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Fight For Stricter Labeling on Foods That Pose Choking Hazard to Children

The American Academy of Pediatrics recently issued a policy statement, called "Prevention of Choking Among Children," that seeks sweeping changes in the way food is designed and labeled, hoping to minimize the incidents of children choking on food. The report notes that choking is a leading cause of death among children, especially those aged 3 and younger.

Both toys and food pose dangers to children, and the academy recommended that the Consumer Product Safety Commission increase its efforts to ensure that toys are appropriately labeled for choking concerns. Addressing food, the academy concluded that "Prevention of food-related choking among children in the United States has been inadequately addressed at the federal level." Like choking warning labels on certain toys, food makers should be required to label high-risk foods to caution parents of the dangers of choking, the academy suggested. Foods such as hot dogs, hard candy, peanuts and other nuts, seeds, whole grapes, raw carrots, apples, popcorn, marshmallows, chewing gum, and sausages all pose significant risks to children, the report said.

Many of the high-risk characteristics of food are man-made, the academy noted (such as the hot dog, which is cylindrical, compressible, and similar in size to a child's airway, allowing it to block the entire passage). "The characteristics of these foods are engineered and, therefore, amenable to change," the report suggested. "Manufacturers of foods that are frequently consumed by children should, to the extent possible, design these products to minimize choking risk to those in

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that age group." The report further recommended that food manufacturers design new foods to minimize choking risks.

The report also encourages the Food and Drug Administration to establish a reporting system for food-related choking incidents and to recall foods that are linked with choking. A spokeswoman for the FDA said the agency plans to review the report and its recommendations.

Why it matters: Federal legislation focused on reducing the risk of choking on food by children was introduced several times over the last decade, although it never passed. State legislation has been enacted (in New York, for example), so food manufacturers should be aware of state laws and the potential for federal regulation.

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Louis Vuitton vs. Hyundai in Trademark Suit

French luxury goods company Louis Vuitton filed suit last week, alleging that Hyundai violated its trademark rights in a commercial the car company aired during the Super Bowl. The complaint, filed in U.S. District Court in Manhattan, claims that the ad is "tarnishing [Louis Vuitton's trademarks'] inestimable value through impermissible association with products of inferior quality."

The 30-second spot entitled "Luxury," depicting the 2011 Hyundai Sonata, contains images of extravagance throughout the commercial: chandeliers function as stoplights, a yacht is parked in a driveway, and police officers snack on caviar. At one point, the Sonata drives by a three-on-three basketball game, complete with a golden net and a basketball featuring what the lawsuit claims is "a spurious replica" of the interlocking "LV" symbol featured on Louis Vuitton goods. While still brown leather, the ball has golden X's and O's on it. A voiceover says: "What if we made luxury available to everyone? Would it still be called luxury? Or maybe we'd need a new word for it. Oh, here's one: Hyundai."

Noting that the 2010 Super Bowl was the most-watched television show in history, the complaint seeks all profits traceable to the commercial, as well as the destruction of the ad.

Why it matters: In choosing reflections of luxury, Hyundai may have chosen the wrong brand to pay homage to in its ad – Louis Vuitton has a long history of vigorous defense of its trademarks. The case will turn on various defenses: (1) Fair use: Did Hyundai use the marks on the basketball as an accurate description of its luxury? (2) Parody: Is the entire ad a parody on luxury? and (3) Likelihood of confusion: Is there a likelihood of confusion among a significant number of consumers who believe that Louis Vuitton has gone into either the basketball or auto

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FDA Warns Food Manufacturers of Labeling Violations

The Food and Drug Administration sent letters to 17 food manufacturers, warning them that the labeling of their food products violates the Food, Drug and Cosmetic Act.

Specific violations included unauthorized health claims and nutrient content claims, and the unauthorized use of terms like "healthy" or "low fat."

The FDA said Nestlé's Drumstick Classic Vanilla Fudge was misbranded because the product label made a nutrient content claim but failed to meet its requirements with regard to trans fats.

Several of Beechnuts' products, like its Whole Grain Oatmeal & Mixed Fruit Cereal, were the subject of letters because they made unauthorized claims on their labels for products intended for infants and children under the age of 2, the FDA said.

And multiple juice products, like POM's POM Wonderful 100% Pomegranate Juice, were illegally marketed as a drug, the FDA said, because of therapeutic claims on the company's Web site that the juice was intended for use in the cure, mitigation, treatment, or prevention of disease.

FDA Commissioner Margaret Hamburg issued an open letter to the industry in conjunction with the warning letters, noting that they should help "clarify the FDA's expectations for food manufacturers as they review their current labeling."

The letters are a result of the Commissioner's front-of-package labeling initiative, launched in October 2009.

As part of the initiative, the Commissioner said the FDA will soon issue new draft guidance regarding calorie and nutrient labeling on the front of food packages, as well as recommend nutritional criteria for foods that make "dietary guidance" statements (for example, "Eat two cups of fruit a day for good health") on their labeling.

Why it matters: The warning letters are the most recent example of the FDA's efforts to address nutrition labeling. Taken in combination with the Commissioner's letter, they serve as notice to food manufacturers to review their current labels for accurate calorie and nutrient claims, as well as the correct use of terms – like "healthy" – that are defined by regulations. With draft guidance on the way from the FDA, companies should be prepared for further action.

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FTC to Review Three Regulatory Rules, Including Grocery Store Advertising

The Federal Trade Commission announced that it will review three regulatory rules in 2010: the Retail Food Store Advertising and Marketing Practices Rule, the Preservation of Consumers' Claims and Defense Rules, and the Labeling Requirements for Alternative Fuels.

The Retail Food Store Advertising and Marketing Practices Rule, or the Unavailability Rule, makes it a violation of federal law for grocery stores to advertise products for sale at a stated price unless they are in stock and available during the effective period of the advertisement. The retailer may also offer similar products that are at least comparable in value to the advertised product, or tender consumers a "rain check."

Merchants who make credit available to customers purchasing their goods or services are subject to the Preservation of Consumers' Claims and Defense Rules. Also known as the Holder in Due Course Rule, it mandates that companies that make credit available to customers purchasing their goods or services advise purchasers that any claims they could bring against the merchant could also be brought against third-party creditors.

Finally, the FTC will review the Labeling Requirements for Alternative Fuels Rule, which sets the labeling requirements for vehicles powered in whole or in part by non-liquid alternative fuels like hydrogen and electricity. This rule is also known as the Alternative Fuels and Vehicles Rule and was previously scheduled for review in 2014. The FTC accelerated its review of the rule, however, to ensure that labels are consistent with the Environmental Protection Agency fuel economy labeling requirements.

The FTC is seeking public comment on the economic impact and need for the rules, in light of any technological, economic, or other industry changes, as well as possible conflicts between the rules and any other state or federal laws or regulations.

Why it matters: Companies who are subject to any of the three rules can take this opportunity to comment on the rules and should be aware of the potential for changes and updates during the review process.

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E-mail Leads to Lawsuit Between Trainers, Oprah's Parent Company

A husband-and-wife team of fitness trainers filed suit against Oprah's parent company for terminating them after they sent an e-mail to their clients, announcing an upcoming appearance on an Oprah-sponsored radio program.

Dina Castillo and Frank Nunez claim that Oprah's parent company, Harpo, asked them to create a customized fitness program for her and her employees based on their Corporate Fitness Challenge. The challenge is an employer-sponsored program where each employee sets a series of goals each month; those who reach their goals qualify for prizes or gifts the company selects.

The program for Harpo was dubbed the "O Fitness Challenge" and enrolled 341 employees, according to the complaint, and the plan was to turn the O Fitness Challenge into a segment for the "Oprah" show. As compensation for the creation of the program, Castillo and Nunez claim they were to receive the right to issue two press releases announcing their relationship with Harpo, in addition to corporate referrals and professional introductions. While they set up the program, and enrolled employees began the challenge, they claim that no press releases or referrals occurred.

In March 2009, the couple was asked to participate in a program on Oprah's Radio XM station by Oprah's formal personal trainer, Bob Green. Prior to the program, they e-mailed their client list to announce their participation on the program, and asked them to listen. But according to their breach of contact complaint, filed in Illinois state court, the couple claims they were then terminated and not paid for their months of work. Castillo and Nunez allege they were told that their marketing attempt was a "gross and egregious violation" of their confidentiality agreement with Harpo. Harpo also declined to compensate the couple, the complaint says, because their services had been "voluntary."

Why it matters: The lawsuit is a reminder to companies engaging in service contracts to carefully detail the rights, responsibilities and remedies of both parties, including but not limited to confidentiality restrictions, approval rights in connection with press releases, and compensation due upon termination.

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