auden C. McClure et al., *Alcohol Marketing Receptivity, Marketing-Specific Cognitions, and Underage Binge Drinking*, 37:51 ALCOHOLISM: CLINICAL & EXPERIMENTAL RES. E404, E404 (2013).

123. Siegel et al., *supra* note 121, at 6.

124. Kathleen Michon, *Tobacco Litigation: History & Recent Developments*, NOLO, available at <http://www.nolo.com/legal-encyclopedia/tobacco-litigation-history-and-development-32202.html> (last visited Dec. 22, 2013).

filed suit against tobacco companies alleging, *inter alia*, violations of state consumer protection statutes.<sup>125</sup>

For example, the State of Iowa filed suit against R.J. Reynolds Tobacco Company, alleging that the company committed violations of the Iowa Consumer Fraud Act.<sup>126</sup> Alleged violations included: a) misleading the public regarding the addictive nature of cigarettes; b) misleading the public regarding whether cigarettes caused life-threatening illnesses; c) falsely claiming the company had performed an independent study to determine the health effects of smoking; d) failing to disclose added ingredients in cigarettes; e) and engaging in marketing practices oriented towards minors.<sup>127</sup> The Iowa District Court for Polk County denied a motion to dismiss the complaint that included “claims relate[d] to false and misleading public statements and unfair trade practices such as . . . marketing harmful tobacco products to minors.”<sup>128</sup> Before such actions were rendered moot in states that signed onto the MSA, other lower courts declined to dismiss consumer protection claims brought by AGs on behalf of the citizens of their states, alleging, in pertinent part, unfair and deceptive marketing of tobacco products to minors.<sup>129</sup>

R.J. Reynolds’ use of Joe Camel, a cartoon character depicted in print ads, on billboards, point-of-sale signage, and promotional items, like t-shirts and beach towels, to market its Camel brand cigarettes galvanized opposition to tobacco marketing to minors. Similar to the marketing strategies at the heart of the alcohol cases, R.J. Reynolds appealed to minors through depictions of Joe Camel, a likeable cartoon character often shown in sexual (surrounded by women in bikinis) or cool (riding a motorcycle) situations while smoking Camel cigarettes. Marketing campaigns built around spokes-characters are intended to build brand awareness. A 1991 study found that by the time children reached the age

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125. UNIV. CAL. SAN FRANCISCO LIBRARY & CTR. FOR KNOWLEDGE MGMT., TOBACCO LITIGATION DOCUMENTS, <http://www.library.ucsf.edu/tobacco/litigation/states> (last visited Dec. 22, 2013).

126. Complaint, *Iowa v. Phillip Morris Inc.*, No. CL71048 1, 41-44 (Iowa Dist. Ct., Nov. 27, 1996), available at [http://www.library.ucsf.edu/sites/all/files/ucsf\\_assets/ia\\_complaint.pdf](http://www.library.ucsf.edu/sites/all/files/ucsf_assets/ia_complaint.pdf).

127. *Id.*

128. Ruling on Certain Defendants’ Motion to Dismiss, *Iowa v. R.J. Reynolds*, No. CL71048 (Iowa Dist. Ct. Aug. 26, 1997), available at [http://www.library.ucsf.edu/sites/all/files/ucsf\\_assets/dec8-26.pdf](http://www.library.ucsf.edu/sites/all/files/ucsf_assets/dec8-26.pdf).

129. See generally, e.g., *State of Colo. ex. rel. Norton v. R.J. Reynolds Tobacco Co.*, No. 97CV3432 (Colo. Dist. Ct. Mar. 20, 1998), available at [http://www.library.ucsf.edu/sites/all/files/ucsf\\_assets/cocomplaint.pdf](http://www.library.ucsf.edu/sites/all/files/ucsf_assets/cocomplaint.pdf); *Maryland v. Phillip Morris, Inc.*, No. 96122017/CL211487 (Md. Cir. Ct. May 21, 1997), available at [http://www.library.ucsf.edu/sites/all/files/ucsf\\_assets/3mdcomplaint.pdf](http://www.library.ucsf.edu/sites/all/files/ucsf_assets/3mdcomplaint.pdf).

of six, Joe Camel and Mickey Mouse “were nearly equally well recognized and correctly matched by almost all children.”<sup>130</sup>

The Joe Camel campaign was challenged under California consumer protection law in the case of *Mangini v. R.J. Reynolds Tobacco Co.* The plaintiff alleged that the use of Joe Camel to market cigarettes constituted an unfair trade practice<sup>131</sup> because it encouraged minors to illegally purchase cigarettes.<sup>132</sup> *Mangini* was subsequently dismissed on preemption grounds,<sup>133</sup> but an intermediate court opinion in the case is one of the few written opinions applying the elements of unfairness to the target marketing of minors. In the opinion, the California appellate court applied the following test for unfairness: “(1) whether [the alleged conduct] . . . offends public policy as established by statutes, the common law, or otherwise; 2) whether it is immoral, unethical, oppressive or unscrupulous; and 3) whether it causes substantial injury to consumers.”<sup>134</sup>

The court found the use of Joe Camel offended California’s “statutory policy of keeping children from starting on the road to tobacco addiction.”<sup>135</sup> The court cited a number of state statutes intended to prevent tobacco use, including bans on tobacco sales to minors and free tobacco sampling.<sup>136</sup> While the court found the question of ethics and morals too subjective, it did find the targeting of minors by tobacco companies to be oppressive and unscrupulous in that “it exploits minors by luring them into an unhealthy and potentially life-threatening addiction before they have achieved the maturity necessary to make an informed decision whether to take up smoking despite its health risks.”<sup>137</sup> The court also recognized findings by the California State Legislature that tobacco advertising was an important contributor to smoking by children.<sup>138</sup> The court concluded that “[a] persuasive argument can be made that the targeting of minors causes substantial physical injury to them.”<sup>139</sup>

In a footnote, the court went on to say that the question of “unfair” marketing is one of degree.<sup>140</sup> The question is whether the defendants had

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130. Paul M. Fischer et al., *Brand Logo Recognition by Children Aged 3 to 6 Years*, 266:22 JAMA 3145, 3147 (1991).

131. *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73, 75 (Cal. 1993).

132. *Id.*

133. *In re Tobacco Cases II*, 41 Cal. 4th 1257, 1276 (Cal. 2007).

134. *Mangini v. R.J. Reynolds Tobacco Co.*, 21 Cal. Rptr. 2d 232, 241 (Cal. Ct. App. 1993).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 242 n. 2.

crossed a boundary in their efforts to market their cigarettes.<sup>141</sup> “If R.J. Reynolds had, for example, presented Teenage Mutant Ninja Turtles on children’s lunch boxes to promote cigarette smoking, we have little doubt there would be a statutory cause of action for unfair advertising.”<sup>142</sup> The court relied on how blatantly the defendant marketed its products to minors to determine if its efforts were unfair.<sup>143</sup> It held that the Joe Camel advertisements could be found to be unfair under the California consumer protection law if the factual record showed they violated “public policy by luring minors into unlawfully purchasing and consuming cigarettes.”<sup>144</sup>

The Joe Camel campaign also was the subject of an enforcement action by the Federal Trade Commission (FTC) as an unfair trade practice under the Federal Trade Commission Act.<sup>145</sup> In its complaint, the FTC alleged that the campaign made smoking attractive to children and adolescents under the age of eighteen, inducing them to smoke, or at least increasing the risk that they would smoke.<sup>146</sup> The complaint alleged that the Joe Camel campaign accomplished its goal of getting teens to smoke because “after the initiation of the Joe Camel campaign, the percentage of smokers under the age of 18 who smoked Camel cigarettes became larger than the percentage of all adult smokers aged 18 and older who smoked Camel cigarettes.”<sup>147</sup> It is of note that two dissenting Commissioners specifically noted that they did not find sufficient evidence to support a causal connection between the Joe Camel campaign and underage smoking.<sup>148</sup>

The complaint also alleged that R.J. Reynolds knew or should have known that its advertising campaign would appeal to individuals under the

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141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 242.

145. Complaint, In the Matter of R.J. Reynolds Tobacco Co., F.T.C. No. 9285 1, 2-3 (May 28, 1997), available at <http://www.ftc.gov/sites/default/files/documents/cases/1997/05/d9285cmp.pdf> [hereinafter Complaint, *R.J. Reynolds*]. Two Commissioners dissented from the decision to issue the complaint, relying heavily on the fact that the Commission declined to file the same claim against R.J. Reynolds three years earlier. *In the Matter of R.J. Reynolds Tobacco Co.*, F.T.C. No. 9285 (May 28, 1997) (Starek, J., dissenting), available at <http://www.ftc.gov/sites/default/files/documents/cases/1997/05/jcrbs3.htm> [hereinafter Starek dissent]; *In the Matter of R.J. Reynolds Tobacco Co.*, F.T.C. No. 9285 (May 28, 1997) (Azcuena, J., dissenting), available at <http://www.ftc.gov/sites/default/files/documents/cases/1997/05/rjrmla.htm> [hereinafter Azcuena dissent].

146. Complaint, *R.J. Reynolds*, *supra* note 145, at 2.

147. *Id.*

148. Azcuena dissent, *supra* note 146; Starek dissent, *supra* note 146.

age of eighteen, and the campaign therefore would cause teens under eighteen to smoke.<sup>149</sup> Moreover, by 1984 the defendant allegedly had identified the need to attract younger, “first usual brand” smokers.<sup>150</sup> The FTC asserted that “children and adolescents do not adequately comprehend the nature of the risk or the seriousness of nicotine addiction, or the other dangerous health effects of smoking cigarettes.”<sup>151</sup> Therefore, due to the harmful nature of cigarettes and nicotine addiction, the Joe Camel campaign was likely to cause substantial injury to children under the age of eighteen.<sup>152</sup>

In its proposed order, the FTC ordered the defendant to “cease and desist from advertising to children its Camel brand cigarettes through the use of the images or themes relating or referring to . . . the Joe Camel figure.”<sup>153</sup> The proposed order also required R.J. Reynolds to supply data concerning each of its cigarette brands’ share of smokers under the age of eighteen, and to issue public education messages discouraging people under eighteen from smoking.<sup>154</sup>

Ultimately, the use of cartoon characters, like Joe Camel, to promote tobacco products was prohibited by the MSA.<sup>155</sup>

## VI. IS “LIVE FOR NOW” THE JOE CAMEL OF SODA MARKETING?

In this section we examine the Live for Now campaign as a potentially unfair trade practice. The legal actions taken to address the Joe Camel campaign were a key element in an overall tobacco control strategy. There are a wide range of factors contributing to the obesity crisis, and as discussed above, research has shown that sugary drinks are a driver of the epidemic. In this section we explore whether, much like the Joe Camel campaign, Live for Now is susceptible to a challenge as an unfair trade practice.

Interpretations of unfair marketing vary from state to state.<sup>156</sup> Federal consumer protection law currently defines an unfair act as a trade practice that “is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by

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149. Complaint, *R.J. Reynolds*, *supra* note 145, at 2.

150. *Id.* at 1.

151. *Id.* at 3.

152. *Id.*

153. *Id.* at 5.

154. *Id.*

155. MASTER SETTLEMENT AGREEMENT, *supra* note 91, at 14.

156. See generally MARY DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 3:15 (2012).

countervailing benefits to consumers or competition.”<sup>157</sup> When determining if an act constitutes an unfair trade practice, “the Commission may consider established public policies as evidence to be considered with all other evidence.”<sup>158</sup> However, “public policy considerations may not serve as a primary basis” for determining whether a trade practice is unfair.<sup>159</sup>

As an initial matter, it is important to distinguish soda marketing to teens from alcohol and tobacco marketing to teens. The private alcohol cases alleging deceptive marketing discussed above failed to establish standing primarily because the cases were filed by parents to recover so-called “family assets.” Soda, unlike alcohol and cigarettes, is a legal product that teens buy with their own spending money. A State Attorney General could certainly investigate and issue a complaint on behalf of the adolescents in her particular state. Any private cases filed alleging unfair target marketing of soda to teens should be filed on behalf of a class of teens who purchased soda products for themselves with their own spending money. Moreover, since soda is a legal product, there would be no issue of intervening criminal activity in the course of the sale to insulate beverage companies that engage in marketing to teens from liability.

With respect to substantial injury to consumers, full-sugar carbonated soft drinks like Pepsi Cola are one of the most obesogenic categories of beverages. One twenty ounce bottle of full sugar Pepsi Cola contains 250 calories and sixty-nine grams of sugar, which equates to approximately eighteen teaspoons of sugar.<sup>160</sup> While evidence of sugar addiction is preliminary and controversial, Pepsi Cola also contains caffeine, which is a mildly addictive substance that can drive consumption.<sup>161</sup> There is evidence that food and beverage marketing is a significant contributor to obesity.<sup>162</sup> The purpose of branding campaigns like Live for Now is to secure lifelong brand loyalty and a lifetime of consumption. The stated purpose of the teen-focused campaign, as expressed by PepsiCo executives, is to make full sugar soda “cool” and to prop-up a slumping category of

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157. 15 U.S.C. § 45(n) (2013).

158. *Id.*

159. *Id.*

160. PEPSICO, THE FACTS ABOUT YOUR FAVORITE BEVERAGES, [http://www.pepsico-beveragefacts.com/infobyproduct.php?prod\\_type=1026&prod\\_size=20&brand\\_fam\\_id=1051&brand\\_id=1000&product=Pepsi](http://www.pepsico-beveragefacts.com/infobyproduct.php?prod_type=1026&prod_size=20&brand_fam_id=1051&brand_id=1000&product=Pepsi) (last visited Dec. 23, 2013).

161. Jennifer L. Temple, *Caffeine Use in Children: What We Know, What We Have Left to Learn, and Why We Should Worry*, 33 NEUROSCI. & BIOBEHAV. REV. 793, 799 (2009).

162. Mary Story & Simone French, *Food Advertising and Marketing Directed at Children and Adolescents in the U.S.*, 1 INT’L J. BEHAV. NUTR. & PHYS. ACTIVITY 3, 13 (2004).

beverages.<sup>163</sup> Similar to the Joe Camel campaign, which reversed a decline in teenage smoking, the Live for Now campaign threatens to do the same for teenage soda consumption. Like tobacco, the health harms of soda accrue as one continues to consume the product. Obesity, especially higher levels of obesity, is associated with increased mortality compared with people of normal weight.<sup>164</sup> For example, one study found that obesity was associated with a substantial number of excess deaths, the majority of which occurred in individuals less than seventy years old.<sup>165</sup> Obesity-related conditions include heart disease, stroke, type-2 diabetes, and certain types of cancer.<sup>166</sup> These conditions are some of the leading causes of preventable death in the U.S.<sup>167</sup>

Whether or not harms caused by a trade practice are easily avoidable by a consumer depends, among other factors, upon the target audience and the tactics used. The Live for Now campaign itself is not easily avoided by adolescents because it is designed to pervade virtually every aspect of their lives via television, internet, mobile marketing, and social media. With respect to the content of the campaign, Live for Now is a clear directive to teens that they should ignore the health risks of full sugar soda like Pepsi Cola. Marketers understand that “reasonable” adolescents have a hard time grasping the idea of long-term consequences, and instead focus on the short-term when making purchase decisions for products like soda.<sup>168</sup> Live for Now is designed to capitalize on this cognitive vulnerability through depictions of healthy and happy young people and the use of popular and successful musicians, athletes, and celebrities as spokespeople for the brand. The target audience of adolescents and the tactics used create a trade practice that leads to future health harms that are not reasonably avoided by adolescents when viewed from their perspective as a target audience of consumers.

No countervailing benefits to consumers or competition of a campaign like Live for Now are readily apparent. The campaign is designed to build brand awareness and brand loyalty as opposed to conveying factual information about the product to consumers or its benefits relative to other similar products in the marketplace. Nothing in

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163. *Al Carey Transcript*, *supra* note 82, at 4.

164. Katherine M. Flegal et al., *Excess Deaths Associated with Underweight, Overweight, and Obesity*, 293:15 JAMA 1861, 1863-64 (2005).

165. *Id.* at 1864.

166. CTRS. FOR DISEASE CONTROL & PREVENTION, ADULT OBESITY FACTS, <http://www.cdc.gov/obesity/data/adult.html> (last visited Sept. 7, 2013).

167. *Id.*

168. Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 231 (1995).

the campaign appears to be designed to spur a competitor to improve its offerings in terms of nutritional profile, price, or quality of ingredients.

Similar to the public health policies to curb youth smoking discussed in the *Mangini* case, public health nutrition policy continues to expand to reduce adolescent consumption of sugary drinks. For example, California state law currently prohibits the sale of full-sugar soft drinks like Pepsi Cola in schools.<sup>169</sup> Pepsi Cola is not an allowable beverage under the U.S. Department of Agriculture's proposed nutrition standards for competitive beverages sold in schools that, when finalized, will apply to all schools participating in the National School Lunch Program.<sup>170</sup> Pepsi Cola is not currently allowed to be sold in middle or high schools under the American Beverage Association's voluntary School Beverage Guidelines established in partnership with the Alliance for a Healthier Generation.<sup>171</sup> In addition, the U.S. Department of Agriculture recommends limiting consumption of empty calories from added sugars and solid fats and includes soda in its list of foods that contribute the most empty calories to the U.S. diet.<sup>172</sup> One twenty ounce bottle of full sugar Pepsi Cola contains 250 calories and approximately eighteen teaspoons of sugar.<sup>173</sup> This amount exceeds the U.S. Department of Agriculture's current total daily empty calorie recommendation for sedentary girls between the ages of fourteen and eighteen of 160 calories per day and is almost equal to the total 265 calorie limit recommended for sedentary boys between the ages of fourteen and eighteen.<sup>174</sup> The target marketing of full sugar soda to teens through campaigns like Live for Now is at odds with these policies.

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169. CAL. CODE REGS. tit. 5, § 15576 (2013); CAL. EDUC. CODE § 49430 (2013); CAL. EDUC. CODE § 49431.5 (2013).

170. National School Lunch Program and School Breakfast Program: Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010, 78 Fed. Reg. 27: 9530 (proposed Feb. 8, 2013) (codified at 7 C.F.R. pts. 210, 220).

171. AM. BEVERAGE ASS'N, SCHOOL BEVERAGE GUIDELINES, <http://www.ameribev.org/nutrition-science/school-beverage-guidelines/> (last visited Jan. 27, 2014).

172. U.S. DEP'T OF AGRIC., WHAT ARE EMPTY CALORIES?, <http://www.choosemyplate.gov/weight-management-calories/calories/empty-calories.html> (last visited Jan. 27, 2014).

173. PEPSI, [http://www.pepsicobeveragefacts.com/infobyproduct.php?prod\\_type=1026&prod\\_size=20&brand\\_fam\\_id=1051&brand\\_id=1000&product=Pepsi](http://www.pepsicobeveragefacts.com/infobyproduct.php?prod_type=1026&prod_size=20&brand_fam_id=1051&brand_id=1000&product=Pepsi) (last visited Jan. 27, 2014).

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## VII. CONCLUSION

It remains to be seen when or whether State AGs or the private bar will take up cases to protect adolescents from aggressive marketing of unhealthy food and beverage products like the Live for Now campaign. The very fact that such actions will involve adolescent consumers makes already complicated legal issues that much more complex. What little case law exists with respect to adolescents and branding is inconsistent at best. Both cigarettes and alcohol are illegal to sell to minors and are addictive products. Pepsi Cola contains high levels of sugar and is caffeinated. The marketing strategies challenged in the alcohol cases had the same goal as the Joe Camel campaign—to persuade adolescents to use an unhealthy product that adults were abandoning in droves. The legal standards for deception and unfairness are quite different. This does not fully explain why the *Mangini* court and the FTC’s unfairness analysis acknowledged the diminished capacity of adolescents to make decisions in their long-term interest with respect to tobacco, yet the deception analysis in the alcohol cases was primarily dismissive of teens’ diminished ability to process alcohol marketing messages. Actions to address food and beverage marketing to adolescents must take great care to include evidence-based arguments about teen decision-making and how their development impacts their behavior as consumers. Exposing the deliberate exploitation of teen biological and psychological development by marketers to increase their consumption of unhealthy products will be equally important. The fact that PepsiCo openly touts to its shareholders and the press that Live for Now is specifically designed to increase teen consumption of one of its most unhealthy beverages also demonstrates that much more work is needed at the broader societal level to denormalize sugary drinks.