

Flag” campaign to encourage more effective ad clearance by publishers and broadcasters. See FTC Releases Guidance to Media on False Weight Loss Claims at <http://www.ftc.gov/opa/2003/12/weightlossrpt.htm>.

<sup>8</sup> *FTC v. Latinos Group Promotions*, No. C05-03021 BZ (N.D. Cal. July 26, 2005) (stipulated final order).

<sup>9</sup> *FTC v. USS Elder Enterprises, Inc.*, No. SA CV-04-1039 AHS (ANx) (C.D. Cal. June 29, 2005) (default judgment).

<sup>10</sup> See Red Flag Bogus Weight Loss Claims: A reference Guide for Media on Bogus Weight Loss Claims Detection, [www.ftc.gov/bcp/online/edcams/redflag/index.html](http://www.ftc.gov/bcp/online/edcams/redflag/index.html).

## INCONCLUSIVE EVIDENCE:

### The Institute of Medicine Report on Food Marketing to Children

By William C. MacLeod and Jason K. Levine

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The Institute of Medicine (the “IOM”) issued its widely anticipated report, *Food Marketing to Children and Youth: Threat or Opportunity?* (“Report”) on December 6, 2005.<sup>1</sup> Anyone reading press accounts of the Report would likely conclude the IOM finally found what critics of the food industry had long maintained – that food advertising was causing kids to gain weight. The Wall Street Journal headline announced: *Panel Faults Food Packaging for Kid Obesity*.<sup>2</sup> Other publications had similar headlines: “*Kidvid Food Ads Blamed*” and “*Report: Junk-Food Ads Lure Kids to Bad Diet*.”<sup>3</sup>

The media’s more detailed analysis was not much better. The Wall Street Journal claimed the Report “concluded that ‘statistically there is strong evidence,’ that exposure to television is ‘associated’ with obesity in children under twelve years old.”<sup>4</sup> Similarly, the New York Times said “A federal advisory group said Tuesday that there was compelling evidence linking food advertising on television and the increase in childhood obesity.”<sup>5</sup> The Richmond Times Dispatch lead with “Advertising junk food on television has enticed children into eating massive amounts of unhealthy food, according to a prestigious national science advisory panel.”<sup>6</sup>

Yet, lost in all this coverage was the most important finding in the Report – the data was insufficient to find that advertising caused childhood obesity, stating that the “evidence is not sufficient to arrive at any finding about a causal relationship from television advertising to adiposity (body fatness).”<sup>7</sup> Moreover, the Report readily acknowledged there are “multiple influences” shaping what children eat and that the Report was intended to be used as part of a package of recommendations to help combat childhood obesity, not as a polemic against the food and beverage industry.<sup>8</sup>

This article discusses the actual conclusions and recommendations of the IOM Report, demonstrating that for the most part the Report wisely advocates integrated society-wide solutions over top down directives. In addition, the article analyses and critiques the Report’s fall back position that if “voluntary efforts . . . are unsuccessful in shifting the emphasis away from high caloric and low-nutrient food and beverages to the advertising of healthful foods and beverages, Congress should enact legislation mandating the shift on both broadcast and cable television.”<sup>9</sup>

### The Report’s Actual Conclusions

The Centers for Disease Control (“CDC”) had asked the IOM to examine the role that “marketing of food and beverages may play as a determinant of the nutritional status of children and youth, and how marketing approaches might be marshaled as a remedy.”<sup>10</sup> The IOM examined “multiple sources of evidence” including peer reviewed articles, industry trade journals, and governmental and non-profit organizations’ briefs and reports.<sup>11</sup> When considering the Report’s findings however, it is important to note that a majority of the 123 sources used were predominantly focused on the effects of viewing of television generally, not the effects of viewing of advertisements alone. Furthermore, even though a significant portion of marketing to children and youth today takes place in media other than television, such as the internet, advergames, and product placement, the Report acknowledges there are “virtually no scientific studies available” on the affects of marketing in these other mediums.<sup>12</sup> Therefore, the conclusions of the Report represent the best the IOM could do with data focused mainly on the effects on children of watching television.

The IOM Report reached five conclusions based on its meta-analysis of previous studies:

- “Along with many other intersecting factors, food and beverage marketing influences the diets and health prospects of children and youth.
- Food and beverage marketing practices geared to children and youth are out of balance with healthful diets, and contribute to an environment that puts their health at risk.
- Food and beverage companies, restaurants, and marketers have underutilized potential to devote creativity and resources to develop and promote food, beverages, and meals that support healthful diets for children and youth.
- Achieving healthful diets for children and youth will require sustained, multisectoral, and integrated efforts that include industry leadership and initiative.
- Public policy programs and incentives do not currently have the support or authority to address many of the current and emerging marketing practices that influence the diets of children and youth.”<sup>13</sup>

These five conclusions are commensurate with the overall tone of the Report. They each carefully place food and beverage marketing in a larger real life context – an “environment” of “intersecting factors” that both children and adults inhabit every day. Moreover, while the conclusions place some responsibility on industry, they also place a significant burden on public policy leaders to address the issue. Unfortunately, this balanced call for responsible action by both business and governmental sectors did not appear in much of the coverage of the report.

## Policy Recommendations of the Report

Although the Report contained ten formal recommendations, most significantly, the IOM recognizes that obesity in American children can only be addressed by making it a public policy priority in addition to any industry efforts to tackle the problem. The Report recommends that government create programs that promote healthy eating and educate youth about healthful diets “in all aspects of the school environment.”<sup>14</sup> Moreover, “[g]overnment at all levels should marshal the full range of public policy levers to foster the development and promotion of healthful diets for children and youth.”<sup>15</sup> To this end, the Report suggests that government should consider a variety of ways to encourage industry involvement in this fight, including “recognition, performance awards, (and) tax incentives.”<sup>16</sup>

The Report does not stop at making policy suggestions that intertwine the imprimatur of government with the know-how of industry. It recommends that, if within two years the types of “voluntary efforts” it advises the food and beverage industry to make are not implemented, that Congress should “enact legislation mandating the shift” from advertising “high-calorie and low-nutrient foods and beverages to the advertising of healthful foods and beverages.”<sup>17</sup> The Report also recommends that the Department of Health and Human Services (“HHS”) designate an agency to monitor the progress of the recommendations made in the Report.<sup>18</sup> The Report notes that the Federal Trade Commission (“FTC”) currently has the authority to regulate “unfair and deceptive advertisements for food products.”<sup>19</sup> Lastly, although the Report discusses the *Central Hudson*<sup>20</sup> test at length, it reaches no conclusions regarding the odds that a “legislatively mandated shift” regulating or banning advertising to children on television would pass judicial muster.

The IOM’s legislative ideas are no doubt intended to spark a national dialogue on the topic of childhood obesity as well as motivating increased industry self-regulation. Nevertheless, when the FTC previously attempted to regulate commercials it believed were causing cavities in children under its unfairness authority, the results were less than successful. The FTC’s “Kid-Vid” rulemaking period in the late 1970s has been called “a well-intentioned, but ill-fated regulatory venture,” that led to the temporary closure of the agency and the permanent revoking of the FTC’s authority to regulate this type of advertising under its § 5 unfairness authority.<sup>21</sup> Accordingly, the FTC no longer has the authority to promulgate regulations of food advertisements to children unless that advertisement is misleading.<sup>22</sup> Further, as has been previously observed when discussing the lessons to be learned from Kid-Vid, “attempts to blame obesity on advertising for particular foods is doomed by the complexity of nutritional issues . . . . As was the case with the Kid-Vid rule, any regulation directed at the advertising of particular foods would have to be justified in isolation of [] other factors – a virtually impossible task.”<sup>23</sup>

Moreover, regulations banning or censoring advertising to children are unlikely to clear the hurdle of *Central Hudson*’s third and fourth prongs: 1. Does the “regulation directly advance the governmental interest asserted?” and 2. Is it “not more extensive than is necessary to serve that interest?”<sup>24</sup> In *Lorillard Tobacco Co.* the Supreme Court struck down an attempt to regulate truthful, nonmisleading tobacco advertising as being more extensive than necessary. Despite the state’s argument that it had an important interest in protecting children from the advertising, the court

held that there was a “protected interest in communication” between the manufacturers and legal consumers.<sup>25</sup> The Report’s recommendation to “shift” children’s advertising to “healthful foods and beverages” will most likely need to be done outside of the legislative or regulatory arena to pass judicial muster under current Supreme Court interpretation of the commercial speech doctrine.<sup>26</sup>

Additionally, it is unclear that an advertising ban would necessarily be effective. A number of European countries have enacted restrictions or bans on advertising to children, including Sweden and Norway.<sup>27</sup> However, according to published reports, more than 20 percent of seven year old Swedish children are obese, a figure that has increased while the ban has been in effect and is greater than current estimates regarding U.S. children.<sup>28</sup> Similarly, over a seven-year period ending in 2000, one study found the obesity rates of Norwegian school children increased dramatically, despite the existence of advertising restrictions.<sup>29</sup> These results do not conclusively indicate that restrictions could never have any success in the U.S., but they should give pause to those advocating an end to television advertising and marketing to children as a panacea.

Finally, advertising bans and restrictions would not address one of the more pressing factors that appears to threaten the health of American youth and adults: our increasingly sedentary lifestyle. As one economist noted when commenting on the rise in non-television sedentary activities by children: “Since advertising on computers and video games has been far less important than advertising on television, it is hard to see how the growth in obesity during the past 25 years could be explained at all by advertising toward children, unless TV advertising became much more effective than it had been.”<sup>30</sup> In addition, advertising bans are not likely to restore physical education classes to our schools. One recent report claims that that only 8 percent of elementary schools and 6 percent of middle schools and high schools offer physical education classes on a daily basis.<sup>31</sup> The results of this lack of physical activity are reflected in a study published in December 2005 by the Journal of the American Medical Association. The study found more than one-third of tested adolescents (ages 12-19) failed a treadmill test, putting approximately 7.5 million American teenagers at a higher risk of cardiovascular disease later in life.<sup>32</sup>

## Conclusion

There are important conclusions to be drawn from the IOM Report. Despite the failure of the Report to conclusively show that watching commercials causes children to gain weight, this study could stand as a pivotal moment in the fight against childhood obesity. The IOM’s research on the influence of a variety of different types of media on our nation’s youth can serve as a helpful tool for parents, consumer groups, and industry in the marketing of healthier food choices to children. In addition, this Report can serve as a solid foundation for research that delves beyond “influences” and reaches the real causes of childhood obesity and points towards workable solutions to the problem. Most importantly, the Report’s recommendation that both public and private resources be devoted to this problem, if followed, could create the type of inclusive initiative that is necessary to both highlight and begin to solve the national problem of childhood obesity.

### Endnotes

- <sup>1</sup> Institute of Medicine, *Food Marketing to Children and Youth: Threat or Opportunity?* (J. Michael McGinnis, et al., eds., 2005).
- <sup>2</sup> Sarah Ellison & Janet Adamy, *Panel Faults Food Packaging for Kid Obesity*, *The Wall Street Journal*, Dec. 7, 2005, at B1.
- <sup>3</sup> William Triplett, *Kidvid Food Ads Blamed*, *Daily Variety*, Dec. 7, 2005, at 31; *Report: Junk-Food Ads Lure Kids to Bad Diet*, *Richmond Times Dispatch*, Dec. 7, 2005, at C1.
- <sup>4</sup> Ellison & Adamy, *supra* note 2.
- <sup>5</sup> Marian Burros, *Federal Advisory Group Calls for Change in Food Marketing to Children*, *N.Y. Times*, Dec. 7, 2005.
- <sup>6</sup> *Report: Junk-Food Ads Lure Kids to Bad Diet*, *Richmond Times Dispatch*, Dec. 7, 2005, at C1.
- <sup>7</sup> Institute of Medicine, *supra* note 1, at 7-7.
- <sup>8</sup> *Id.* at 7-1.
- <sup>9</sup> *Id.* at 7-12.
- <sup>10</sup> *Id.* at xiii.
- <sup>11</sup> *Id.* at ES-5.
- <sup>12</sup> *Id.* at ES-5-6.
- <sup>13</sup> *Id.* at 7-2; *see also* Chairman J. Michael McGinnis, Public Briefing, Dec. 6, 2005, at <http://www.iom.edu/CMS/3788/21939/31330.aspx>.
- <sup>14</sup> Institute of Medicine, *supra* note 1, at 7-11.
- <sup>15</sup> *Id.* at 7-12.
- <sup>16</sup> *Id.*
- <sup>17</sup> *Id.*
- <sup>18</sup> *Id.* at 7-13.
- <sup>19</sup> *Id.* at 6-18-24.
- <sup>20</sup> *Central Hudson Gas Co. & Elec. Corp. v. Pub. Serv. Comm'n.*, 447 U.S. 557 (1980).
- <sup>21</sup> J. Howard Beales, *Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present*, 6, 8 (2004) <http://www.ftc.gov/speeches/beales/040802adstokids.pdf>.
- <sup>22</sup> 15 U.S.C. § 57a(h) (2006).
- <sup>23</sup> William C. MacLeod & Judith L. Oldham, *Kid-Vid Revisited: Important Lessons for the Childhood Obesity Debate* 18 *Antitrust Magazine* 34 (Summer 2004).
- <sup>24</sup> 447 U.S. at 566.
- <sup>25</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001).
- <sup>26</sup> Institute of Medicine, *supra* note 1, at 7-12.
- <sup>27</sup> Sweden: Radio and Television Act of 1996, Ch. 7, § 4; Norway: Act No. 127 of 4 December 1992 Relating to Broadcasting, <http://odin.dep.no/kkd/engelsk/media/018041-200005/index-dok000-b-n-a.html>. See also Legislative Intervention to Address Obesity in Overseas Jurisdictions (2004) at <http://www.diabetes.org.nz/resources/files/ObesityLegislation.doc>.
- <sup>28</sup> *Child Obesity Threatens Life Expectancy*, *The Local*, Apr. 13, 2005, at <http://www.thelocal.se/article.php?ID=1274&date=20050413>; Institute of Medicine, *supra* note 1, at ES-1.
- <sup>29</sup> LF Andersen, et al., *Overweight and Obesity Among Norwegian Schoolchildren: Changes from 1993-2000*, *Scand J Public Health* 33(2):99-106 (2005), at [http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list\\_uids=15823970&dopt=Citation](http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=15823970&dopt=Citation).
- <sup>30</sup> Gary Becker, *Don't Blame Fast Food Ads For Fat Kids*, *Chicago Sun-Times*, Dec. 18, 2005, at B5.

<sup>31</sup> Jacqueline Stenson, *As Gym Classes Dwindle, How Can Kids Keep Fit?*, *MSNBC.com*, Aug. 9, 2005, at <http://www.msnbc.msn.com/id/8827876/>.

<sup>32</sup> Mercedes R. Carnethon, et al., *Prevalence and Cardiovascular Disease Correlates of Low Cardiorespiratory Fitness in Adolescents and Adults*, 294 *Journal of American Medical Association* 2981, Dec. 21, 2005.

## CONSUMER PROTECTION ON FILM: Movies Every Attorney Should See

By C. Steven Baker

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Many of the same consumer protection scams challenged by the Federal Trade Commission have also been given the Hollywood treatment. In no particular order, here is a list of some of my favorites.

### The Hucksters (1947)

Clark Gable stars as an advertising executive on Madison Avenue at the end of World War II who must make compromises to sell soap.

### The Flim Flam Man (1967)

George C. Scott stars as Mordecai Jones, an aging con man in the rural South described as "Master of Back-Stabbing, Cork-Screwing, and Dirty-Dealing." Features the classic shell game and even a variation on the old "punch board" scam, challenged as an unfair trade practice in *Globe Cardboard Novelty Co. v. FTC*, 192 F.2d 444 (3d Cir. 1951) and dozens of other cases.

### The Sting (1973)

Is there anyone that hasn't seen this Paul Newman-Robert Redford classic?

### Used Cars (1980)

Very funny, but not well known, comedy about rival used car dealers. The plot revolves in part around worries about being caught by consumer protection agencies. Stars Jack Warden and Kurt Russell. Directed by Robert Zemeckis before movies like *Back to the Future* and *Forrest Gump* made him famous.

### Tin Men (1987)

Danny DeVito and Richard Dreyfuss star as Ernest Tilley and B.B. Babowsky, aluminum siding salesmen in 1963 Baltimore who are called before the State Home Improvement Commission. Great music by the Fine Young Cannibals.