



NATIONAL POLICY & LEGAL ANALYSIS NETWORK
TO PREVENT CHILDHOOD OBESITY



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State AG Enforcement of Food Marketing Laws: A Brief History

In their role as the primary agents enforcing state consumer protection laws, state attorneys general (AGs) are promising allies for advocates and researchers working to address problematic food and beverage marketing practices. Consumer protection laws vary from state to state,¹ but every state has one or more laws prohibiting *deceptive trade practices* such as false or misleading advertisements.² A bare majority of states also prohibit *unfair* acts or practices,³ and some states prohibit *unconscionable* business practices.⁴

State AGs have demonstrated their willingness and ability to enforce these laws against food and beverage marketers, particularly in cases involving health or nutritional benefits claims, or involving products that pose a health risk.⁵ Also, state AGs' efforts have tended to focus on foods and beverages of poor nutritional quality, indicating they could be allies for child obesity prevention advocates concerned about what — as well as how — foods are marketed to children.

Many researchers and advocates concerned about childhood obesity have looked to state attorneys general (AGs) with a hopeful eye. This fact sheet is one of a series from NPLAN about state AGs and their potential as effective allies in efforts to curb questionable and unhealthy food and beverage marketing practices aimed at children. All of these resources are available at www.nplan.org.

That Was Then: State AGs as the “Food Cops”

During the 1980s, a group of eight to ten state AGs became known as the “food cops” because of their focus on challenging unsupported and misleading food labeling and health claims.⁶ This group, led by the AG offices in California, New York, and Texas, challenged the marketing practices of a wide range of processed-food companies, breakfast cereal makers, and fast food restaurants. The Texas AG, for example, challenged Kraft for misleadingly advertising Cheez Whiz as “real cheese,” and the New York AG challenged Arby’s promotion of a high-calorie sandwich as a “lean meal.”⁷

In 1986, about a dozen state AGs (led by New York, California, and Texas) secured agreements with several national fast food chains obligating the chains to provide certain nutritional and ingredient information to customers through brochures and other means. The state AGs contended that the disclosure of this information was required by state deceptive and unfair trade practices laws and food labeling laws.⁸

Shortly thereafter, in the spring of 1987, the California, New York, and Texas AGs initiated another investigation of a McDonald's advertising campaign alleging that the company was making false and misleading claims about reduced sodium content, milkshake ingredients, and the heart-healthiness of its hamburgers.⁹

The “food cops” tended to focus on marketing practices related to health claims or concerns. They challenged Campbell's “Soup is Good Food” campaign for making deceptive health benefit claims; they challenged claims by Carnation that its infant formula was “hypoallergenic”; and they alleged that Proctor & Gamble's “no cholesterol” claims about Crisco were misleading. They investigated Sara Lee's use of the word “light” to market a dessert line that had more calories per serving than its regular desserts; they challenged ingredient and nutritional claims Nabisco made about two of its cereal products; and they challenged how Nabisco and CPC International marketed their margarine products with claims about cholesterol reduction.¹⁰ In actions that may provoke déjà-vu, Kellogg's marketing of two of its children's breakfast cereals (among other cereals) also came under fire: in 1988, the New York AG reached an agreement that required Kellogg to stop claiming that its Rice Krispies cereal contained “energy-releasing” B vitamins that “can help give you some get up and go.”¹¹ Around that same time period, several AGs also investigated Kellogg's claims about three other cereal products — including a claim that Frosted Flakes is a “snack” that is “good for you” and has less sugar than an apple.¹²

Kellogg ultimately filed a lawsuit against the Iowa AG's office in August 1990, calling the investigations “harassment.”¹³ Around this same time, Kellogg also sued the Texas AG's office to enjoin its investigation of how Kellogg was marketing a cereal named Heartwise.¹⁴

By this point, state AGs had developed a reputation for advancing a national policy on health claims that was much more stringent than what the U.S. Food and Drug Administration (FDA), the Federal Trade Commission (FTC) and industry groups supported.¹⁵ Moreover, these state AG enforcement activities highlighted the lack of regulation of these kinds of claims. In fact, the state AGs' actions were one of the forces that helped pass the Nutrition Labeling and Education Act of 1990¹⁶ — one example of how state AGs have used their consumer protection authority to bring impact cases and spur national policy development on food marketing issues.

This Is Now: Recent AG Campaigns

Alcoholic energy drinks

Alcoholic energy drinks (AEDs) provide a more recent example of state AGs' actions to address the marketing of problematic foods and beverages. Alcoholic energy drinks (AEDs) typically combine malt liquor or other alcohol with caffeine or other stimulants. These products began appearing on the market in the United States in 2000, and

gained popularity within a few years.¹⁷ Critics say the drinks are marketed in ways that appeal to teenagers, and that these products are linked to binge drinking¹⁸ and increased likelihood of drunk driving.¹⁹

Over the past three years, a number of state AGs have been conducting a campaign, supported by public health advocates, to change industry practices and public understanding around these products, and to draw federal regulatory attention to the public health concerns they pose. This campaign has included a combination of formal and informal multistate actions, from “open letters” to formal investigations and settlements, as well as public education efforts.²⁰ As a basis for taking action, state AGs alleged that companies such as Anheuser-Busch and MillerCoors were violating state consumer protection, product safety, and trade practice laws by, among other practices, “making express and implied false or misleading health-related claims about the energizing effects of [their AEDs], failing to disclose to consumers the effects and consequences of drinking alcohol beverages that are combined with caffeine and/or other stimulants,” and advertising these products to people under the age of 21.²¹

“Smart Choices”³⁴

The recent “Smart Choices” nutrition rating system provides another example of how state AGs can help drive change in industry practices and promote national policy development. Smart Choices was an industry-sponsored, voluntary rating system developed by a group of food and beverage industry representatives, nutrition experts, health organizations, and government observers. Foods that met certain nutritional standards based on the USDA's Dietary Guidelines for Americans qualified for the “Smart Choices” logo on the front of their packaging, which was touted as being a helpful tool for consumers to quickly identify food products that were good nutritional choices. The program was to be fully implemented by the participating food and beverage manufacturers (which included Kellogg, Kraft Foods, PepsiCo, General Mills, and others) by the end of 2009.

The program came under fire in the late summer and fall of 2009, when foods such as Kellogg's Fruit Loops and Frosted Flakes, and Frito-Lay's Cracker Jack, were found to qualify for the “Smart Choices” logo. Media ridicule and public skepticism, accompanied by calls for a formal investigation into the program, led to its collapse. Following a call for investigation by Congresswoman Rosa L. DeLauro (D-Conn.), Connecticut Attorney General Richard Blumenthal announced that he and several other state AGs were investigating the Smart Choices program. Several days later, the FDA announced it was also going to investigate, and the program was put on hold. In December 2009, the Institute of Medicine announced that, at the direction of the FDA and the U.S. Centers for Disease Control and Prevention (CDC), it was undertaking a review of front-of-package nutrition rating systems and would issue a report in 2010.³⁵

AG Actions on Alcoholic Energy Drinks (AEDs): A Timeline

May 2007: Twenty-nine state AGs sent a letter to Anheuser-Busch expressing “serious concerns” about its development and promotion of several AEDs. One called “Spykes” was packaged in “tiny, attractive, brightly colored containers,” appealing particularly to teenage and pre-teen girls. The AGs asked the company to change how it packaged and marketed these drinks.²² Shortly thereafter, Anheuser-Busch announced it was pulling Spykes off the market.

August 2007: Thirty state AGs sent a letter to the federal Alcohol and Tobacco Tax and Trade Bureau (TTB) expressing concern about the formulation and marketing of AEDs, asking the TTB to “review the entire category of alcoholic energy drinks in a systematic way to discover and act upon misleading claims.”²³ (The TTB regulates the labeling of alcoholic beverages.) The TTB responded with a letter thanking the state AGs for bringing their concerns to its attention, assuring them that it would continue to “carefully monitor advertisements and formulas for compliance,” and would “aggressively take enforcement action when we find violations.”²⁴

July 2008: Capping an investigation by eleven states that included subpoenas, Anheuser-Busch agreed to stop selling AEDs until it reformulated them without caffeine or other stimulants.²⁵

September 2008: Twenty-five state AGs sent a letter to MillerCoors criticizing its decision to introduce a new AED to the market (SparksRed).²⁶

December 2008: MillerCoors entered into an AVC with 13 state AGs and the San Francisco City Attorney’s Office; the company agreed to reformulate its “Sparks” brand, the most popular line of AEDs, so the products would not contain caffeine or any other stimulant, and to stop producing any alcoholic beverage containing more than insignificant amounts of naturally occurring caffeine.²⁷

July 2009: Three state AGs submitted a comment on a proposed FTC order setting out an agreement with Constellation Brands, which made an AED called Wide Eye. The AGs urged the FTC to revise and strengthen the order to include prohibitions on specific misleading marketing practices, including the product’s name.²⁸

September 2009: Eighteen state attorneys general and the San Francisco City Attorney’s Office sent a letter to the FDA describing an emerging scientific consensus that caffeinated alcoholic drinks do not meet the FDA’s Generally Recognized as Safe (GRAS) standard. The AGs called upon the FDA to take “all necessary steps that will result in the immediate removal of AEDs from the marketplace.”²⁹ The AGs also submitted a letter from leading scientists and medical professionals explaining that, based on a thorough review of published scientific literature, AEDs pose significant public health risks, including “increased risk of serious injury to oneself and to others, as the result of driving while intoxicated, sexual assault, and other dangerous behaviors.”³⁰

November 2009: The FDA announced that it was collecting information from 27 AED manufacturers about their “rationale, and supporting data and information, for concluding that [the] use of caffeine in an alcoholic beverage is GRAS or prior sanctioned [by the FDA].”³¹ The FDA press release referred to the September letter from the AGs.³²

December 2009: The TTB announced that in 2010 it will seek public comments on the labeling and advertising of alcoholic beverages that contain caffeine, vitamins, and minerals.³³

Kellogg’s immunity claims

In October 2009 — at the same time the Smart Choices program was under fire — Kellogg began distributing boxes of Cocoa Krispies and other “Krispies” cereals that boasted, “Now helps support your child’s IMMUNITY” in a large banner on the front of each box. San Francisco City Attorney Dennis Herrera, pursuant to a California consumer protection law relating to false or misleading advertising claims,³⁶ promptly sent a letter to Kellogg expressing concern about this immunity-boosting claim and demanding that Kellogg substantiate it.³⁷ One week later Kellogg announced it was ending the marketing campaign.³⁸ That same day, the Oregon AG’s office issued a Civil Investigative Demand (CID) to Kellogg, also demanding substantiation of its immunity claims. On December 15, 2009, Kellogg sent the Oregon AG’s office a letter documenting an agreement that, in exchange for the withdrawal of the CID and the closing of its investigation, Kellogg agreed to cease production of products with immunity claims as of November 26, 2009, and to stop shipment of these products by January 15, 2010. Kellogg also stated that it had no plans to make such immunity claims for its products again, and if it does resume using these claims within six years, it will provide the Oregon AG’s office with advance notice “and the scientific evidence that Kellogg believes substantiates this claim.”³⁹ Additionally, Kellogg agreed to donate about 480,000 boxes of cereal to two food banks.⁴⁰

Beyond Law Enforcement

State AGs have also contributed to obesity prevention efforts through consumer education programs and other initiatives. In 2010, for example, Vermont Attorney General William Sorrell convened representatives from state government, community groups, industry, and other stakeholder groups to identify actions to reduce obesity in Vermont as part of a statewide obesity initiative.⁴¹ For many years, the Minnesota Attorney General’s Office has published a booklet called “Fast Food Facts,” which provides calorie information and healthier eating suggestions for fast food consumers.⁴² In 2004, the New York Attorney General’s Office issued a report to help consumers seeking health care coverage for obesity treatments to understand their rights.⁴³

For more information about state AGs and their consumer protection authority and activities, see the other fact sheets in this series, available at www.nplan.org.

Additional Resources:

- *State Attorneys General and Public Health: Capacity and Impact*, a 2010 memo from the National State Attorneys General Program and the Rudd Center on Food Policy and Obesity, available at www.law.columbia.edu/center_program/ag/policy/health/Obesity
- The National State Attorneys General Program has launched a Health Law Initiative to provide resources and convene events on the role of Attorneys General in health advocacy and enforcement.” For more information, see www.law.columbia.edu/center_program/ag/policy/health



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- ¹ For an overview of the state consumer protection laws in the fifty states (with a focus on comparing the strengths and weaknesses of each state's laws), see CAROLYN CARTER, NAT'L CONSUMER LAW CTR. INC., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES (2009), available at www.consumerlaw.org/issues/udap/content/UDAP_Report_Feb09.pdf; Alan S. Brown et al., *Comparison of Consumer Statutes Across the Fifty States*, FDCC Q. (2005), available at http://findarticles.com/p/articles/mi_qa4023/is_200504/ai_n14800199/?tag=content;col1. See also David L. Belt, *The Standard for Determining "Unfair Acts or Practices" Under State Unfair Trade Practices Acts*, 80 CONN. BAR J. 247 (2006) (discussing the unfairness standards in the 28 jurisdictions that have unfair business practices laws).
- ² MARY DEE PRIDGEN, CONSUMER PROTECTION AND THE LAW § 3:1 (2009); see also CARTER, *supra* note 1, at 11.
- ³ See Belt, *supra* note 1 at 303.
- ⁴ PRIDGEN, *supra* note 2, at § 3:15.
- ⁵ See Richard M. Cooper, et al., *History of Health Claims Regulation*, 45 Food Drug Cosm. L.J. 655, 678-82 (1990) (summarizing state AG consumer protection enforcement activity relating to health and nutrition claims in the 1980s). See also Office of the Attorney Gen.: State of California, Atty. Gen. Brown Settles Potato Chip Lawsuit with Heinz, Frito-Lay & Kettle Foods, <http://ag.ca.gov/newsalerts/release.php?id=1595&> (last visited Apr. 24, 2010); Complaint, *People v. Snyders of Hanover, Inc.*, et al., (Cal. Super. Ct., Alameda County June 1, 2009), available at <http://ag.ca.gov/prop65/pdfs/snyders.pdf>; Press Release, Office of the Attorney Gen.: State of Cal., Attorney General Lockyer Announces Settlement With Hershey and Mars Subsidiaries To Reduce Lead In Mexican Candy Popular with Children (June 29, 2006), available at <http://ag.ca.gov/newsalerts/release.php?id=1317>.
- ⁶ Luther C. McKinney et al., *What to Do When the Attorney General Calls: State Regulation of National Advertising*, 3 DEPAUL BUS. L.J. 119, 122 & 126 (1991).
- ⁷ PRIDGEN, *supra* note 2, at § 7.1.
- ⁸ Affidavit of Stephen Gardner, July 12, 1994, available at www.mcspotlight.org/people/witnesses/advertising/gardner_stephen.html.
- ⁹ *Three State Enforcers Demand Withdrawal of McDonald's Ads*, 52 ANTITRUST & TRADE REG. REP. (BNA) 932 (1987). See also Affidavit of Stephen Gardner, *supra* note 8.
- ¹⁰ McKinney, *supra* note 6, at 126-30.
- ¹¹ Cooper, *supra* note 5, at 679 (citing *In re Kellogg Co.*, Assurance of Discontinuance (Aug. 4, 1988)).
- ¹² McKinney, *supra* note 6, at 130; Associated Press, *5 More States Accuse Kellogg of Deceptive Claims*, N.Y. TIMES, Dec. 30, 1990, § 1. As described below, Kellogg again recently came under state AG scrutiny for marketing its "Krispies" line of cereals as "immunity boosting," and Frosted Flakes as a "Smart Choice." In addition, a Kellogg's marketing campaign for Frosted Mini-Wheats was investigated by the FTC. The FTC found that that Kellogg's claims that eating Frosted Mini-Wheats improved children's attentiveness by 20% were unsubstantiated. In *re Kellogg Co.*, FTC No. 082-3145, July 31, 2009, available at www.ftc.gov/os/caselist/0823145/index.shtm.
- ¹³ McKinney, *supra* note 6, at 130.
- ¹⁴ *Id.* at 131.
- ¹⁵ Cooper, *supra* note 5, at 678.
- ¹⁶ See, e.g., INSTITUTE OF MEDICINE, FOOD LABELING: TOWARD NATIONAL UNIFORMITY 4 (Donna V. Porter & Robert O. Earl eds., 1992) (noting that criticism of food labeling practices "escalated in the 1980s" and that "[b]y 1990, efforts to reform the current policy on food labeling, especially in regard to nutrition information, were being pursued by the Federal agencies and Congress. . . . culminat[ing] in the passage of NLEA."
- ¹⁷ MICHELE SIMON, MARIN INSTITUTE, ALCOHOL, ENERGY DRINKS, AND YOUTH: A DANGEROUS MIX 6, available at www.marininstitute.org/site/images/stories/pdfs/energydrinkreport.pdf.
- ¹⁸ *Id.*
- ¹⁹ See, e.g., Dennis L. Thombs, et al., *Event-Level Analyses of Energy Drink Consumption and Alcohol Intoxication in Bar Patrons*, 35 ADDICTIVE BEHAV. 325 (2010).
- ²⁰ For example, the California Attorney General's Office and the California Department of Alcohol and Drug Programs recently launched a website to educate the public about the health and safety risks of AEDs, and to provide resources to public health advocates and others. This website is available at www.adp.ca.gov/youth/aed_index.shtml.
- ²¹ Assurance of Voluntary Compliance and Voluntary Discontinuance, *In re Anheuser-Busch, Inc.* (July 1, 2008), at 2, available at www.marininstitute.org/site/images/stories/pdfs/ag_and_ab_agreement.pdf; and Assurance of Voluntary Compliance and Voluntary Discontinuance, *In re MillerCoors, LLC* (Dec. 18, 2008), at 2, available at www.marininstitute.org/site/images/stories/pdfs/sparksmillercoors_finalavc12_08.pdf.
- ²² Letter from several state Attorneys Gen. to August A. Busch IV, President and Chief Executive Officer, Anheuser-Busch Cos., Inc. (May 10, 2007), available at www.ct.gov/ag/lib/ag/children/attorneysgenerallettertoanheuserbuschrealecoholenergydrinks.pdf.
- ²³ Letter from several state Attorneys Gen. to the Honorable John J. Manfreda, Adm'r, Alcohol and Tobacco Tax and Trade Bureau 3 (Aug. 20, 2007), available at www.marininstitute.org/alcopops/resources/TTB_Letter_Final_Sigs_08172007.pdf.
- ²⁴ Letter from the Honorable John J. Manfreda, Adm'r, Alcohol and Tobacco Tax and Trade Bureau to the Nat'l Ass'n of Attorneys Gen. (Sept. 20, 2007) (on file with author).
- ²⁵ *In re Anheuser-Busch*, *supra* note 21.
- ²⁶ Letter from several state Attorneys Gen. to W. Leo Kiely, Chief Executive Officer and President, MillerCoors, LLC (Sept. 18, 2008), available at www.marininstitute.org/site/images/stories/pdfs/ag_sparks_red_ltr.pdf.
- ²⁷ *In re MillerCoors*, *supra* note 21.
- ²⁸ Letter from chief legal officers of Conn., Me., and Md. to the Office of the Sec'y, Fed. Trade Comm'n (July 10, 2009), available at www.ftc.gov/os/comments/constellationbrands/542620-00002.pdf.
- ²⁹ Letter from chief legal officers of Connecticut, Utah, and Guam to Dr. Margaret A. Hamburg, Comm'r, U.S. Food and Drug Admin. (Sept. 25, 2009), available at www.fda.gov/downloads/Food/FoodIngredientsPackaging/UCM190371.pdf.
- ³⁰ Letter from several researchers and scientists to the Attorneys General of Connecticut, Utah, and Guam (Sept. 21, 2009), available at <http://www.fda.gov/downloads/Food/FoodIngredientsPackaging/UCM190372.pdf>.
- ³¹ Caffeinated Alcoholic Beverages Sample Letter #1 (FDA, Nov. 13m 2009), available at www.fda.gov/Food/FoodIngredientsPackaging/ucm190387.htm. For links to additional sample letters and other materials related to the FDA's inquiry, see www.fda.gov/Food/FoodIngredientsPackaging/ucm190366.htm.
- ³² Press Release, U.S. Food and Drug Admin. (Nov. 13, 2009) available at www.fda.gov/NewsEvents/Newsroom/pressannouncements/ucm190427.htm.
- ³³ Semiannual Agenda and Fiscal Year 2010 Regulatory Plan, U.S. Dep't of the Treasury (Dec. 7, 2009), available at www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a64e27.
- ³⁴ For more information on history of the Smart Choices program and its collapse, see KATE ARMSTRONG, STUMPED AT THE SUPERMARKET, MAKING SENSE OF NUTRITION RATINGS SYSTEMS (2010), available at www.nplan.org.
- ³⁵ For more information and updates about the Institute of Medicine's activities on front-of-package labeling systems, see Institute of Medicine, Examination of Front-of-Package Nutrition Rating System and Symbols, www.iom.edu/Activities/Nutrition/NutritionSymbols.aspx (last visited Apr. 24, 2010).
- ³⁶ CAL. BUS. & PROF. CODE § 17508 (Deering 2009).
- ³⁷ Letter from Dennis J. Herrera, City Attorney, San Francisco, Cal. to A.D. David MacKay, President and Chief Executive Officer, Kellogg Co. (Oct. 27, 2009), available at www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=335.
- ³⁸ Press Release, San Francisco City Attorney's Office (Nov. 4, 2009), available at www.sfcityattorney.org/index.aspx?page=250.
- ³⁹ Letter from Gary Pilnick, Sr. Vice President Gen. Counsel, Kellogg Co. to David Hart, Assistant Attorney Gen. in Charge, Or. Dep't of Justice (Dec. 15, 2009) (on file with author).
- ⁴⁰ *Id.* In response to Kellogg's "immunity boosting" campaign, the FTC subsequently expanded its order in the Mini-Wheats case (see note 12 above), to prohibit Kellogg from making health benefit claims about any of its foods unless the claims are backed by scientific evidence and are not misleading, for at least twenty years. In *re Kellogg Co.*, FTC No. 082-3145, Order to Show Cause and Order Modifying Order (May 28, 2010), available at www.ftc.gov/os/caselist/0823145/100602kellogg_order.pdf.
- ⁴¹ Office of the Attorney General: The State of Vermont, Attorney General's Obesity Initiative, www.atg.state.vt.us/issues/consumer-protection/obesity.php (last visited Apr. 20, 2010).
- ⁴² MINNESOTA ATTORNEY GEN.'S OFFICE, FAST FOOD FACTS, www.turnoffyourtv.com/healtheducation/fastfoodfacts.html (last visited Apr. 24, 2010).
- ⁴³ NEW YORK ATTORNEY GEN.'S OFFICE, FOCUS ON: OVERCOMING OBESITY, A REPORT FROM THE NEW YORK STATE DEPARTMENT OF LAW, HEALTH CARE BUREAU (2004), available at www.law.columbia.edu/null?&exclusive=filemgr.download&file_id=161570&rtcontentdisposition=filename%3DSpitzer%2004%20Overcoming%20Obesity.pdf.