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LEGISLATION, REGULATIONS & STANDARDS

FDA Provides Update on Antimicrobial Resistance

The U.S. Food and Drug Administration (FDA) has published Commissioner Scott Gottlieb's September 14, 2018, [remarks](#) delivered at the Pew Charitable Trusts on the issue of antimicrobial resistance, including the effects of antibiotics in animals raised for food production. Gottlieb indicated that the agency will release "a draft strategy, likely as a new guidance for industry, by the end of fiscal year 2020" to advise companies on "ensuring that medically important antimicrobials are labeled with appropriately defined durations of use."

In addition, FDA's Science Board will hold a [public meeting](#) on October 22, 2018, to hear the Center for Veterinary Medicine's response to the board's recommendations on the National Antibiotic Resistance Monitoring System. The board will also discuss "potential hazards and nutritional considerations in the production of food derived from animal cell culture technologies."

Proposed Law Would Ban Dog and Cat Slaughter for Consumption

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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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The U.S. House of Representatives has passed Rep. Vern Buchanan's (R-Fla.) [Dog and Cat Meat Trade Prohibition Act of 2018](#), a bill that would prohibit the slaughter of dogs and cats for the purpose of human consumption. The bill would also prohibit the knowing sale or donation of a dog or cat to a person who would slaughter it for consumption. The bill has been introduced in the U.S. Senate and referred to the Committee on Agriculture, Nutrition, and Forestry.

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LITIGATION

Kombucha Sugar, Alcohol Claims Dismissed

Two California courts have dismissed lawsuits brought by a competitor alleging kombucha companies misrepresented the amount of sugar and alcohol in their products. *Tortilla Factory LLC v. Rowdy Mermaid Kombucha LLC*, No. 18-2984 (C.D. Cal., entered September 11, 2018); *Tortilla Factory LLC v. Better Booch LLC*, No. 18-2980 (C.D. Cal., entered September 13, 2018). In April 2018, Tortilla Factory [filed several lawsuits](#) alleging that a number of its competitors, including Rowdy Mermaid Kombucha and Better Booch, misrepresent the alcohol and sugar content in their beverages in violation of federal law.



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The court in *Rowdy Mermaid* found that Tortilla Factory did not suffer an injury from Rowdy Mermaid's conduct; while the plaintiff argued that the companies are "vying for the same dollars from the same consumers," it failed to argue that "the two companies' products are sold in the same stores, through the same channels, or even in the same geographic areas," the court found. "Moreover, Plaintiff has not alleged facts supporting its claim that Rowdy Mermaid's allegedly inaccurate alcohol content labeling caused consumers to purchase Rowdy Mermaid products instead of those products by Plaintiff or other companies. The Court does not need to adopt the presumption that there are two separate markets—one for kombucha below 0.5% alcohol and one for kombucha with greater than 0.5% alcohol—in order to come to this conclusion." Further, the court found that the alcohol issue was "best reserved" for the Alcohol and Tobacco Tax and Trade Bureau.



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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.

The *Better Booch* court found that Tortilla Factory had standing to sue, finding a “presumed commercial injury” because the companies are direct competitors. Better Booch argued that Tortilla Factory failed to plead the heightened standard for misrepresentation allegations, and the court agreed for the sugar-content allegation—finding “information and belief” insufficient to support the claim—but disagreed on the issue of alcohol content. “Tortilla Factory alleges that it employed a third-party to utilize the headspace gas chromatography combined with mass spectrometry from a third-party lab to test Better Booch’s product, and that this test indicated that defendants’ product contained roughly four to five times the limit for beverages considered non-alcoholic,” the court noted. “These allegations thus answer the ‘who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false.” Accordingly, the court dismissed without prejudice the allegation as to sugar content but allowed the alcohol-content claim to continue.

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.



EEOC Alleges Harassment, Gender Bias at Del Taco

The U.S. Equal Employment Opportunity Commission (EEOC) has filed a lawsuit alleging that Del Taco LLC failed to provide “a conciliation agreement acceptable to the Commission” following allegations of discriminatory practices against female employees. *EEOC v. Del Taco LLC*, No. 18-1978 (C.D. Cal., filed September 17, 2018). Allegations include sexual harassment of female employees by male shift leaders and general managers. The complaint asserts that after Del Taco was notified of the alleged harassment, it “failed to take prompt and effective remedial action reasonably calculated to end the harassment,” including “failing to conduct an adequate investigation,” “failing to adequately discipline harassing supervisors and/or coworkers,” “failing to follow complaint procedures and take sexual harassment complaints seriously” and “actively deterring employees from making sexual harassment complaints.” EEOC seeks class certification for the female employees and asks the court to compel Del Taco to “institute and carry out policies, practices, and programs to ensure that it would not engage in further unlawful employment practices.”

Ninth Circuit Affirms Olive-Oil Class-Action Settlement

The U.S. Court of Appeals for the Ninth Circuit has rejected a class member's objection to a settlement between Salov North America Corp. and a class of Filippo Berio olive-oil purchasers. *Kumar v. Salov N. Am. Corp.*, No. 17-16405 (9th Cir., entered September 11, 2018). The appeals court held that the district court properly found the settlement “fair, reasonable, and adequate” after considering “the strength of the plaintiffs’ case and the risk involved with further litigation.”

Trader Joe’s to Settle Tuna Slack-Fill Class Action

Trader Joe’s has agreed to pay \$1.3 million to settle allegations that it underfills its five-ounce tuna cans. *In re Trader Joe’s Tuna Litig.*, No. 16-1371 (C.D. Cal., motion filed September 14, 2018). Under the agreement, class members will receive \$29, which will be diluted pro rata if the total amount of claims exceeds the available funds. According to the motion for preliminary approval, the plaintiffs’ investigation included “commissioning pressed weight testing of Trader Joe’s Tuna and reviewing numerous pressed weight test reports in cooperation with qualified experts from the U.S. National Oceanic and Atmospheric Administration.”

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