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LEGISLATION, REGULATIONS & STANDARDS

## Amended Food Additive Bill Advances to California Governor’s Desk

The California Senate has passed an amended version of a first-in-the-nation [bill](#) seeking to ban certain food additives, removing titanium dioxide from the list of prohibited additives and pushing back when the law would take effect. Assembly Bill 418, also known as the California Food Safety Act, goes to Governor Gavin Newsom for final approval.

The amended version of the bill would take effect January 1, 2027, pushed back from the enforcement date of January 1, 2025, in the version of the bill passed by the Assembly. It prohibits persons or entities from manufacturing, selling, delivering, distributing, holding or offering for sale in commerce a food containing brominated vegetable oil, potassium bromate, propylparaben or Red Dye No. 3. The original bill also included titanium dioxide.

The bill was brought by Assemblymember Jesse Gabriel and co-sponsored by the Environmental Working Group and Consumer Reports. In a [statement](#), Gabriel said he and the bill’s co-sponsors are thrilled to move the bill forward. “This marks a major step forward in our effort to protect children and families in California from dangerous and toxic chemicals in our food supply,” he said.

## Sen. Introduces Legislation Targeting Meatpacking, Poultry Companies

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**M. Katie Gates Calderon**

816.559.2419

[kgcalderon@shb.com](mailto:kgcalderon@shb.com)

U.S. Sen. Josh Hawley (R-Mo.) has introduced the [Strengthening Antitrust Enforcement for Meatpacking Act](#) in an effort to “empower antitrust enforcers to break up giant meatpacking and poultry monopolies,” according to a [press release](#). The bill would amend the Packers and Stockyards Act of 1921 to establish thresholds for market concentration.

"Today's meatpacking monopolists are making massive profits while shutting down competition," said Hawley. "Congress must give antitrust prosecutors the power to end anti-competitive behavior without lengthy court battles. It's time to hold monopolies accountable and empower farmers."

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## LITIGATION

### Crystal Light Artificial Flavor Lawsuit to Continue

A federal court in Illinois has denied a bid by Kraft Heinz Co. to dismiss a proposed class action alleging the company falsely labels its Crystal Light beverages as having no artificial flavors. *Tatum v. Kraft Heinz Co.*, No. 23-0073 (N.D. Illinois, entered September 7, 2023). The plaintiff alleged that the defendants intentionally conceal that their products contain artificial flavoring chemicals that simulate the advertised natural flavors, including malic acid or dl-malic acid.

In its motion to dismiss, Kraft Heinz argued the plaintiff has not plausibly alleged that malic acid acts as an artificial flavor because under U.S. Food and Drug Administration regulations, malic acid is neither “artificial” nor a “flavor,” but rather it acts as a “flavor enhancer.” Additionally, the company argued that the plaintiff has not plausibly alleged that the omission of an “artificial flavor” disclosure is likely to mislead a reasonable consumer.

The court found that the company’s products go further than omitting the disclosure of artificial flavors, however. “Defendant’s Crystal Light Pure products contain labels which expressly state that the products contain ‘no artificial sweetener, flavors, or preservatives,’” the court said in its ruling. “The Court finds that such affirmative statements are likely to mislead reasonable consumers seeking products free from artificial flavors.”

The court held that the plaintiff had plausibly alleged that the malic acid in the products functions as a flavor and that the “no artificial flavors” statements on products’ labels could be deceptive to a reasonable consumer, and, as such, her Illinois Consumer Fraud and Deceptive Business Practices Act claim should be allowed to proceed. Under the same reasoning, the



**Lindsey Heinz**

816.559.2681

[lheinze@shb.com](mailto:lheinze@shb.com)



**James P. Muehlberger**

816.559.2372

[jmuehlberger@shb.com](mailto:jmuehlberger@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.



court also denied the defendants' motion to dismiss the plaintiff's California and Pennsylvania claims. Additionally, the court allowed the plaintiff's state and common law claims to move forward.



## Court Allows Protein Labeling Claims Against Mondelez to Proceed

A federal court in California has denied Mondelez's attempt to dismiss claims that it misleads consumers about the protein in its Enjoy Life Lentil Chips. *Klammer v. Mondelez Int'l, Inc.*, No. 22-2046 (N.D. Cal., entered September 6, 2023).

The plaintiff alleged the product is labeled as "high protein" and "protein-packed" despite that it is not high protein or a good source of protein, according to the court's order. The plaintiff also alleged that the company makes protein claims on the front and back label while omitting the corrected amount of protein expressed as a percent daily value in the nutrition facts panel on the product's label.

The plaintiff argued that "high protein lentils" and "protein-packed" are implied nutrient content claims. Mondelez disagreed. The court held that the plaintiff has sufficiently alleged that the statements plausibly imply a level of protein and constitute nutrient content claims.

"The Court finds Plaintiff has plausibly alleged his claim that the 'high protein' and 'protein-packed' statements on the Product labels are unlawful based on the omission of the corrected amount of protein per serving," the court said in the order.

## Court Grants Dismissal to 'Popcorn Indiana' Maker

A Indiana federal court has granted dismissal in a false advertising lawsuit alleging the makers of Popcorn Indiana popcorn mislead consumers into thinking the products are made in Indiana by an Indiana company. *Gibson v. Eagle Family Foods Grp. LLC*, No. 22-02147 (S.D. Ind., entered August 29, 2023). Eagle Family Foods Group LLC manufactures, labels, markets and sells popcorn under the brand Popcorn Indiana; while the product is made with Indiana corn, it is not popped in Indiana, and Eagle is not an Indiana company.

The plaintiff alleged she bought the product because she believed the "Popcorn Indiana" label referred to the place the corn was grown, the place it was popped and the place the company is

located. She alleged Eagle violated the Indiana Deceptive Consumer Sales Act and other state consumer fraud laws, among other claims, and sought injunctive relief.

Eagle argued the plaintiff lacks standing to seek injunctive relief because she now knows the geographic origin of the products and cannot plausibly claim future risk of being misled. The plaintiff argued that relief is still appropriate because she can no longer rely on the labeling of similar products referencing a geographical location.

The court said the plaintiff's counsel has unsuccessfully made this argument "almost verbatim" in other cases across the country. "That argument is unsuccessful here, too," the court said. "[The plaintiff's] generalized skepticism about 'similar products' that refer to a geographical location does not provide any basis for imposing injunctive relief against Eagle, specifically, and it wholly fails to satisfy [the plaintiff's] burden of showing a 'real and immediate threat' that she will purchase and be deceived by the Product in the future." The court further dismissed all of the plaintiff's claims, but granted the plaintiff leave to file an amended complaint.

## Kraft Heinz Secures Dismissal of MiO Labeling Suit

A federal court in Illinois has dismissed a proposed class action alleging that Kraft Heinz Co.'s MiO-branded products mislead consumers as to whether they contain artificial flavors. *Boss v. Kraft Heinz Co.*, No. 21-6380 (N.D. Ill., entered September 7, 2023). The plaintiffs claimed that the products contain malic acid or dl-malic acid, a synthetic flavoring agent, but the products' labeling fails to disclose the presence of artificial flavor. They brought claims under the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA) and similar Pennsylvania and California laws, as well as other common law claims.

The court held that the plaintiffs failed to establish that Kraft Heinz engaged in a deceptive act or practice that could mislead a reasonable consumer. The court said that the plaintiffs' ICFA claim is based on their allegation that Kraft Heinz's omission of any reference to artificial flavor on the front label and ingredient list was misleading and caused consumers to assume the taste was only from natural flavors.

The court also found that the product's front labeling stating it contains "Natural Flavor with Other Natural Flavors" does not amount to an affirmative representation that the product is free from artificial flavors.

“The Court finds that absent an affirmative representation that MiO is an ‘all-natural’ product or free from artificial ingredients, the omission of an ‘artificial flavor’ disclosure would not mislead a reasonable consumer into believing that the Products are completely natural and free from artificial flavors,” the court said, concluding the ICFA claim is based on an unreasonable interpretation of the product’s label.

The court similarly dismissed the plaintiff’s consumer fraud claims under California and Pennsylvania law and the plaintiff’s common law claims.

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