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FIRM NEWS

Shook, McDonough and Anstoetter Earn Top Honors in JD Supra 2018 Readers Choice Awards

Shook, Hardy & Bacon has been named the “Top Firm for Food & Beverage” news in the [JD Supra 2018 Readers Choice Awards](#), chosen by readers from more than 50,000 authors whose work was published on the site in 2017. [Madeleine McDonough](#) and [Mark Anstoetter](#) were ranked first and second “Top Authors” in [Food & Beverage](#) out of 800 authors, and McDonough was ranked second in “Top Authors” in the [Class Action](#) category.

LEGISLATION, REGULATIONS & STANDARDS

Washington Bans PFAs in Food Packaging

Washington Governor Jay Inslee has signed into law the Healthy Food Packaging Act ([H.B. 2658/S.B. 6396](#)), making the state the first in the country to ban perfluorinated chemicals (PFAs) in food packaging. If the Washington’s Department of Ecology identifies safer alternatives to PFAs by January 1, 2020, the law will ban

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Shook offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

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[Mark Anstoetter](#)

PFA in paper food packaging effective January 1, 2022; if the state is unable to find a safer alternative, the law will not go into effect and the Department of Ecology must annually review the availability of alternatives. When the department finds an acceptable alternative, the ban will go into effect two years later.

Public Meeting Scheduled for Codex Session on Analysis and Sampling Methods

The U.S. Department of Agriculture (USDA) and the U.S. Food and Drug Administration (FDA) will sponsor a public meeting April 6, 2018, in Washington, D.C., to provide information and receive public comment on U.S. draft positions for the Codex Committee on Methods of Analysis and Sampling meeting to be held in Budapest, Hungary, May 7-11, 2018. The committee is responsible for defining criteria and serving as a coordinating body for groups working on analysis, sampling and quality assurance systems applicable to foods.

McCain, Shaheen Renew Objections to Catfish Import Restrictions

After the Vietnamese government asked the World Trade Organization (WTO) to discuss U.S. Department of Agriculture (USDA) restrictions on catfish imports, Sens. John McCain (R-Ariz.) and Jeanne Shaheen (D-NH) sent a letter to U.S. Trade Representative Robert Lighthizer asking him to support repeal of the restrictions.

“Since its implementation, the USDA Catfish Inspection Program has done nothing more than erect a damaging trade barrier against Asian catfish imports to protect a handful of domestic catfish farmers in Southern states,” the senators wrote. “If the U.S. loses this latest WTO battle, it could negatively impact U.S. agriculture exports to Vietnam, including cotton, wheat, pork, soybeans, beef, poultry, eggs and fruit. Vietnam is one of our largest Asian trading partners and our 10th largest agricultural export market. Additionally, more than 525,000 American jobs directly rely on imported seafood.”

816.474.6550

manstoetter@shb.com



Madeleine McDonough

816.474.6550

202.783.8400

mmcdonough@shb.com

ABOUT SHOOK

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility inspections, subject to FDA, USDA and FTC regulation.



McCain and Shaheen have been critics of the catfish restrictions since at least 2013, calling them “duplicative” and “wasteful,” and in 2016 successfully persuaded the Senate to pass a Resolution of Disapproval of the USDA program.



ASB Finds Beverage Ad Offensive to Redheads

The Australian Advertising Standards Bureau (ASB) has upheld complaints that Rusty Yak Ginger Ale’s advertising, which urged viewers to “stop the ginger gene” from spreading by looking for bottles of the product hidden in six-packs of beer, was offensive to people with red hair. Carlton and United Breweries ran the television and internet ads for the product and told ASB the ads were intended to launch the product “in an affectionate, light-hearted and humorous way by linking the hair colour with [its] ‘crisp and zingy Rusty Yak gingery flavor.’” The Ad Standards Community Panel considered the ad in relation to its advertising code of ethics, which refers to discrimination on the basis of race, ethnicity and other personal characteristics. The panel said, “DNA can be considered to be related to ancestry and descent . . . in this context the reference to people with red hair falls within the definition of race.” The panel also said the “suggestion that the genetic trait needed to be stopped was a negative one” and found that “the most reasonable interpretation of this line was that having red hair was undesirable.” Carlton and United Breweries disagreed with the finding but withdrew the ads.

LITIGATION

Advocacy Groups Sue USDA For OLPP Withdrawal

The Center for Environmental Health, the Center for Food Safety, Cultivate Oregon, and the International Center for Technology Assessment have filed a complaint for declaratory and equitable relief against Secretary of Agriculture Sonny Perdue, alleging that the U.S. Department of Agriculture’s (USDA’s) withdrawal of the Organic Livestock and Poultry Practices rule (OLPP) violated both

the Organic Foods Production Act (OFPA) and the Administrative Procedures Act (APA). *Ctr. for Env'tl Health v. Perdue*, No. 18-1763 (N.D. Cal., filed March 21, 2018).

The complaint alleges that USDA's first rationale for withdrawal of the OLPP, that it lacked the authority to set standards for livestock production, is "contrary to the plain language of OFPA, which unambiguously requires USDA to promulgate additional standards for the care of livestock based on NOSB (National Organic Standards Board) recommendation." The rationale was not a permissible interpretation of the OFPA's requirements, the complaint asserts, and is arbitrary and capricious.

USDA's second rationale for withdrawal, the plaintiffs state, was consideration for the "supposed regulatory burdens and costs to producers." That rationale "similarly violated both OFPA and the APA, as it runs contrary to the economic evidence before USDA, and relies on factors Congress never intended USDA to consider, while ignoring the benefits (including non-economic benefits) of strong and consistent organic standards, as intended by OFPA." The complaint also claims that USDA's failure to consult NOSB before withdrawing the OLPP or explain its deviation from NOSB recommendations violated both acts.

Jury Awards Plaintiff in Mondelez Age Discrimination Case

A jury in Pennsylvania federal court has awarded \$200,000 to a former Mondelez employee who alleged the company discriminated against her because of her age and terminated her after she complained of the alleged discrimination. *Konsavage v. Mondelez Global LLC*, No. 15-1155 (M.D. Pa., verdict issued March 19, 2018). The plaintiff, who worked for Nabisco and its successor Mondelez for 31 years, reportedly said that beginning in 2013 a new supervisor told her that she should reduce her workload to give younger employees a chance, that she lacked agility and that she had no potential at her age. The following year, she was allegedly demoted and forced to take a \$9,000 pay cut before being fired a few months later. The jury awarded her emotional distress damages pursuant to the Pennsylvania Human Relations Act.

“Super Herb” Beverage Maker Facing Putative Class Action Complaint

Rebbl Inc. faces a putative class action alleging its “super herb” beverages are falsely advertised and labeled because the claims made for their ingredients are “not supported by sound scientific evidence.” *Richburg v. Rebbl Inc.*, No. 18-1674 (E.D.N.Y., filed March 16, 2018). The complaint alleges that beverages in Rebbl’s product line of “Elixirs” and “Proteins” contain several ingredients—turmeric, reishi, maca, matcha, ashwaganda, medium chain triglyceride oil and coconut milk—that the company falsely asserts can reduce stress and improve beauty, health or wellness. Claiming violations of New York’s General Business Law, breach of warranties, fraud and unjust enrichment, the plaintiff seeks class certification, injunctive relief, damages and attorney’s fees.

Safeway Settles Olive Oil Labeling Class Action

A California state court has reportedly approved a class action settlement that will provide vouchers or cash to state residents who bought Safeway olive oil allegedly falsely labeled as “imported from Italy.” *Kumar v. Safeway*, No. RG14726707 (Cal. Super. Ct., entered March 16, 2018). The class alleged that Safeway labeled its olive oil as imported and “extra virgin” but manufactured it from olives grown and pressed outside Italy. The settlement reportedly offers class members \$0.25 to \$0.75 or vouchers worth up to \$1.50; attorneys were awarded more than \$1.4 million in fees and expenses and the named plaintiff will receive \$6,490.

SCIENTIFIC / TECHNICAL ITEMS

Childhood Obesity is Rising, According to Study

Researchers have released a study concluding that rates of childhood obesity are rising rather than declining or stabilizing as

previously reported. Using data from the National Health and Nutrition Examination Survey (NHANES), researchers reportedly found that although the prevalence of obesity has increased across all childhood age groups since 1999, “significant increases in obesity and severe obesity” have appeared in children aged two to five and adolescent females aged 16 to 19. Asheley C. Skinner, et al., “Prevalence of Obesity and Severe Obesity in US Children, 1999-2016,” *Pediatrics*, March 2018. The researchers reported that they observed “disconcerting” racial-ethnic differences in obesity rates, with African-Americans and Hispanics having a higher prevalence of obesity while Asian-American children had a lower prevalence in all age and sex categories. Specifically, the researchers noted “astounding” differences between Hispanic children and those of all other races, finding nearly half of all Hispanic youth overweight or obese.

Researchers purportedly found “scant evidence” that “intense clinical and public health” efforts to reduce obesity have had any effect and opined that the “decline in Americans’ health is occurring without impactful policy at the national level . . . effective prevention and treatment interventions remain undeveloped or have not been effectively disseminated.”

Beef, Dairy Consumption Linked to High Greenhouse Gas Emissions

Using a “food impacts” database, researchers from Tulane University and the University of Michigan have reportedly found that high levels of beef and dairy consumption account for large portions of diet-related greenhouse gas emissions. Martin C. Heller, et al., “Greenhouse gas emissions and energy use associated with production of individual self-selected US diets,” *Environmental Research Letters*, March 2018. The study reported that the distribution of greenhouse gas emissions by food group was “quite typical of Western dietary patterns, with the dominant impacts coming from meats and dairy.” Beef consumption accounted for 72 percent of the emissions difference between the highest-impact and lowest-impact groups. The researchers also discovered that beverages, primarily fruit and vegetable juices, had the third-largest impact in the analysis.

A *New York Times* op-ed argued a similar point less than a week before the study's publication. Citing a paper by researchers from the Toulouse School of Economics on the practicality of instituting an EU carbon tax on beef to reduce emissions, Richard Conniff asserted that a similar proposal could help the United States. "Wouldn't it make more sense to put a carbon tax on fossil fuel, a larger source of greenhouse gas emissions? You bet. But many people who now commute in conventional gas-fueled automobiles have no better way to get home — or to heat their homes when they get there. That broader carbon tax will require dramatically restructuring our lives," Conniff wrote. "A carbon tax on beef, on the other hand, would be a relatively simple test case for such taxes and, according to the French study, only a little painful, at least at the household level: While people would tend to skip the beef bourguignon, they could substitute other meats, like pork and chicken, that have a much smaller climate change footprint." Conniff acknowledges that a co-author of the French paper said the proposed tax "has no chance of becoming reality, 'not even in Europe' and certainly not in the United States. Our politicians continue to regard the beef industry as, well, a sacred cow."

MEDIA COVERAGE

“Joy of Cooking” Authors Question Brian Wansink Study

Brian Wansink, director of the Food and Brand Lab at Cornell University, is facing criticism from a couple that owns the rights to “The Joy of Cooking,” which Wansink asserted had increased calorie counts of its recipes by an average of 44 percent since its first publication in 1936. *The New Yorker* reports that John Becker and his wife were “blindsided” when Wansink published “The Joy of Cooking Too Much” in the *Annals of Internal Medicine* in 2009, but they assumed his findings were correct. At the time, they posted a response on the cookbook’s website saying that out of 4,400 recipes, Wansink had analyzed 18.

Becker later saw a cartoon commissioned by Cornell to appear with Wansink’s original study, and he decided to check Wansink’s results, apparently finding numerous recipes that contradicted Wansink’s findings. Becker forwarded his research to James

Heathers, a behavioral scientist at Northeastern University, who reportedly found issues in the 2009 study: Wansink had compared recipes on the basis of serving size despite 10 of the 18 recipes lacking specific serving sizes, and he also compared recipes that created different dishes despite bearing identical titles. For example, Heathers told *The New Yorker*, one of Wansink's "egregious calorie gainers" was a recipe for gumbo; the 2006 version is thickened with roux and contains sausage and chicken, while the 1936 version was a clear soup of chicken and vegetables.

Wansink reportedly told the magazine that the published data was an abbreviated version of his full study and that he removed "several key elements" before publication at the request of the journal's editors. Several of Wansink's studies have been retracted, and Cornell has reportedly begun a formal investigation into his work.

NAFTA Talks Include Food Labeling

During negotiations for updates to the North American Free Trade Agreement, the Trump administration is reportedly seeking to stop the enactment of laws mandating food labels that warn of high levels of sugar, salt and fat. Officials in Mexico and Canada are reportedly considering regulatory actions similar to those in Chile, which approved requirements for black-box warnings on food labels in 2016. Although public health experts reportedly praise Chile's new rules, the United States and other countries, along with food industry trade organizations, fought the legislation before the World Trade Organization. The *New York Times* quoted Dr. Camila Corvalán, a nutritionist at the University of Chile who helped develop the warning labels, as saying, "The fact that the industry is freaking out is reassuring, but at the same time it's worrying that the U.S. government is trying to defend the position of the food industry."

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