



FIRM NEWS

Shook Partner Published on New York Consumer Protection Laws

Cary Silverman, a partner in the firm’s Public Policy Group, was published in Albany’s *Times Union* letters to the editor on a proposed New York consumer protection law. Responding to state representatives arguing that the state’s existing law is “weak,” Silverman asserted that “[w]hen it comes to class action lawsuits targeting food and beverage marketing, New York courts host, by far, the most lawsuits of this type in the country.”

Silverman’s letter argued against the proposed Consumer and Small Business Protection Act, which would “only make matters worse,” he says. “It will entice more lawsuits by increasing minimum payouts and by allowing lawyers to create nonprofits for the purpose of filing lawsuits. If elected officials truly want to help New Yorkers tricked by fraudsters or ripped off in shady deals, they should reject this proposal altogether. The New York attorney general is already empowered to prosecute bad actors. Individuals and small businesses who believe they’ve been duped not only have New York’s consumer law but also other remedies available to them.”

Silverman regularly publishes on public policy issues affecting companies frequently targeted by class action complaints, especially those in the food and beverage sector. In 2021, he authored “Class Action Chaos: The Rise of Consumer Class Action Lawsuits in New York” for the New York Civil Justice Institute and “The Food Court: Developments in Litigation Targeting Food and Beverage Marketing” for the U.S. Chamber Institute for Legal Reform.

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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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U.S. Lawmakers Introduce Poppy Seed Safety Act

U.S. Sens. Richard Blumenthal (D-Conn.), John Boozman (R-Ark.) and Tom Cotton (R-Ark.) have introduced legislation that would “prohibit the sale of poppy seeds that contain a harmful level of opiates and require the Food and Drug Administration (FDA) to issue regulations that establish a maximum level of contamination,” according to a [press release](#) from Boozman’s office. The name of the proposed legislation, the Stephen Hacala Poppy Seed Safety Act, was purportedly chosen to honor a [man](#) who died from morphine overdose after consuming poppy seed tea. Other parts of the poppy plant are outlawed under federal drug laws, but poppy seeds are excluded because they are used as a food ingredient.

“Despite government warnings, unwashed poppy seeds, which can contain lethal doses of morphine, are still available for sale online and entering our food supply,” Cotton said in the press release. “As our country continues to fight the opioid crisis, it’s time to end sales of unwashed seeds so that no other families experience the pain the Hacala family has endured.”

EU Wine Labeling Regulations Take Effect

A [European Union rule](#) requiring a list of ingredients and nutrition values on wine labels took effect December 8, 2023. An amendment to the rule was published two weeks before the effective date that changed requirements for the label, drawing [criticism](#) from winemakers forced to reprint labels to accommodate the change. Before the adjustment, winemakers interpreted the rules to mean that an “i” or QR code was sufficient, but November 24 rules published by the European Commission required “ingredients” to be printed in full. The European Commission disputed the criticism, noting that the rule applies only to wines produced after December 8.

FTC Warns Trade Associations, Influencers About Aspartame and Sugar Posts

The U.S. Federal Trade Commission (FTC) has sent [warning letters](#) to two trade associations and 12 health influencers



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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.

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.



asserting that they failed to provide adequate disclosures on social media posts “promoting the safety of the artificial sweetener aspartame or the consumption of sugar-containing products.” The letters state that the organizations—the American Beverage Association (ABA) and the Canadian Sugar Institute—may have violated the FTC Act with their marketing practices on Instagram and TikTok because some of the influencers apparently hired by the organizations did not disclose at all or did not adequately disclose the purported partnership.



“[A] news article quoted the ABA as saying that the presence of the terms ‘safetyofaspartame.com’ or ‘#safetyofaspartame’ in some paid posts was an adequate disclosure of a dietician’s paid relationship with ABA,” one letter states. “We disagree with that assertion. Even if the terms were displayed in a clear and conspicuous manner, they are insufficiently clear to communicate the paid relationship between the dietician and the American Beverage Association.”

U.S. to Allow Fresh Beef Imports from Paraguay

The U.S. Department of Agriculture (USDA) has issued a final rule that will take effect December 14, 2023, allowing for the importation, under certain conditions, of fresh (chilled or frozen) beef from Paraguay. The importation of fresh beef from Paraguay was previously banned over concerns about foot-and-mouth disease (FMD). According to USDA, the agency conducted a risk analysis concluding that the overall risk associated with importing fresh beef from Paraguay is low and that the country has the infrastructure and emergency response capability to effectively report, contain and eradicate FMD in the event of an outbreak.

The move has drawn opposition from industry groups like the National Cattlemen's Beef Association, which said it strongly opposes the decision. “USDA based their decision to allow beef imports from Paraguay on a deeply flawed risk assessment that uses old data from site visits that were conducted more than nine years ago,” the organization said in a statement. “Paraguay has a history of FMD outbreaks, and it is unclear if their inspection system can provide an equivalent level of safety for animal health to prevent a possible FMD outbreak on U.S. soil.”

USDA Updates Bioengineered Food List

The U.S. Department of Agriculture (USDA) Agricultural Marketing Service (AMS) has amended the National Bioengineered (BE) Food Disclosure Standard's List of

Bioengineered Foods to add “sugarcane (Bt insect-resistant varieties)” and adjust the summer squash listing to “squash (summer, mosaic virus-resistant varieties).”

AMS finalized the rule after receiving comments about the changes, some of which argued that sugarcane is “likely highly refined” and thus “does not contain detectable modified genetic material.” The agency noted that “the List establishes a presumption about what foods and food ingredients are or may be BE. Inclusion on the List does not affirmatively mean an item on the List, or a food produced from an item on the List, is a BE food. Rather, inclusion on the List establishes a presumption and requires a regulated entity to make a BE food disclosure unless it maintains records, in accordance with 7 CFR 66.9, to demonstrate genetic material is not detectable, or that the regulated entity or food qualifies for an exemption listed at 7 CFR 66.5.”

LITIGATION

Court Narrows Claims Against PepsiCo in Gatorade Fit Labeling Suit

A California federal court has ruled that a plaintiff alleging PepsiCo makes unlawful health claims about its Gatorade Fit products may not seek equitable restitution, but may seek prospective injunctive relief. *Gunner v. PepsiCo, Inc.*, No. 23-0332 (C.D. Cal., entered November 29, 2023). The plaintiff alleged that PepsiCo’s use of the label claim “Healthy Real Hydration” on its Gatorade Fit sports beverages is inconsistent with federal and state regulatory requirements governing beverages fortified with certain vitamins and minerals.

The court previously dismissed the plaintiff’s first and second amended complaints after finding he failed to allege actual reliance as required under California law. He filed a third amended petition, which PepsiCo opposed, arguing in its motion to dismiss that the plaintiff lacked standing to sue under California’s Unfair Competition Law (UCL) and had other legal adequate legal remedies.

The court ruled that the plaintiff’s third-amended complaint included sufficient information to allege reliance. On the second point, the court ruled partly in favor of PepsiCo and partly in favor of the plaintiff. The court dismissed the plaintiff’s claim under the UCL for equitable restitution, finding that the plaintiff could sue under other statutes such as the Consumer Legal Remedies Act or False Advertising Law. However, PepsiCo’s motion did not challenge the plaintiff’s standing to pursue prospective injunctive

relief, the court held. "The fact that other statutes provide Gummer with an adequate damages remedy does not require dismissal of his UCL claim for future equitable relief, which these other statutes do not authorize," the court said. "Gummer's UCL claim for prospective injunctive relief, which PepsiCo does not challenge, therefore survives." The court allowed the plaintiff to refile his complaint.

Consumers Sue Gerber for "No Preservatives" Claims

Two New York women have filed a proposed class action alleging Gerber Products Co. misleads consumers by using "No Preservatives" labeling on its Yogurt Melts and Fruit & Veggies Melts, which they assert contain preservatives. *Smith v. Gerber Products Co.*, No. 23-09834 (S.D.N.Y., filed November 7, 2023).

The plaintiffs allege that the product's back labels indicate that they contain "No Preservatives," but in fact contain citric acid, ascorbic acid or sodium ascorbate. The plaintiffs allege that these ingredients act as preservatives, regardless of Gerber's purpose or intent for adding them to the products, such as to add flavor. "Defendant's misrepresentation seeks to capitalize on consumers' preference for products with no preservatives," the plaintiffs argue, citing research purportedly showing that 84 percent of American consumers buy "free-from" foods because they are seeking to buy more natural or less processed foods.

The plaintiffs allege violations of Sections 349 and 350 of New York's General Business Law, breach of express warranty and unjust enrichment and seek class certification, damages, injunctive relief and attorney's fees.

State of New York Sues PepsiCo, Frito-Lay for Plastic Pollution

New York Attorney General Letitia James has filed a lawsuit against PepsiCo and its subsidiaries Frito-Lay Inc. and Frito-Lay North America, Inc., alleging their single-use plastic bottles, bottle caps and snack food wrappers have "significantly contributed to" a public nuisance along the shores of the Buffalo River. *New York v. PepsiCo, Inc.*, Index No. 814682/2023 (Erie County Supreme Court, filed November 15, 2023).

In the complaint, James said because plastic does not biodegrade, the companies' packaging contaminates the river and public drinking water supplies, threatening public health and the environment. "PepsiCo has failed to abate the harm or warn the

public that its plastic packaging is a potential source of plastic pollution and presents a risk of harm to human health and the environment,” she asserted in the complaint. “Instead, it has misled the public about its efforts to combat plastic pollution, while increasing its production and sale of single-use plastic packaging.” In addition to the public nuisance claim, James is asserting violations of Section 349 of the New York General Business Law and Section 63(12) of the New York Executive Law, and Strict Products Liability: Failure to Warn.

The company told CNN in a statement that it is “serious about plastic reduction and effective recycling, and has been transparent in our journey to reduce use of plastic and accelerate new packaging innovation.”

“This is a complex issue and requires involvement from a variety of stakeholders, including businesses, municipalities, waste-reduction providers, community leaders and consumers,” the spokesperson said, adding that the company has “worked effectively with a variety of communities across the country and remain[s] committed to doing so.”

MEDIA COVERAGE

Academies Walk Back Appointments of Scientists Involved in Discredited Alcohol Study

Two scientists who were part of a discredited alcohol study through the National Institutes of Health (NIH) will not take part in a committee preparing a report on alcohol and health that will be used to update the federal government’s guidelines on alcohol consumption, the *New York Times* has reported. The principal scientist of the discredited study—which covered the health effects of moderate drinking—and another colleague from the study were named to a National Academies of Sciences, Engineering and Medicine committee. Their appointments were not yet final, and the *Times* noted that soon after the article was published, a spokesperson from the Academies indicated to the newspaper that the organization had decided not to include them on the panel.

“After considering public comments the National Academies of Sciences, Engineering, and Medicine have received on provisional appointees to a committee that will review the evidence of the effects of alcohol on health, Eric B. Rimm and Kenneth J. Mukamal are no longer being considered for service on the committee,” the spokeswoman told the *Times*. The *Times* reported NIH ended the study after it learned that its principal scientist and NIH officials had solicited research funding from

alcohol manufacturers, in violation of federal policy and a conflict of interest.

The principal scientist and his colleague were named to a committee tapped to review evidence about the relationship between drinking alcohol and other health issues and the effects of drinking while breastfeeding. The appointments outraged public health researchers, the *Times* reported. “It’s like putting the fox in charge of the henhouse,” one public health researcher told the *Times*.

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