MEMORANDUM

Individual State Authority to Protect Underage Youth by Regulating Placement of Alcohol Advertising Based on Statutory Provisions That Prohibit Unfair Competition

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August 2004

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I. Introduction

This memorandum analyzes state and federal unfair trade practices (or unfair competition) laws and administrative and court decisions to determine what authorities state governments may have to protect youth by restricting the placement of alcohol advertising in media (including magazines, radio, and television) where a disproportionate share of the audience is under the legal drinking age.

States have enacted various statutory schemes regarding unfair trade practices. Since we are not conducting a comparison of unfair competition statutes across states, we have instead focused on the law of one state—New Mexico—as a case study for our analysis. Our findings, we believe, have important implications for other states with similar statutory provisions. It is important to observe, however, that many states have enacted statutory schemes regarding unfair trade practices that are different from New Mexico's scheme and that may prohibit a different range of conduct.

II. Summary of Conclusions

Based on our analysis, we conclude that New Mexico has the authority under its unfair trade practices statute to restrict the placement of alcohol advertising in magazine, radio, and television media to prevent "targeting minors" [1] through the placement of alcohol advertising in media where a disproportionate share of the audience is under the legal drinking age.[2]

The application of New Mexico's "Unfair Practices Act" (UPA) to youth targeting of alcohol advertisements is a matter of first impression. Such conduct appears to violate at least two provisions of the UPA, those that prohibit "unconscionable trade practices" and "unfair or deceptive trade practices." A court reasonably could find that youth targeting in alcohol advertising constitutes an "unconscionable trade practice" because targeting of minors takes advantage of a vulnerable age group unable to ascertain the risks associated with alcohol consumption. Additionally, a court could reasonably conclude that youth targeting in alcohol advertising constitutes "unfair or deceptive trade practices" because alcohol advertising targeting minors creates the misleading representation to those under the legal drinking age, either directly or by implication, that underage drinking is acceptable or even expected behavior.[3]

To prove these violations, the state would need to establish a clear, limited definition of "youth targeting" that relies on marketing research data that could be routinely used by advertisers to define target audiences and that does not unnecessarily restrict advertisers from reaching adult audiences. The admissibility of such evidence has been upheld in at least one state appellate

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[1] "Targeting minors" was defined in *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co*., 116 Cal.App.4th 1253, 11 Cal.Rptr.3d 317 (Cal.App. 4 Dist. 2004), and this is the definition used throughout this memorandum. *See* Section IV A, *infra*.

[2] This memorandum does not address the legality of advertising practices that overexpose youth without necessarily "targeting"them.

[3] Unlike the laws of many other states, New Mexico's prohibition of "unfair or deceptive trade practices" appears to primarily address practices that are deceptive in nature. New Mexico's prohibition of "unconscionable trade practices," however, would appear to prohibit many, if not all, practices that could be considered unfair, but not necessarily deceptive, under the laws of other states.

decision (although not addressing unfair competition allegations) involving restrictions on tobacco advertising targeting youth. In that case, "targeting minors" was shown by marketing data demonstrating that tobacco advertising placement exposed youth 12 to 17 years of age (youth under the minimum smoking age) to the same or higher degree than the company's stated target audience of young adults 21 to 34 years of age. Thus, one possible measure for "targeting minors" in the alcohol context could be established by evidence of alcohol advertising placement that exposes youth 12 to 20 years of age (youth under the minimum drinking age) to the same degree as or a higher degree than the industry's stated target audience of young adults 21 to 34 years of age. A state could consider other possible definitions. For example, targeting minors can be measured by the extent to which youth are exposed compared to their share of the general population within the media market in question. If youth 12 to 20 years of age are exposed to a greater degree than their population share of the media market, then targeting minors will have been established. The definition should rest on the particular circumstances of the alleged unfair trade practice.

State government should anticipate a wide variety of defenses to UPA claims, including the most likely and potentially strongest defense that regulations restricting youth targeting in alcohol advertising violate the commercial speech rights of alcohol industry members under the *Central Hudson* test established by the United States Supreme Court. We conclude that, if the remedy for violating the UPA were carefully crafted so that alcohol advertisers could effectively reach adult audiences, it would survive a constitutional challenge on two alternative grounds. First, because targeting minors with alcohol advertisements is a violation under the UPA, it constitutes unlawful speech, which is not entitled to the protections accorded commercial speech under the *Central Hudson* test. Second, even if a court were to conclude that such regulations restrict lawful commercial speech, the state could show that the requirements of *Central Hudson* have been met if: (1) the state has a substantial governmental interest in promoting the welfare and temperance of minors exposed to certain media advertisements of alcoholic beverages; (2) the restrictions on youth targeting directly advance this state interest; and (3) the restrictions are no more extensive than necessary.

III. State Authority to Regulate Unfair or Deceptive Trade Practices

We have selected New Mexico's Unfair Practices Act as a case study to assess the application of such a state statute to alcohol advertising placement that targets minors. The following provisions establish the framework for such an analysis:

> **§ 57-12-3. Unfair or deceptive and unconscionable trade practices prohibited**
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> Unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful. N. M. S. A. 1978, § 57-12-3
>
> **§ 57-12-2. Definitions**
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> As used in the Unfair Practices Act:
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> * * *
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> C. "trade" or "commerce" includes the advertising, offering for sale or distribution of any services and any property and any other article, commodity or

thing of value, including any trade or commerce directly or indirectly affecting the people of this state;

D. "unfair or deceptive trade practice" means an act specifically declared unlawful pursuant to the Unfair Practices Act, a false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods or services or in the extension of credit or in the collection of debts by a person in the regular course of his trade or commerce, which may, tends to or does deceive or mislead any person and includes:

* * *

(14) using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if doing so deceives or tends to deceive;

* * *

E. "unconscionable trade practice" means an act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts which to a person's detriment:

(1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or

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N. M. S. A. 1978, § 57-12-2

§ 57-12-4. Interpretation

It is the intent of the legislature that in construing Section 3 of the Unfair Practices Act the courts to the extent possible will be guided by the interpretations given by the federal trade commission and the federal courts. N. M. S. A. 1978, § 57-12-4

New Mexico courts have stated that although Federal Trade Commission (FTC) and federal court opinions should be consulted in interpreting § 57-12-3, New Mexico's UPA definitions cannot be disregarded.[4]

§ 57-12-13. Regulations

The attorney general is empowered to issue and file as required by law all regulations necessary to implement and enforce any provision of the Unfair Practices Act.
N. M. S. A. 1978, § 57-12-13

§ 57-12-15. Enforcement

[4] *See Richardson Ford Sales, Inc. v. Johnson* 100 N.M. 779, 788, 676 P.2d 1344, 1353 (N.M.App. 1984).

> In order to promote the uniform administration of the Unfair Practices Act in New Mexico, the attorney general is to be responsible for its enforcement, but he may in appropriate cases delegate this authority to the district attorneys of the state and when this is done, the district attorneys shall have every power conferred upon the attorney general by the Unfair Practices Act. N. M. S. A. 1978, § 57-12-15
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> **§ 57-12-8. Restraint of prohibited acts; remedies for violations**
> A. Whenever the attorney general has reasonable belief that any person is using, has used or is about to use any method, act or practice which is declared by the Unfair Practices Act to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the state alleging violations of the Unfair Practices Act. The action may be brought in the district court of the county in which the person resides or has his principal place of business or in the district court in any county in which the person is using, has used or is about to use the practice which has been alleged to be unlawful under the Unfair Practices Act. The attorney general acting on behalf of the state of New Mexico shall not be required to post bond when seeking a temporary or permanent injunction in such action.
> * * *
> N. M. S. A. 1978, § 57-12-8

New Mexico case law has stated that "[g]enerally, the Unfair Practices Act is intended to provide a private remedy for individuals who suffer pecuniary harm for conduct involving either misleading identification of a business or goods, or false or deceptive advertising."[5] However, based upon the directives in the UPA itself, the state attorney general is clearly responsible for enforcement of the Act, empowered to implement regulations, and directed to initiate proceedings in the public interest.[6] "The UPA authorizes the attorney general to pursue injunctive relief and restitution to injured persons, in addition to actions for civil penalties for willful violations of the Act."[7] Moreover, the state appellate court clarified that "[b]ecause the Unfair Practices Act constitutes remedial legislation, we interpret the provisions of this Act liberally to facilitate and accomplish its purposes and intent."[8] (citations omitted)

IV. Applying UPA Laws to Alcohol Advertising Placement That Targets Minors

A. "Targeting Minors" Defined

Because researching in each of the 50 states whether state-level laws or court decisions define "targeting minors" was beyond the scope of this memo, we only pursued this question in conjunction with using New Mexico as a case study. In the case of New Mexico, we did not discover any published court opinions addressing the concept of "targeting minors." Nevertheless, a recent California appellate court decision, *People ex rel. Lockyer v. R.J.*

[5] *Parker v. E.I. DuPont de Nemours & Co., Inc.,* 121 N.M. 120, 132-133, 909 P.2d 1, 13- 14 (N.M.App. 1995).
[6] *State ex rel. Stratton v. Gurley Motor Co.,* 105 N.M. 803, 808, 737 P.2d 1180, 1185 (N.M.App. 1987).
[7] *Id.*
[8] *Id.*

Reynolds Tobacco Co.[9] has analyzed the "targeting minors" concept and concluded that intent can be inferred under certain circumstances. The court found that R.J. Reynolds Tobacco Company ("Reynolds") had violated the Master Settlement Agreement (MSA),[10] which prohibited Reynolds from using tobacco advertising or marketing practices that target youth. Specifically, Reynolds exposed youth ages 12 to 17 to its print media advertising at levels substantially similar to levels of Reynolds' stated targeted audience of young adults, who generally were ages 21 to 34. The court conducted a detailed analysis of advertising placement and its role in targeting particular audiences, the first such review by any state or federal appellate court. It concluded that standard marketing research data was reliable and admissible in determining audience exposure to tobacco advertising. The court stated: As a "... means to measure the existence of prohibited youth targeting ... [t]he record contains substantial evidence that an advertising vehicle's exposure is the standard for evaluating the ability to reach a target audience. The evidence also suggests the way to avoid targeting a particular group is to minimize exposure of the advertising to that group."[11]

The court held that the state must prove that Reynolds intended to target youth as a key element of the violation. It held that intent can be inferred from the marketing data presented by the state:

> "We have said that 'intent' … denotes not only those results the actor desires, but also those consequences which he knows are substantially certain to result from his conduct. … If Reynolds intended its print advertising to target young adults but knew to a substantial certainty it would be exposed to youth to the same extent as young adults, then as a matter of law, Reynolds is deemed to have intended to expose, and thus targeted, youth as well as young adults. [A]lthough Reynolds had access to data showing that the level of exposure of its advertising to youth was about the same as exposure to the targeted young adult smokers, Reynolds 'studiously avoided' measuring its advertising exposure to youth or comparing exposure to youth with exposure to young adults, probably because Reynolds 'knew the likely result of such analysis.'" [12]

The court noted that Reynolds' practices were in sharp contrast to its competitors, which relied on the marketing research data available to Reynolds to avoid targeting youth. Competitors were able to target adult audiences, including young adults, without targeting youth, demonstrating that the youth targeting restrictions were not unduly burdensome. As stated by the court:

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[9] *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co*., 116 Cal.App.4th at 1253.

[10] In November 1998, Reynolds and other tobacco product manufacturers signed the MSA as part of a large litigation settlement with numerous states. As part of the MSA, Reynolds signed a waiver regarding any constitutional claims it might have. As such, this case does not address the *Central Hudson* commercial speech analysis. See *infra*, Section V.

[11] *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.,* 116 Cal.App.4th at 1267. In defining "targeting youth," the court used the age range of 21 to 34 years, as compared with the age range of 18 to 34 years (18 being the minimum smoking age) because the court found that R.J. Reynolds's stated targeted audience of young adults was age 21 to 34. *Id.*

[12] *Id.* at 1264 (citations omitted).

> "The record contains evidence that Reynolds could implement alternative advertising schedules using different magazines to avoid targeting youth while maintaining effective targeting of young adult smokers."[13]

The case provides a basis for defining "youth targeting" in the context of alcohol advertising.[14] Like Reynolds, alcohol producers have access to data showing the level of exposure of their advertising to youth. National data suggest that a state could show that many alcohol marketers are targeting youth, at least as to specific brands, through their placement of advertisements in radio, television, and magazines.[15] As with tobacco, it is illegal to provide alcohol to minors (defined as under the age of 21 for alcohol, in contrast to tobacco products, which cannot be provided to those under the age of 18). Limiting youth exposure to alcohol advertisements supports these minimum age access laws. All states prohibit youth access to alcohol in recognition of underage drinking's significant contribution to youth alcohol-related motor vehicle crashes, other forms of injury, violence, suicide, and problems associated with school and family.[16] The concern about alcohol marketing and underage drinking has been heightened by recent findings in the scientific research community. Studies have established that youth exposure to alcohol advertising increases awareness of that advertising, which in turn influences young people's beliefs about drinking, intentions to drink, and drinking behavior [17] This research mirrors similar findings regarding the impact of tobacco advertising on youth consumption of tobacco[18] and supports a long-standing recognition by the U.S. Supreme Court and other federal courts that advertising increases consumption among those targeted by the advertisers.[19]

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[13] *Id*. at 1267.

[14] The *Reynolds* case defined youth targeting for the purposes of interpreting the MSA, a contractual agreement between the State of California and Reynolds. It therefore does not address whether youth targeting can be the basis of an unfair trade practices violation, a topic discussed *infra*, Section IV B.

[15] Center on Alcohol Marketing and Youth, *Overexposed: Youth a Target of Alcohol Advertising in Magazines* (Washington, D.C.: Center on Alcohol Marketing and Youth, 2002) (available at http://camy.org/research/files/overexposed0902.pdf (cited 15 July 2004)); Center on Alcohol Marketing and Youth *Youth Exposure to Alcohol Ads on Television 2002: From 2001 to 2002 Alcohol's Adland Grew Vaster* (Washington, D.C.: Center on Alcohol Marketing and Youth, 2004) (available at http://camy.org/research/tv0404/report.pdf (cited 15 July 2004)); Center on Alcohol Marketing and Youth, *Television: Alcohol's Vast Adland* (Washington D.C.: Center on Alcohol Marketing and Youth, 2002) (available at http://camy.org/research/files/television1202.pdf) (cited 15 July 2004)); Center on Alcohol Marketing and Youth, *Youth Exposure to Radio Advertising for Alcohol – United States, Summer* 2003 (Washington D.C.: Center on Alcohol Marketing and Youth, 2004) (available at http://camy.org/research/files/radio0104.pdf (cited 15 July 2004)); Center on Alcohol Marketing and Youth *Radio Daze: Alcohol Ads Tune in Underage Youth* (Washington, D.C.: Center on Alcohol Marketing and Youth, 2003) (available at http://camy.org/research/files/radio0303.pdf (cited 15 July 2004)). An analysis of the CAMY data and the extent to which it establishes "youth targeting" in specific states under the definition used in the *Reynolds* case is beyond the scope of this memorandum.

[16] Institute of Medicine, The National Academies, *Reducing Underage Drinking: A Collective Responsibility* (Washington, DC: National Academies Press, 2003).

[17] R.L. Collins et al, Predictors of beer advertising awareness among eighth graders. *Addiction*, 98: 1297-1306, 2003; S.E. Martin et al., Alcohol advertising and youth. *Alcoholism: Clinical and Experimental Research*, 26: 900-906, 2002.

[18] *See, e.g.,* J. Pierce, W. Choi, E. Gilpin, A. Farkas, C. Berry, Tobacco industry promotion of cigarettes and adolescent smoking. *Journal of the American Medical Assn*., 279: 511-515, 1998; J. Pierce, E. Gilpin, D. Burns, E. Whalen, B. Rosbrook, D. Shopland, M. Johnson, Does tobacco advertising target young people to start smoking? *Journal of the American Medical Assn*. 266: 3154-3158, 1991.

[19] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564, 121 S.Ct. 2404 (2001).

As set forth above, the California appellate court defined "targeting minors" as tobacco advertising placement that exposed youth 12 to 17 years of age to the same degree as or a higher degree than the company's stated target audience of young adults 21 to 34 years of age. Accordingly, for alcohol advertising placement, states wishing to restrict targeting minors would need to develop an alternative measure, since the minimum drinking age in the United States is 21, rather than 18, the minimum smoking age. One possible measure could be to simply adjust the age ranges used in *Reynolds*, such that "targeting minors" would be established by evidence of alcohol advertising placement that exposes youth 12 to 20 years of age to the same degree as or a higher degree than the industry's targeted audience of young adults 21 to 34 years of age. A state could consider other possible definitions. For example, targeting minors could be measured by the extent to which youth are exposed compared to their share of the general population within the media market in question. If youth 12 to 20 years of age are targeted to a greater degree than their population share of the media market, then targeting minors will have been established. The marketing data available to advertisers permits this alternative measurement.[20] As discussed below, the definition should rest on the particular circumstances of the alleged unfair trade practice.

B. Potential Violations Under the New Mexico UPA

The *Reynolds* case provides a useful definition for targeting minors in the context of alcohol advertising placement in specific media, and this definition will be used in the remainder of this memorandum. In the context of New Mexico as a case study, could an alcohol advertiser that targets minors be found in violation of New Mexico's UPA? Two possible violations could be identified.[21]

1. "Unconscionable Trade Practices"

The strongest argument for finding that youth targeting in alcohol advertising violates the UPA involves "unconscionable trade practices." These are defined in the UPA as an act "in connection with the offering for sale ... of any goods ... which to a person's detriment ... takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree . ..."[22] Alcohol advertisers that place advertising in media with disproportionately large youth audiences apply sophisticated marketing techniques to a vulnerable audience lacking the knowledge, ability or experience to evaluate these advertisements against the dangers of youth alcohol consumption.

The New Mexico appellate court, in *Portales Nat. Bank v. Ribble*, illustrated the facts sufficient to demonstrate an unconscionable trade practice claim. The borrowers alleged that the bank had engaged in an unconscionable trade practice by "taking advantage of [their] lack of ability and capacity due to their advancing age."[23] The court found that there was a "pattern of conduct by the Bank," that when "considered in the aggregate, constitutes unconscionable trade practices as defined by Section 57-12-2(E). Though the individual acts may be legal, it is reasonable to infer that the Bank took advantage of the [borrowers] to a 'grossly unfair degree' because of (1) the

[20] *See* Center on Alcohol Marketing and Youth reports, *supra*, note 15.
[21] *See* Section V, *infra*, for analysis of these claims in light of FTC and federal case law.
[22] N.M.S.A. 1978, § 57-12-2(E).
[23] *Portales Nat. Bank v. Ribble,* 75 P.3d 838, 842-843 (N.M.App. 2003).

[borrowers'] advancing age, (2) their clear inability to handle their accounts, and (3) their long-term dealings with the Bank. ..."[24]

Unfortunately, New Mexico courts have offered little guidance beyond the *Ribble* case regarding this portion of the UPA.[25] Nevertheless, even though it does not address advertising placement, *Ribble* provides strong support for recognizing the special vulnerability youth bring to the alcohol market and the duty of alcohol marketers to avoid actions that take advantage of their lack of experience and knowledge. A minimal duty would be to adopt advertising placement policies that do not target youth as defined in the *Reynolds* case. This finding can be made under this portion of the UPA despite the legality of the individual acts of placing advertisements in a particular magazine or during a specific radio or television broadcast.[26] The alcohol advertisers targeting minors as defined in *Reynolds* are thus taking advantage of a vulnerable age group unable to ascertain the realities of alcohol consumption.

The UPA specifies, however, that its interpretation should be guided by FTC and federal court decisions.[27] As shown below in Section V, an analysis of these decisions provides support for a finding that alcohol advertising placements that target youth constitutes an unconscionable trade practice under New Mexico law.[28]

2. "Unfair or Deceptive Trade Practices"

A second potential violation of the New Mexico's UPA involves "unfair or deceptive trade practices." The relevant elements for such a claim are: (1) a false or misleading representation (2) knowingly made (3) in connection with the sale of goods or services (4) in the regular course of trade or commerce (5) which may, tends to, or does deceive or mislead any person. *See* § 57-12-2(D).

Assuming that there is evidence of youth targeting, which includes a finding of intent, element (2) is satisfied—the representation was knowingly made. Elements (3) and (4) are clearly satisfied, since alcohol advertisements are connected to the sale of alcohol, which is the regular course of trade for alcohol producers. Elements (1) and (5) provide the most difficult hurdles. In general, claims meeting these elements involve advertising or marketing content rather than placement. Youth targeting, as defined in the *Reynolds* case, rests entirely on advertising placement rather than advertising content (i.e., a false or misleading statement). Consequently, evidence of youth targeting does not provide the sort of evidence typically supporting an unfair or deceptive trade practice claim.

The statute includes a list of examples of "unfair or deceptive trade practices," including "using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if

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[24] *Id.*

[25] In these circumstances, FTC and federal court opinions provide important persuasive authority for interpreting the UPA, a topic addressed in Section V, *infra*.

[26] *Portales Nat. Bank v. Ribble, supra*, 75 P.3d at 843.

[27] N. M. S. A.1978, § 57-12-4.

[28] We note that states considering the use of state unfair trade practices laws to address the alcohol industry's overexposure of underage youth to alcohol advertising should consider potential defenses affecting a court's subject matter jurisdiction, including defenses based on preemption by federal or even other state consumer protection laws. For example, states do not have authority to regulate cable television. Analysis of subject matter defenses such as preemption is outside the scope of this memorandum.

doing so deceives or tends to deceive." § 57-12-2(D)(14). This list is not exclusive, however.[29] As such, the State alternatively could allege that alcohol advertising targeting minors creates a misleading representation to those under the legal drinking age, either directly or by implication, that underage drinking is acceptable or even expected behavior. Given that the "UPA does not require a statement, but rather any representation,"[30] it would not be necessary for the State to show that the alcohol advertisers made any misleading statements. An argument therefore could be made that alcohol advertisers that target youth through their placement of advertising in youth-oriented media have created a misleading representation through the placement alone, without regard to specific content.

Section 57-12-2(D) "does not require that the defendant's conduct actually deceive a consumer; it permits recovery even if the conduct only 'tends to deceive.'"[31] (citations omitted) Thus, the State would need not show that any consumers were actually deceived or misled, only that they "may" be deceived or misled.[32]

As stated above, the UPA also specifies that its interpretation is to be guided by FTC and federal court decisions. An analysis of these decisions provides support for a finding that alcohol advertising placements that target youth constitute an "unfair or deceptive" trade practice under New Mexico law.

V. Applying the FTC "Unfairness Doctrine" to Alcohol Ads That Target Minors

An act or practice is deemed by the FTC to be unfair, and thereby unlawful if it "… causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination."[33]

A. Three-Pronged Test for Unfairness Claims

1. Substantial Injury to Consumers

"The substantial injury prong can be satisfied if the FTC establishes that consumers were injured by a practice for which they did not bargain … [and that the] [i]njury may be sufficiently substantial if it causes a small harm to a large class of people" (citations omitted). [34] As noted above, underage drinking is a significant contributor to youth alcohol-related motor vehicle crashes, other forms of injury, violence, suicide, and problems associated with school and family, and exposure to alcohol advertising affects youth alcohol consumption and belief patterns.[35]

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[29] *See Thompson v. Youart*, 109 N.M. 572, 576, 787 P.2d 1255, 1259 (N.M.App. 1990), which refers to two elements of the list as "examples" of unfair or deceptive trade practices. *See also Jaramillo v. Gonzales*, 132 N.M. 459, 466, 50 P.3d 554, 561 (N.M.App. 2002), which indicates that the list "includes but is not limited to" the listed items.

[30] *Jaramillo v. Gonzales, supra*, 132 N.M. at 467.

[31] *Smoot v. Physicians Life Ins. Co.* 87 P.3d 545, 550 -551 (N.M.App. 2003).

[32] Unfair Practices Act, N. M. S. A. 1978, § 57-12-2(D).

[33] 15 U.S.C. §§ 45(a)(1), (n).

[34] *F.T.C. v. J.K. Publications, Inc.*, 99 F.Supp.2d 1176, 1201 (C.D.Cal. 2000).

[35] *See* Section IV, *supra*.

The U.S. Supreme Court and federal appellate courts have recognized this connection between advertising and youth consumption.[36] For example, in *Anheuser-Busch v. Schmoke*, the Fourth Circuit Court of Appeals "recognized the reasonableness of Baltimore City's legislative finding that there is a '*definite correlation between alcoholic beverage advertising and underage drinking*'"[37] (emphasis added).

Young people have a reasonable expectation that alcohol advertisers will not target them in their placement of advertisements given the special risks associated with youth consumption and the fact that it is illegal to supply them with the product. Given these facts, this first prong appears to be satisfied.

2. Countervailing Benefits

The FTC "recognizes that most business practices entail a balancing of costs and benefits to the consumer" and so the FTC "'will not find that a practice unfairly injures consumers unless it is injurious in its net effects.' ... To make this cost-benefit determination, the Commission examines the potential costs that the proposed remedy would impose on the parties and society in general."[38] In a consumer credit case, the FTC balanced the costs and benefits and concluded that its credit practices rule would have "only a *marginal impact* on the cost or *availability* of credit, and that this marginal cost was *clearly overshadowed by the much greater risks to consumers* resulting from the use of HHG security interests and wage assignments."[39] (emphasis added)

Correspondingly, restrictions on alcohol advertisements that target minors would, if narrowly defined, have only a marginal impact on the availability of such advertising information to adults, including young adults.[40] This minimal cost is clearly overshadowed by the much greater risks to underage consumers resulting from these targeted advertisements. These restrictions would not unduly restrict competition, since alcohol companies could effectively compete for the legal, adult market by placing advertisements in a manner that does not target youth yet reaches adult audiences. In fact, the restrictions may promote, not deter, fair competition. The FTC has recognized the importance of restricting advertising that unfairly targets children because advertisers who engage in such practices obtain an unfair advantage over competitors in the marketplace.[41]

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[36] *Lorillard Tobacco Co. v. Reilly*, *supra*, 533 U.S. at 557-61 (acknowledging conclusions of studies linking tobacco advertising and smoking by underage youth).

[37] *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325, 327 (4th Cir. 1996).

[38] *American Financial Services Association v. F.T.C.*,54 USLW 2080, 1985-2 Trade Cases P 66, 185 (D.C. App. 1985) (citing *Policy Statement* at 37).

[39] *Id.* at 186.

[40] *See* discussion, *infra,* at Section IV. The specific criteria for determining youth targeting should take into account the impact of the criteria on the advertisers' ability to reach adult audiences.

[41] *See Federal Trade Commission v. R.F. Keppel & Bro.*, 291 U.S. 304, 308, 54 S.Ct. 423 (1934), where the Court held that competitors were at a disadvantage because they refused to engage in a marketing practice that constituted a "reprehensible encouragement of gambling among children." Research suggests that wine producers, whose advertising tends not to disproportionately reach youth, are at a disadvantage to beer and distilled spirits producers, whose advertising does disproportionately reach youth. (*See* Center on Alcohol Marketing and Youth reports, *supra*, note 15).

3. Ability of Consumers to Avoid Injury

The FTC requirement that the "injury cannot be reasonably avoided" by the consumer stems from the FTC's reliance on "free and informed consumer choice as the best regulator of the market."[42] According to the FTC, "'Normally we expect the marketplace to be self-correcting, and we rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the market.' Policy Statement at 37." The FTC recognizes, however, that:

> "[C]ertain types of seller conduct or market imperfections may unjustifiably hinder consumers' free market decisions and prevent the forces of supply and demand from maximizing benefits and minimizing costs. In such instances of *market failure*, the Commission may be required to take *corrective action*. Such corrective action is taken 'not to second-guess the wisdom of particular consumer decisions, but rather to *halt some form of seller behavior* that unreasonably creates or *takes advantage* of an obstacle to the free exercise of consumer decision making'" (citations omitted; emphasis added).[43]

Applying these principles here, alcohol advertising that targets minors represents an instance of market failure that requires corrective action. Such advertising takes advantage of minors' vulnerability, which acts as an obstacle to underage consumers' free decision making. Minors are not able to make the same informed decisions as adults. Moreover, when an advertiser targets minors with a disproportionate share of alcohol advertising through its advertising placement practices, it is reasonable to expect that minors will increase their consumption of alcohol and discount alternative messages regarding alcohol's risks.[44]

It is well-established that these laws are "'not made for experts but to protect the public,--that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impression'" (citation omitted).[45] The public, which includes minors, needs protection from alcohol advertising that targets the vulnerabilities of those under the legal drinking age with misleading impressions about alcohol consumption.

Both the U.S. Supreme Court and the FTC have recognized the special vulnerability of youth in the context of unfair trade practices. For example, the U.S. Supreme Court, in *Federal Trade Commission v. R.F. Keppel & Bro.*, held that the distribution of candy so as to induce purchase via an element of chance, which essentially encouraged children to gamble, was an unfair method of competition. The Court stated that "here the competitive method is shown to exploit consumers, children, who are unable to protect themselves."[46]

In a complaint by the FTC regarding advertising that enticed children to engage in dangerous behaviors, the FTC won a consent decree from General Foods to take off the air an

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[42] *Id.*
[43] *Id.*
[44] For further discussion, *see* Institute of Medicine, The National Academies, *Reducing Underage Drinking: A Collective Responsibility, supra,* pp. 134-138.
[45] *Feil v. F.T.C.* 285 F.2d 879, 902 (9th Cir. 1960).
[46] *Federal Trade Commission v. R.F. Keppel & Bro.*, *supra*, 291 U.S. at 313.

advertisement for cereal that depicted the picking and eating of plants in the wild. The FTC stated:

> "[The] advertisements have the tendency or capacity to represent, directly or by implication, to children that they can eat plants or parts thereof which they find growing or in natural surroundings without harm or the risk of harm. In truth and in fact, children cannot eat plants or parts thereof which they find growing or in natural surroundings without harm or the risk of harm. Therefore, the aforesaid advertisements were and are unfair and deceptive acts or practices. ..."[47]

A similar conclusion was reached in another consent order by the FTC, in *In re Mego International*. The FTC took action against a doll manufacturer whose advertisements depicted a child using an electric hair dryer near water without adult supervision. The FTC found that:

> "[The] advertisement has the tendency or capacity to influence children to engage in ... the use of an electrical personal grooming appliance without the close and watchful supervision of an adult. Therefore, such advertisement has the tendency or capacity to induce behavior which is harmful or involves an unreasonable risk of harm, and was and is an unfair or deceptive act or practice."[48]

B. Established Public Policy

FTC decisions currently focus primarily on consumer injury, but the Commission also looks at public policy implications.[49] Clearly, established public policy considerations support a conclusion that alcohol advertisements targeted to minors should be restricted in order to serve important public health goals.

In *Federal Trade Commission v. R.F. Keppel & Bro.*, the Court found that the distribution of candy so as to induce purchase via an element of chance, which essentially encouraged children to gamble, was an unfair method of competition. The Court stated this "practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy."[50] So, too, the practice of targeting minors with alcohol advertisements encourages minors to consume alcohol, which is contrary to well-established public policy.

The Court also indicated that the unfairness doctrine is a flexible one, giving the FTC great latitude to prohibit "[n]ew or different practices ... as they arise in the light of the circumstances in which they are employed."[51] As marketing practices gain increasing sophistication, particularly in their ability to target particular demographic groups through sophisticated market research, the FTC has the authority to address newly emerging unfair methods of competition, such as the targeting of minors with alcohol advertisements.

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[47] *In re General Foods Corp.*, 86 F.T.C. 831 (1975), Par. 9.
[48] *In re Mego International*, 92 F.T.C. 186 (1978), Par. 8.
[49] Public policy considerations may support application of the FTC's unfairness doctrine in appropriate cases. *See* Letter from the FTC to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science and Transportation, United States Senate, Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (December 17, 1980); J. Harrington, "Up in Smoke: the FTC's Refusal to Apply the 'Unfairness Doctrine' to Camel Cigarette Advertising," 47 Fed. Comm. L. J. 593, 604 (April, 1995).
[50] *Federal Trade Commission v. R.F. Keppel & Bro.*, *supra*, 291 U.S. at 313.
[51] *Id.* at 314.

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In summary, using New Mexico as a case study, a review of FTC and federal court decisions provides support for a finding under the New Mexico Unfair Practices Act that alcohol advertising placement practices that target minors as defined in the *Reynolds* case constitute an unfair business practice.

VI. Alcohol Advertising Placement, Targeting Minors, and the First Amendment Protection of Commercial Speech

State restrictions placed on commercial speech are constrained by the First Amendment under a four-part test established by the U.S. Supreme Court in *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*:

1. whether the speech concerns lawful activity and is not misleading
2. whether the government's interest in regulating the speech is substantial
3. whether the regulation directly advances the asserted government interest
4. whether the regulation is narrowly tailored to serve the government's interest[52]

If the first element or "prong" is established, then the remaining three prongs must be analyzed. The government must establish that all three remaining prongs are satisfied or the regulation in question will fail to meet the test and will be held unconstitutional. In the case of New Mexico, under this test, a proposed restriction on targeting youth through alcohol advertising placement under New Mexico's Unfair Practices Act would withstand Constitutional challenge if the advertising being restricted were "unlawful" under the first prong or if the restriction met the requirements of the second, third, and fourth prongs. Each of these alternatives is analyzed below.

A. Alcohol Advertising That Targets Youth is Unlawful Activity Under the UPA and Therefore Fails the First Prong of the *Central Hudson* Test.

Central Hudson states that the "government may ban forms of communication more likely to deceive the public than to inform it ... or commercial speech related to illegal activity."[53] This concept underlies the "first prong" of the *Central Hudson* test, whereby misleading or unlawful speech will not be afforded First Amendment protection. If speech is found to be misleading or related to illegal activity, the remaining parts of the test are moot.

Several cases have addressed the illegal commercial speech under the first prong of the *Central Hudson* test. In *Levi Strauss & Co. v. Shilon*, the Ninth Circuit Court of Appeals ruled that an offer to sell counterfeit goods is not protected speech, observing that, "... proposals to engage in commercial transactions are not accorded First Amendment protection ... [when] the underlying transaction is illegal."[54] In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, the U.S. Supreme Court upheld an ordinance that made it unlawful to "aid" in any unlawful

[52] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343 (1980).
[53] *Central Hudson,* 447 U.S. at 563-64.
[54] *Levi Strauss & Co. v. Shilon,* 121 F.3d 1309, 1313 (9th Cir. 1997).

employment practice and that the practice of placing want ads for nonexempt employment in sex-designated columns did in fact serve to aid employers placing the ads to suggest illegal sex preferences. The Court explained that the "advertisements, as embroidered by their *placement*, signaled that the advertisers were likely to show an illegal sex preference in their hiring decisions. Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity."[55] (Emphasis added.)

In *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, the U.S. Supreme Court upheld an ordinance regulating the manner of marketing of items that might be used for an illegal purpose (i.e., regulating the display of smoking accessories to discourage illegal drug use). The Court indicated that the restriction on the manner of marketing did not "appreciably limit" the retailer's communication of information, but that the "ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is deemed 'speech,' then it is speech proposing an illegal transaction, which a government may regulate or ban entirely."[56]

These cases support the assertion that commercial speech related to illegal activity is not protected by the First Amendment. As discussed above, New Mexico could show that targeting minors through the placement of alcohol advertisements in media where youth are over-represented is illegal because it constitutes an unfair, deceptive or unconscionable trade practice. This finding of illegality, on its face, suggests that a regulation restricting youth targeting of alcohol advertising would survive a *Central Hudson* challenge.

This issue appears to be one of first impression for both federal and New Mexico courts. The U.S. Supreme Court and federal appeals courts have reviewed restrictions on alcohol and tobacco advertising placement in several cases but have not considered claims that the *Central Hudson* test had been satisfied by the fact that the placement practices themselves are illegal. In *Lorillard Tobacco Co. v. Reilly,*[57] for example, the state conceded that restrictions on outdoor tobacco advertising designed to reduce youth exposure would include restrictions on lawful tobacco advertising. A similar assumption is found in *Anheuser-Busch v. Schmoke.*[58] A key distinction here is that both the violation and proposed remedy are based on a finding of an illegal trade practice under the UPA. The illegal trade practice is based on using a clear, limited definition of youth targeting that can be measured using marketing research data that are routinely used by advertisers to define target audiences and does not unduly restrict advertisers from reaching adult audiences. These factors are not present in previous federal appellate cases that have analyzed alcohol advertising placement.[59]

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[55] *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376, 389, 93 S.Ct. 2553, 2560 - 2561 (U.S.Pa. 1973).

[56] *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496, 102 S.Ct. 1186, 1192 (U.S.Ill. 1982).

[57] *Lorillard Tobacco Co. v. Reilly*, *supra*, 533 U.S. at 525.

[58] *Anheuser-Busch v. Schmoke*, 101 F.3d 325, 327 (4th Cir. 1996).

[59] An unpublished decision of a California lower court appears to reject the argument that advertising placement is an unfair trade practice and therefore an illegal and misleading activity under the first prong of the *Central Hudson* test. In *In re Tobacco Cases II*, L 31628649 (Cal. Superior 2002), the Superior Court in San Diego County

B. Restrictions Based on New Mexico's UPA on Alcohol Advertising That Targets Youth Meet the Requirements of the Remaining Three Prongs of the Central Hudson Test.

Continuing the case study, as analyzed above, we conclude that: (1) New Mexico can restrict youth targeting in the placement of alcohol advertising under its Unfair Practices Act; and (2) that such youth targeting, as an unfair and illegal practice, falls outside the commercial speech protections of the First Amendment. However, even assuming that a court found that the UPA-based restrictions did restrict commercial speech that is neither misleading nor illegal, we conclude that such a restriction would meet the remaining three prongs of the *Central Hudson* test and thus would withstand a First Amendment challenge.

1. The *Central Hudson* Test and Related Cases

As noted earlier, *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*,[60] the U.S. Supreme Court established a four-part test for determining whether a government regulation of commercial speech is valid under the First Amendment. If a court determined that proposed restrictions on youth targeting concerned speech that was neither illegal nor misleading under the UPA, then the remaining three prongs of the test would need to be satisfied:

1. whether the government's interest in regulating the speech is substantial
2. whether the regulation directly advances the asserted government interest
3. whether the regulation is narrowly tailored to serve the government's interest[61]

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dismissed a class action lawsuit brought on behalf of citizens of California who had smoked when they were under 18 years old. Plaintiffs claimed that tobacco companies targeted advertisements to underage smokers in violation of the California unfair trade practices legislation. The court held that the advertisements were not deceptive and did not involve illegal activity, since they did not specifically encourage minors to break the law, rejecting the plaintiffs' argument that their placement constituted an unfair trade practice. The court therefore concluded that the advertisements were constitutionally protected commercial speech.

The targeting to minors arguments presented here are distinguishable from the contentions advanced and then lost in *In re Tobacco Cases II*, L 31628649. First, in contrast to *Reynolds,* the plaintiffs in the San Diego case failed to provide concrete, quantifiable evidence that such targeting had occurred. Second, the court noted that the plaintiffs' proposed definition of targeting and their proposed remedy would have a broad impact on the tobacco industry's ability to reach adult consumers. Third, *In re Tobacco Cases II*, L 31628649 is a lower court opinion that interprets the California unfair trade practices legislation; therefore, it has no precedential (much less persuasive) authority inside or outside California.

Rockwood v. City of Burlington, Vermont, 21F. Supp. 2d 411 (D. Vt. 1998) also addressed youth targeting by tobacco advertisers, but did *not* involve Vermont's unfair business practices statutes. The federal district court held that a city ordinance restricting advertising and product give-aways and prohibiting sponsorship of events using tobacco product names was an unconstitutional restriction on commercial speech. The court found that tobacco advertising, even where it targets the youth market, met the first prong of *Central Hudson*. The advertising was lawful activity inasmuch as it did not directly incite illicit activity. Additionally, it was not misleading because even though the advertising made claims about smoking making one healthier, wealthier, wiser, and wildly popular, it contained truthful and nonmisleading information about brand availability and price. As with *In re Tobacco Cases II*, the plaintiffs did not provide concrete, quantifiable evidence that the industry targeted minors and did not argue that the advertising practices constituted an unfair business practice, and proposed broad remedies that unduly restricted the industry's ability to reach the legal, adult audience.

[60] *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*, *supra*, 447 U.S. at 557.

[61] *Id. at* 566.

The government must establish that all three are satisfied or the regulation in question will fail to meet the test and will be found to be unconstitutional.

The *Central Hudson* test, announced in 1980, constitutes an "intermediate" level of scrutiny for commercial speech that lies somewhere between the less demanding "reasonableness" test (the standard ordinarily applied to noncommercial expressive activity in nonpublic fora and to government actions taken in a state's proprietary/market participatory capacity) and the more burdensome "strict scrutiny" test (the standard customarily applied to noncommercial expressive activity in traditional and designated public fora). In *Central Hudson*, the Court advanced the distinction between the protection accorded commercial and other forms of speech under the First Amendment, stating: "The Constitution ... accords a lesser protection to commercial speech than to other constitutionally guaranteed expression. [Citation omitted.] The protection available for a particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."[62] It is the government's interest in protecting consumers from "commercial harm" that provides "the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech."[63] On the other hand, it is also the government's interest not to tread on commercial speech given that "bans that target truthful non-misleading commercial messages rarely protect consumers from such harms. … Instead, such bans often serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech."[64]

Applying the principles of *Central Hudson*, a state statute restricting placement of alcohol advertising that targets youth will be consistent with the First Amendment if properly drafted. A state has an interest in promoting the welfare and temperance of minors exposed to certain publicly visible advertisements of alcoholic beverages. The restrictions limiting alcohol advertising to media having a low youth audience composition will be valid under *Central Hudson* if they directly advance this interest and if the restrictions are not more extensive than necessary to serve this interest.[65]

The Supreme Court has not applied the *Central Hudson* test specifically to state restrictions on the placement of alcohol advertising that targets youth in magazine, radio, and television media. Nevertheless, both the Supreme Court and federal circuit courts have considered constitutional challenges to complete bans on outdoor alcohol or tobacco advertising as well as narrower prohibitions against the placement of outdoor advertising in particular areas where children are expected to walk to school or play in their neighborhood. These cases can guide the development of statutory provisions that address the regulation of alcohol advertising placement in media with disproportionately large youth audiences.[66]

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[62] *Central Hudson*, 447 U.S. at 562-563.
[63] *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426, 113 S.Ct. 1505 (1993).
[64] *44 Liquormart, Inc. v. State of Rhode Island*, 517 U.S. 484, 502-503, 116 S.Ct. 1495 (1996), citing *Central Hudson*, 447 U.S. at 566, n.9.
[65] *Id.*
[66] *See* J. F. Mosher, JD and Stacy Saetta, JD, *Model State Statute for Regulating Billboard and Other Forms of Outdoor Alcohol Advertising (With Commentaries)* (Washington, DC: Center on Alcohol Marketing and Youth, 2004). Available at http://camy.org/research/statelaws0403/modelbillboard.pdf (cited 3 June 2004).

44 Liquormart

In the 1996 Supreme Court decision *44 Liquormart*, Rhode Island had prohibited all advertising throughout the state, "in any manner whatsoever," of the price of alcoholic beverages except for price tags or signs displayed with the beverages and not visible from the street.[67] The State contended that the ban served the State's interest in promoting temperance by keeping alcoholic prices high and therefore consumption low.[68] The Supreme Court held the blanket ban unconstitutional as "an abridgement of speech protected by the First Amendment."[69]

The opinion for the Court did not provide a rationale for its conclusion that the ban violated the First Amendment, and no opinion addressing the First Amendment violation commanded a majority of the Court. Nevertheless, eight justices in three separate opinions concluded that the mechanism of keeping alcoholic prices high as a way to keep consumption low imposed too broad a prohibition on speech to be justified by the end.[70] Justice Stevens, joined by Justices Kennedy, Souter, and Ginsburg, noted, "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance."[71] Justice Stevens also noted that alternative forms of regulation were available that would not impinge speech and would "be more likely to achieve the State's goal of promoting temperance. As the State's own expert conceded, higher prices can be maintained either by direct regulation or by increased taxation."[72] Similarly, Justice O'Connor, writing an opinion in which Chief Justice Rehnquist, Justice Souter and Justice Breyer joined, concluded,

> "If the target is simply higher prices generally to discourage consumption, the regulation imposes too great, and unnecessary, a prohibition on speech in order to achieve it. ... '[T]he objective of lowering consumption of alcohol by banning price advertising could be accomplished by establishing minimum prices and/or by increasing sales taxes on alcoholic beverages.'"[73]

Justice O'Connor concluded that because the regulation failed "even the less stringent standard set out in *Central Hudson*, nothing here requires adoption of a new analysis for the evaluation of commercial speech regulation."[74] Eight justices thus concluded that keeping legal users of alcoholic beverages ignorant of prices through a blanket ban on price advertising did not further any legitimate end.[75]

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[67] *44 Liquormart,* 517 U.S. at 489-490.
[68] *See id.*
[69] *44 Liquormart*, 517 U.S. at 515.
[70] *See 44 Liquormart*, 517 U.S. at 515 (Stevens, J., concurring in the judgment); *id*. at 524 (Thomas, J., concurring in the judgment); id. at 528-534 (O'Connor, J., concurring in the judgment).
[71] *Id.* at 505.
[72] *Id.* at 507.
[73] *Id.* at 530 (O'Connor, J., concurring in the judgment) (quoting *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5, 7 (1st Cir.1994) (quoting Rhode Island's expert witness)).
[74] *Id.* at 532 (O'Connor, J., concurring in the judgment).
[75] *See id.* at 506-507 (Stevens, J., concurring in the judgment); *id.*at 522-523 (Thomas, J., concurring in the judgment); *id.* at 531 (O'Connor, J., concurring in the judgment).

Anheuser-Busch

In the 1996 decision *Anheuser-Busch v. Schmoke*, the Fourth Circuit Court of Appeals upheld against a constitutional challenge a city ordinance prohibiting the placement of stationary, outdoor advertising that promoted alcoholic beverages in certain areas of Baltimore City.[76] The ordinance was designed to promote the welfare and temperance of minors exposed to advertisements for alcoholic beverages by banning such advertisements in particular areas where children were expected to walk to school or play in their neighborhood.[77]

Applying the four-prong test for evaluating commercial speech announced in *Central Hudson*, the appellate court concluded that the ban of outdoor advertising of alcoholic beverages in limited areas directly and materially advanced Baltimore's interest in promoting the welfare and temperance of minors.[78] The Fourth Circuit "recognized the reasonableness of Baltimore City's legislative finding that there is a 'definite correlation between alcoholic beverage advertising and underage drinking.'"[79] It also concluded that the regulation of commercial speech was not more extensive than necessary to serve the governmental interest. Noting that in the regulation of commercial speech there is some latitude in the "fit" between the regulation and the objective, the appellate court concluded "no less restrictive means may be available to advance the government's interest."[80]

While the court in *Anheuser-Busch* acknowledged that the geographical limitation on outdoor advertising could also reduce the opportunities for adults to receive the information, the court recognized that there were numerous other means of advertising to adults that did not subject the children to "'involuntary and unavoidable solicitation [while] ... walking to school or playing in their neighborhood.'"[81] The court concluded that although no ordinance of this kind could be so perfectly tailored as to encompass all and only those areas to which children are daily exposed, Baltimore's efforts to tailor the ordinance by exempting commercial and industrial zones from its effort rendered it not more extensive than was necessary to serve the governmental interest under consideration.[82]

Lorillard

In the 2001 Supreme Court decision *Lorillard,* Massachusetts had promulgated regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars. Applying the *Central Hudson* test, the Supreme Court assumed that the First Amendment protected the rights of manufacturers and sellers to sell and advertise their tobacco products and that the State had an interest in preventing the use of tobacco by minors, but then struck down virtually all of the regulations.

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[76] *Anheuser-Busch v. Schmoke*, *supra,* 101 F.3d at 327.
[77] *Id.*
[78] *See Anheuser-Busch*, 101 F.3d at 327.
[79] *Id.*
[80] *Id.*
[81] *See Anheuser-Busch*, 101 F.3d at 327.
[82] *Id.*

One of the regulations ruled unconstitutional prohibited outdoor advertising of smokeless tobacco or cigars within 1,000 feet of schools or playgrounds. The Court found that this regulation directly advanced the government's substantial, even "compelling" interest in preventing underage tobacco use, given the evidence before the Court of the problem with underage use of smokeless tobacco and cigars.[83] The Court disagreed with Massachusetts' claim, however, that the regulation met *Central Hudson's* fourth test, concluding that in some metropolitan areas, the regulation, given its wide geographic reach, constituted "nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers."[84] The Court further found that the range of restricted communications, including a ban on oral communications and signs of any size, demonstrated a lack of tailoring to target only advertising and promotion practices that appeal to youth, while permitting others.[85]

Another regulation ruled unconstitutional prohibited indoor, point-of-sale advertising of smokeless tobacco and cigars lower than five feet from the floor of retail stores located within 1,000 feet of schools or playgrounds. The Court held that this regulation failed both the third and fourth prongs of *Central Hudson*, on the ground that the five-foot rule did not advance the goals of preventing minors from using tobacco products and curbing demand for the activity by limiting youth to the activity, since not all children are less than five feet and those who are can look up and take in their surroundings.[86] The Court also concluded that the blanket height restriction did not constitute a reasonable fit with the goal of targeting tobacco advertising that entices children, finding that the height restriction was an attempt to regulate directly the communicative impact of indoor advertising.[87]

2. A State Can Justify Restrictions on Alcohol Advertising Placement That Targets Youth Under the *Central Hudson* Test.

Applying the teachings of *44 Liquormart*, *Anheuser-Busch*, and *Lorillard*, one could argue that the first and second elements of *Central Hudson* are present. Alcohol advertising in media arguably is protected commercial speech. Adults can legally purchase and consume alcohol, and, apart from earlier-stated arguments that alcohol advertising is an unlawful or misleading business practice when placed in magazine, radio, and television media where a disproportionate share of the audience is under the legal drinking age, the proposed advertisements could be construed as otherwise non-misleading.

Moreover, the possible interest a state could assert in support of restricting alcohol advertising in media with a disproportionately underage audience is in promoting the welfare and temperance of minors exposed to certain media advertisements of alcoholic beverages. Numerous U.S. Supreme Court and appellate court cases have recognized this as a substantial governmental interest that satisfies the second prong of the *Central Hudson* test. The key to satisfying *Central Hudson*, then, is establishing that the restrictions directly advance the state's substantial interest (third prong) and are no more extensive than necessary to serve this interest (fourth prong).

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[83] *Lorillard Tobacco Co. v. Reilly*, *supra*, 533 U.S. at 557-61.
[84] *Id.* at 562.
[85] *Id.* at 563.
[86] *Id.* at 567.
[87] *Id.*

Third Element of Central Hudson

In order to meet the third element of *Central Hudson*, a state must show that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[88] The state is not required to show that "empirical data come ... accompanied by a surfeit of background information. ... [Courts] have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and 'simple common sense.'"[89]

To satisfy this element, a restriction on alcohol advertising that targets youth should include, as part of the legislative process, strong findings of fact with respect to the government's interest in promoting the welfare and temperance of minors. To show that the industry concedes the necessity of restricting alcohol advertising to underage youth, these findings should set forth the beer, wine, and liquor industry's own voluntary codes limiting placement of alcohol advertising to media where at least 70% of the audience is expected to be adults of legal purchase age.[90] The findings should also include data on how most wine advertisers not only concede the necessity of not overexposing underage youth to alcohol advertising but successfully reach an adult audience while minimizing reach to the underage audience.[91]

In addition to findings on self-regulation by the alcohol industry, the findings also should include data on the recommended standards for restricting alcohol advertising to youth of Mothers Against Drunk Driving ("MADD"), the American Medical Association ("AMA"), and the National Academies of Science/Institutes of Medicine ("NAS/IOM"). The findings should include the FTC's September 1999 report noting that some alcohol industry members adopted a 25 percent threshold for alcohol advertising,[92] MADD's recommendation to restrict broadcast alcohol advertising to shows with a youth viewership of 10%,[93] the AMA's call for a total ban on broadcast alcohol advertising,[94] and the NAS/IOM recommendation, found in its report

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[88] *Edenfield v. Fane*, 507 U.S. 761, 770-771, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993).
[89] *Florida Bar v. Went For It, Inc*., 515 U.S. 618, 628, 115 S.Ct. 2371 (citations and internal quotation marks omitted).
[90] Beer Institute. "Advertising and Marketing Code" <http://www.beerinstitute.org/adcode2.pdf>; Distilled Spirits Council of the United States. "Code of Responsible Practices for Beverage Alcohol Advertising and Marketing" <http://www.discus.org/industry/code/code.htm>. Wine Institute. "Code of Advertising Standards" <http://www.wineinstitute.org/communications/statistics/Code_of_Advertising.htm.>
[91] Center on Alcohol Marketing and Youth, *Overexposed: Youth a Target of Alcohol Advertising in Magazines* (Washington, D.C.: Center on Alcohol Marketing and Youth, 2002).
[92] Center on Alcohol Marketing and Youth, *Overexposed: Youth a Target of Alcohol Advertising in Magazines* (Washington, D.C.: Center on Alcohol Marketing and Youth, 2002), citing Federal Trade Commission. FTC *Reports on Industry Efforts to Avoid Promoting Alcohol to Underage Consumers: Self-Regulation Can Be Effective, But Third-Party Review Needed*. 9 September 1999. <http://www.ftc.gov/opa/1999/9909/alcoholrep.htm>.
[93] Center on Alcohol Marketing and Youth, *Overexposed: Youth a Target of Alcohol Advertising in Magazines* (Washington, D.C.: Center on Alcohol Marketing and Youth, 2002), citing Mothers Against Drunk Driving. MADD Online: MADD's Positions on Responsible Marketing and Service. <http://www.madd.org/activism/0,1056,1621,00.html>.
[94] Center on Alcohol Marketing and Youth, *Overexposed: Youth a Target of Alcohol Advertising in Magazines* (Washington, D.C.: Center on Alcohol Marketing and Youth, 2002), citing American Medical Association.

"Reducing Underage Drinking: A Collective Responsibility," that the industry immediately implement an industry standard of 25 percent threshold for television and magazine advertising and move toward a 15 percent threshold to further reduce the number of youth who are exposed to advertising intended for adults.[95] The findings should also include data on how in the tobacco advertising context, Philip Morris ceased advertising in publications where the composition of those younger than 18, the minimum smoking age, was 15% or more of the total readership, or where the audience included more than 2 million persons younger than 18 years of age, based on readership data.[96]

Furthermore, restrictions on alcohol advertising targeting youth should be supported with evidence of studies showing that the harms of youth exposure to alcohol advertising are real and that restricting alcohol advertising that targets youth will materially affect the state's problems with underage drinking. As described in Section IV(A), *supra*, studies and analyses by CAMY are examples of the kind of research that would be needed to document youth exposure to alcohol advertising,[97] while other public health research has demonstrated a link between advertising and youth intentions to drink, beliefs about drinking, and drinking behaviors.[98] The same evidence establishing "targeting minors" for purposes of an unfair competition claim likewise supports the evidence necessary to surmount *Central Hudson*'s third prong.[99]

Fourth Element of Central Hudson

The fourth element of the *Central Hudson* analysis "complements" the third element, "whether the speech restriction is not more extensive than necessary to serve the interests that support it."[100] "The least restrictive means" is not the standard; instead, the case law requires a reasonable "'fit' between the legislature's ends and the means chosen to accomplish those ends ... a means narrowly tailored to achieve the desired objective.'"[101]

Since the primary purpose for restricting alcohol advertising placement that targets youth is protecting youth the regulations themselves should be carefully tailored to address these specific goals. The Fourth Circuit U.S. Court of Appeals addressed this issue in the *Anheuser-Busch* case and described four reasons for concluding that the Baltimore ordinance was narrowly tailored.[102] First, the ordinance "[did] not ban outdoor advertising of alcoholic beverages but merely restrict[ed] the time, place, and manner of such advertisements."[103] Second, Baltimore's

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"Alcohol, Availability, Promotion, Taxation & Labeling." <http://www.ama-assn.org/ama/pub/article/3342-3626.html>.

[95] Institute of Medicine, The National Academies, *Reducing Underage Drinking: A Collective Responsibility, supra,* pp. 138-40.

[96] Center on Alcohol Marketing and Youth, *Overexposed: Youth a Target of Alcohol Advertising in Magazines* (Washington, D.C.: Center on Alcohol Marketing and Youth, 2002).

[97] *See* Center on Alcohol Marketing and Youth reports, *supra*, note 15.

[98] *See* Collins and Martin et al., *supra*, note 17.

[99] *See id.*

[100] *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 188, 119 S.Ct. 1923 (1999).

[101] *Went For It, Inc., supra*, at 632, 115 S.Ct. 2371 (quoting *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 480, 109 S.Ct. 3028 (1989)).

[102] *Anheuser-Busch*, 101 F.3d at 329.

[103] *Id.*

ordinance "did not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available to Anheuser-Busch and its competitors."[104]

Third, in Baltimore's case, "neither the state nor the city [was] attempting to undermine democratic processes and circumvent public scrutiny by substituting a ban on advertising for a ban on the product, as the *44 Liquormart* Court feared was the situation with [Rhode Island]."[105] Rather, in Baltimore, the possession and consumption of alcoholic beverages by minors had already been banned directly through legislation.[106] Thus, the appellate court found, "Baltimore's restrictions ... reinforce the democratic decisionmaking mechanism's conclusion as to the dangerousness of underage drinking by protecting children from exposure to advertising which the legislature reasonably considers harmful in itself to children's maturation."[107]

Fourth, in contrast to the Rhode Island regulations in *44 Liquormart*, which evidenced Rhode Island's desire to enforce adult temperance through an artificial budgetary constraint, the Baltimore regulations in *Anheuser-Busch* showed the city's interest was "to protect children who are not yet independently able to assess the value of the message presented."[108] The Fourth Circuit thus conformed its decision to the Supreme Court's repeated recognition that children deserve "special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media."[109] In the context of cable television, the court noted, the U.S. Supreme Court upheld restrictions on programming imposed by the Cable Television Consumer Protection and Competition Act as a means of protecting children from indecent programming.[110] In the context of the radio medium, the Court approved extra restrictions on indecent speech because of the pervasiveness of the medium and the presence of children in the audience.[111] Similarly, the Supreme Court sustained a law that protected children from non-obscene literature.[112] And, while it has recognized a right to private possession of adult pornography in the home,[113] the Court distinguished child pornography and allowed a stronger legislative response "to destroy a market for the exploitative use of children."[114] Consequently, the Fourth Circuit concluded, the underlying reason for the special solicitude of children was articulated long ago: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens."[115] In light

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[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.* at 329-330.
[111] *See FCC v. Pacifica Foundation*, 438 U.S. 726, 750-51, 98 S.Ct. 3026, 3040-41 (1978) (comparing indecent speech during hours when children are listening to the proverbial pig in the parlor); see also *Action for Children's Television v. FCC*, 58 F.3d 654, 657 (D.C.Cir.1995) (upholding the Public Telecommunications Act against a First Amendment challenge based on the state's compelling interest in protecting minors), cert. denied, --- U.S. ----, 116 S.Ct. 701 (1996).
[112] *See Ginsberg v. New York*, 390 U.S. 629, 639-40, 88 S.Ct. 1274, 1280-81 (1968).
[113] *See Stanley v. Georgia*, 394 U.S. 557, 566, 89 S.Ct. 1243, 1248-49 (1969).
[114] *Osborne v. Ohio*, 495 U.S. 103, 109, 110 S.Ct. 1691, 1696 (1990); *see also New York v. Ferber*, 458 U.S. 747, 759, 102 S.Ct. 3348, 3355-56 (1982).
[115] *Prince v. Massachusetts*, 321 U.S. 158, 168, 64 S.Ct. 438, 443 (1944).

of these cases, the court concluded that the Supreme Court had indicated "its desire to ensure that children do not become lost in the marketplace of ideas."[116]

A similar analysis of the fourth element of *Central Hudson* applies here. First, a state restriction on alcohol advertising placement that targets youth merely restricts the time, place, and manner of such advertising. It would not constitute an outright ban of advertising in magazines, radio, and television altogether. In addition, the restriction would not affect advertising in newspapers, direct mail, Internet, and other media. The narrowly tailored restrictions against placement presumably would affect just those magazine, radio, and television media that would result in exposure of youth ages 12 to 20 to the same degree as or to a higher degree than the industry's targeted audience of young adults ages 21 to 34 or in exposure of youth ages 12 to 20 to a greater degree than their population share of the relevant media market, which is between 15 and 16% on a national basis.[117] Accordingly, arguments that the restrictions would require the "dumbing down" of the rights of industry members and adult consumers to communication "'fit only for children'" would carry little or no weight. [118]

In this regard, the IOM/NAS report states: "If placements of alcohol advertisements are not permitted unless the expected audience is 85 percent or 90 percent adults, then the companies are presumably not targeting young people, and the message is being designed to be attractive to adults."[119] Based on data reported by Center on Alcohol Marketing and Youth (CAMY), a 15 percent threshold would preclude alcohol advertising on 34.0 percent of television programs if the base includes children under 12 and 19.2 if it excludes children under 12.[120] Assuming alcohol advertising dollars would be redeployed to programs with audience compositions below the threshold, a 15 percent threshold (using a base of 12 and older) would reduce youth gross rating points (the industry standard measure of exposure) by 22 percent.[121]

Additionally, alcohol purchase and consumption by persons under 21 years of age are unlawful. Therefore, restrictions protecting children from exposure to alcohol advertising reinforce democratic decision-making. Moreover, such restrictions, limited to media with a high youth to young adult ratio, are not intended to enforce adult temperance. Instead, the regulations specifically and narrowly address the state's interest in protecting children who are not yet independently able to assess the value of the alcohol advertisements with which they are presented.

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[116] *Anheuser-Busch*, 101 F.3d at 329.
[117] Center on Alcohol Marketing and Youth, *Overexposed: Youth a Target of Alcohol Advertising in Magazines* (Washington, D.C.: Center on Alcohol Marketing and Youth, 2002).
[118] *Lorillard Tobacco Co. v. Reilly*, *supra*, 533 U.S. at 564, citing *Butler v. Michigan*, 352 U.S. 380, 383, 77 S.Ct. 524 (1957).
[119] Institute of Medicine, The National Academies, *Reducing Underage Drinking: A Collective Responsibility, supra,* pp. 140-1.
[120] Center on Alcohol Marketing and Youth, *Alcohol Advertising and Promotion: Excerpts from "Reducing Underage Drinking: A Collective Responsibility*." (Washington, D.C.: Center on Alcohol Marketing and Youth, 2003), citing Institute of Medicine, The National Academies, *Reducing Underage Drinking: A Collective Responsibility, supra,* pp. 140-1, fn 7.
[121] *Id.*

States should be prepared to counter an argument that the analysis in *Lorillard*, which struck down several tobacco advertising regulations intended to prevent underage smoking, supersedes the analysis in *Anheuser-Busch*, and that therefore *Anheuser-Busch* should not be relied upon to uphold regulations restricting alcohol advertising. States can respond that, unlike the broad sweep of the regulations in *Lorillard*, the Baltimore ordinance restricting alcohol advertising in *Anheuser-Busch* was narrowly tailored. In *Lorillard*, the outdoor advertising regulations prohibited all smokeless tobacco or cigar advertising within 1,000 feet of schools or playgrounds, preventing advertising in 87 percent to 91 percent of Boston, Worcester, and Springfield, Massachusetts, that is, "a substantial portion of the major metropolitan areas of Massachusetts." The substantial geographical reach of the outdoor advertising regulations was compounded by the fact that "outdoor" advertising included not only advertising located outside an establishment, but also advertising inside a store if that advertising was visible from outside the store. Moreover, the regulations restricted advertisements of any size, and the term "advertisement" also included oral statements. Consequently, in some geographical areas, the Massachusetts regulations constituted nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers.[122]

As discussed earlier, in contrast to the Massachusetts regulations held unconstitutional in *Lorillard*, restrictions against alcohol advertising that targets youth would not constitute an entire ban on alcohol advertising media placement in magazines, radio, and on television. Moreover, the restrictions would be narrowly tailored to oppose only advertising placement that exposes youth ages 12 to 20 to the same or higher degree than the industry's targeted audience of young adults ages 21 to 34 or, alternatively, that expose youth ages 12 to 20 to a greater degree than their population share of the relevant media market. Furthermore, CAMY's youth advertising exposure analysis, upon which the restrictions recommended in the IOM/NAS report relied in part, are based on methodologies applying acknowledged industry standards for measuring and comparing magazine readership or television and radio program viewership of adults and teenagers. That is, CAMY's analysis employs the same tools and syndicated data sources utilized by media planners and buyers to execute advertising campaigns. Indeed, CAMY's analysis, described in its varied reports on overexposure of youth to alcohol advertising, utilizes the same methodologies applied to analyze adult and teen survey data on tobacco advertising found to be admissible in *People ex rel. Lockyer v. R.J. Reynolds Tobacco Company*, where the court determined, based on the data, that the tobacco company had violated a master settlement agreement prohibiting targeting of youth in advertising of tobacco products.[123] Consequently, unlike the tobacco advertising restrictions in *Lorillard*, restrictions on alcohol advertising media placement targeting youth would constitute neither a "total ban" nor even a "near-complete ban" of outdoor alcohol advertising. Accordingly, the *Anheuser-Busch* analysis remains a valid, persuasive authority for upholding restrictions on alcohol advertising in these media.

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[122] *Lorillard,* 533 U.S. at 562-563.

[123] In *R.J. Reynolds*, the court of appeal upheld the admission into evidence of survey data of MediaMark Research In. ("MRI"), a leading source of U.S. magazine audience estimates for consumer advertising, showing tobacco advertising exposure or reach to the admitted target audience of young adult magazine readers was essentially the same as to youthful readers ages 12 to 17. *Id.*, 116 Cal.App.4th at 1258, 1269-1280. MRI data on alcohol advertising likewise supports CAMY's analysis. To calculate audience delivery from the MRI data, CAMY applied the same ad exposure measures as described in the *R.J. Reynolds* case: reach, frequency, composition, coverage, index, impressions, and target rating points.

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As shown above, regulations restricting youth targeting in alcohol advertising would not violate the commercial speech rights of alcohol industry members. Such regulations restricting youth targeting in alcohol advertising only limit unlawful speech, which is not entitled to the protections accorded commercial speech. Even if a court were to conclude that such regulations affect lawful commercial speech, a state has a substantial governmental interest in promoting the welfare and temperance of minors exposed to certain media advertisements of alcoholic beverages. Regulations limited just to alcohol advertising placement in media with a high youth to young adult ratio directly advance the state's substantial interest and are no more extensive than necessary to serve this interest.