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## FOOD AND BEVERAGE LITIGATION AND REGULATORY UPDATE

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A state bill requiring food with specified additives to be labeled "not recommended for human consumption," a putative class action challenging the size of fast food products, dismissed discrimination allegations for non-dairy milks, and more.

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### LEGISLATION, REGULATIONS & STANDARDS

## MAHA Report: UPFs, Chemical Exposures Tied to Childhood Chronic Disease

The Presidential Commission to Make America Healthy Again (MAHA) has released its [assessment](#) identifying key drivers of childhood chronic disease, including poor diet and aggregation of environmental chemicals. The report said that ultra-processed foods (UPFs)—defined in the report as “packaged and ready-to-consume products that are formulated for shelf life and/or palatability but are typically high in added sugars, refined grains, unhealthy fats, and sodium and low in fiber and essential nutrients”—make up nearly 70% of an American child’s caloric intake, purportedly leading to the reduction of key nutrients in children's diets, increased caloric intake and the increased inclusion of food

additives. "UPFs have allowed us to save money and to 'eat on the run,' but today's over-reliance on UPFs is damaging the health of American children," the commission said.

The commission also said that the current regulatory framework for chemical exposure should be continually evaluated to ensure that synthetic chemicals and other exposures do not interact together to pose a threat to children's health. The commission will next create a comprehensive strategy addressing the report's findings.

## **Texas Bill Requiring 'Not Recommended for Human Consumption' Food Labeling Passed in Legislature**

The Texas legislature has passed a [bill](#) that would require foods containing any of 44 specified food additives to carry a label with the text "WARNING: This product contains an ingredient that is not recommended for human consumption by the appropriate authority in Australia, Canada, the European Union, or the United Kingdom." The [list](#) contains artificial colors, additives and other ingredients, including bleached flour, bromated flour, diacetyl, olestra, potassium bromate, propylparaben and titanium dioxide as well as variations of red, yellow, green and blue food dyes. The bill would exclude food served in restaurants and retail establishments and carves out exemptions for ingredients determined to be "safe for human consumption" by the U.S. Food and Drug Administration or Department of Agriculture. If signed by Gov. Greg Abbott, the "Make Texas Healthy Again" bill would take effect September 1, 2025.

## **FDA, NIH Announce Nutrition Regulatory Science Program**

The U.S. Food and Drug Administration (FDA) and National Institutes of Health (NIH) have [announced](#) a joint research initiative to better understand the root

causes of diet-related chronic disease. According to a press release, the Nutrition Regulatory Science Program will “implement and accelerate a comprehensive nutrition research agenda that will provide critical information to inform effective food and nutrition policy actions to help make Americans’ food and diets healthier.”

## **FDA Approves Three Natural Food Colors**

The U.S. Food and Drug Administration (FDA) has approved three food colors from natural sources, the agency [announced](#). FDA approved petitions for [Galdieria extract blue](#), derived from unicellular red algae; [butterfly pea flower extract](#), a blue color that can be used to achieve blues, purple and greens; and [calcium phosphate](#), a white color.

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## **LITIGATION**

### **Mondelez Takes Aim At Aldi for Similar Product Packaging**

Mondelez International Inc. and its subsidiary Intercontinental Great Brands LLC have filed suit alleging Aldi’s private label product packaging “blatantly copies and trades upon the valuable reputation and goodwill” Mondelez has developed in its cookie and cracker snack products. [\*Mondelez Int’l v. Aldi, Inc.\*](#), No. 25-5905 (N.D. Ill., filed May 27, 2025). Mondelez alleges that Aldi’s actions are likely to deceive and confuse consumers and dilute the distinctive quality of Mondelez’s unique product packaging and, if not stopped, threatens to irreparably harm Mondelez and its brands.

## **Court Awards Summary Judgment in Bellwether Infant Formula Case**

A federal court has granted summary judgment for Abbott Laboratories in the first bellwether case set to proceed to trial in multidistrict litigation alleging Abbott's formula for preterm infants caused infant deaths from necrotizing enterocolitis (NEC). [\*In re Abbott Labs., et al., Preterm Infant Nutrition Prods. Liab. Litig.\*](#), MDL No. 3026, M.D. No. 22-c-0071 (N.D. Ill., entered May 2, 2025). The court held that the record did not support the plaintiff's state law claims, finding that the plaintiff did not present evidence of a feasible design alternative to Abbott's cow's-milk formula and was unable to demonstrate that Abbott's alleged failure to warn was the cause-in-fact of the plaintiff's child's NEC.

## **PepsiCo Faces Consumers' Popcorners Slack-Fill Claim**

A California plaintiff has filed a proposed class action alleging PepsiCo Inc. sells Popcorners products containing an unlawful amount of slack fill. [\*Reyes v. PepsiCo, Inc.\*](#), No. 25-4951 (C.D. Cal., filed June 1, 2025). "Defendant underfills the Product for no lawful reason," the plaintiff argues. "The front of the Product's packaging does not include any information that would reasonably apprise Plaintiff of the quantity of product relative to the size of the container, such as a fill line." The plaintiff asserts violations of California's Consumers Legal Remedies Act, Unfair Competition Law, and False Advertising Law.

## **Burger King Advertising Class Action to Proceed**

A federal court has denied Burger King Corp.'s (BKC's) motion to dismiss a putative class action alleging that the company's advertising misleads consumers about the size or amount of ingredients of its menu items. [\*Coleman v. Burger\*](#)

King Corp., No. 22-cv-209925 (S.D. Fla., filed May 5, 2025). "[T]he Plaintiffs plausibly allege that a reasonable consumer could have been deceived into believing that BKC had increased the size of its burgers since 2017 because BKC's advertisements 'show[ ] that the burger increased in size by approximately 35% and the amount of beef increased by more than 100%' in comparison to BKC's pre-2017 advertisements," the court held.

## **Consumer Challenges Chobani's 'Only Natural Ingredients' Package Claims**

A California plaintiff has filed a putative class action alleging Chobani's packaging falsely claims its Nonfat Plain Greek Yogurt and Whole Milk Plain Greek Yogurt contain "only natural ingredients." Wysocki v. Chobani, LLC, No. 25-0907 (S.D. Cal., filed April 16, 2025). The plaintiff alleges that third-party testing has shown the products contain endocrine-disrupting phthalates. "These phthalates are endocrine-disrupting chemicals 'mainly used as plasticizers added to polyvinyl chloride (PVC) plastics for softening effects' which 'are detrimental to human health,'" the plaintiff alleges, and she further asserts that the Environmental Protection Agency has reported the chemicals as "probable human carcinogens."

## **Diageo Faces Tequila Purity Claims**

Two consumers and a Brooklyn restaurant have filed a proposed class action alleging Diageo North America, Inc., falsely markets its Casamigos and Don Julio tequilas as containing "100% agave" despite containing other types of alcohol. Pusateri v. Diageo N. Am., Inc., No. 2482 (E.D.N.Y., filed May 5, 2025). Consumers pay premium prices for tequila made exclusively from Blue Weber Agave, the complaint asserts, because the crop "takes longer to grow and is more difficult to harvest and produce than other spirits such as vodka and gin." The plaintiffs allege that they paid "super-premium prices for Casamigos and Don

Julio tequila" but "received neither a premium product nor 100% Blue Weber Agave tequila. Instead, an investigation of Casamigos and Don Julio tequilas has shown that they consist of significant concentrations of cane or other types of alcohol rather than pure tequila."

## **Court Dismisses Suit Alleging Discrimination for Non-Dairy Alternative Surcharge**

A California court has granted Dunkin's request to dismiss a putative class action alleging the company's practice of charging an extra fee for non-dairy milk alternatives is disability discrimination. [\*Garland v. Dunkin Donuts Franchising, LLC\*](#), No. 23-6621 (N.D. Cal., entered April 21, 2025). The court declined to exercise personal jurisdiction over claims brought by non-California residents and dismissed the California plaintiffs' claims after finding no Americans with Disabilities Act violations because Dunkin' charges the same price to all customers to substitute a non-dairy alternative, regardless of disabilities. "The Court finds no plausible allegation in the [First Amended Complaint] that a non-disabled customer pays a lower price for a soy milk Dunkaccino, for instance, than a lactose intolerant customer pays for the same product," the court stated. "One of the plaintiffs, moreover, alleges that she did not disclose her lactose intolerance and milk allergy to the Dunkin' server because she felt it violated her privacy rights. If true, then how could the upcharge have been imposed based on her disability?"

## **9th Circuit Affirms Summary Judgment for Baby Food Maker**

The U.S. Court of Appeals for the Ninth Circuit affirmed a lower-court ruling granting summary judgment to Plum Organics in a putative class action alleging the company failed to disclose that its products may contain heavy metals and perchlorate. [\*Gulkarov v. Plum, PBC\*](#), No. 21-0913 (9th Cir., entered April 25,

2025). The court disagreed with the plaintiffs' assertion that Plum had extensive knowledge of the risk of heavy metals and perchlorate in its products and actively concealed the risk, noting that Plum has acknowledged on its website that its products contain traceable levels of heavy metals. The court also declined to certify a question to the California Supreme Court as to what legal standard applies in the case, finding that under any plausible legal standard, Plum is entitled to summary judgment.

## **Ziploc Maker Faces Microplastics Lawsuit**

S.C. Johnson & Son faces a proposed class action alleging it markets Ziploc products as “microwave safe” and “freezer” safe while the products are allegedly made from materials that can leach microplastics into food through ordinary use. [\*Cheslow v. S.C. Johnson & Son, Inc.\*](#), No. 25-3655 (N.D. Cal., filed April 25, 2025). The plaintiff alleges that the products, which are made from polyethylene and polypropylene, are “fundamentally unfit for microwave and freezer use.”

## **Court Dismisses Portions of Smartfood Artificial Flavoring Suit**

A federal court has dismissed parts of a putative class action alleging two types of Smartfood products were deceptively marketed as containing “no artificial flavors” and “no artificial preservatives.” [\*Wilson v. Smartfoods, Inc.\*](#), No. 24-12814 (N.D. Ill., filed May 5, 2025). The additive at issue is maltodextrin, which serves as both an artificial flavor and artificial preservative. The court dismissed the plaintiffs’ claims involving Smartfood’s Movie Theater Butter Popcorn, which none of the plaintiffs had purchased, and claims relating to maltodextrin serving as an artificial flavoring in Smartfood’s White Cheddar Popcorn. Although the complaint alleges maltodextrin is an artificial flavoring agent, the court found, they do not allege it functions as a flavor. The ruling allows the plaintiffs to amend their complaint.

## **Suit Alleges San Pellegrino Deceives Consumers About Healthiness of Sparkling Beverages**

Two California consumers have filed a proposed class action alleging Nestlé USA falsely advertises San Pellegrino as healthy despite containing 17-26g added sugar. [\*Calangian v. Nestlé USA\*](#), No. 25-4005 (N.D. Cal., filed May 8, 2025). The plaintiffs point to packaging claims such as “Made With Natural Origin Italian Lemons” and images of ripe fruits and leaves as well as website content touting “Real Mediterranean Fruit Juice” and “No Artificial Flavors or Sweeteners” to allege that Nestlé markets the products as “healthy and conducive to physical activity and good health” despite containing 34%-52% of the U.S. Food and Drug Administration's recommended daily allowance for sugars.

## **Good and Gather Pasta Sauce Labeling Prompts Suit**



A California plaintiff has filed a putative class action alleging Target Corp.'s Good and Gather pasta sauces are falsely labeled as containing "no artificial colors, flavors or preservatives" despite containing citric acid. [\*Deforest v. Target Corp.\*](#), No. 25-0851 (C.D. Cal., filed April 23, 2025). "Citric acid acts as a preservative when added to food products, including the Products at issue," the complaint asserts. "Plaintiffs and the Class Members paid a price premium to receive premium products that did not contain artificial colors, flavors or preservatives, instead Plaintiffs received non-premium products containing artificial preservatives."

## Court Allows Some Nestlé Boost Glucose Control Claims to Proceed

Part of a proposed class action alleging Nestlé's Boost Glucose Control beverages were deceptively advertised as designed for diabetics will proceed after a court partially denied Nestlé's motion for summary judgment. [\*In re Nestle Boost Nutritional Drink Litig.\*](#), No. 21-9812 (N.D. Cal., April 18, 2025). In its summary judgment motion, Nestlé argued that the plaintiffs could not establish either deception or a resulting injury based on the labeling. The court ruled that a genuine dispute of facts exists as to two of the three named plaintiffs and allowed their claims to proceed. The court granted Nestlé's motion as to a third named plaintiff, however, finding she could not establish a viable claim because she continued to purchase the product after filing the lawsuit.

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## More to Explore

- The [previous issue](#) of the *Food and Beverage Litigation and Regulatory Update* covered federal and state efforts to limit the use of food dyes, a complaint challenging "climate neutral" packaging, plaintiffs questioning protein content, and more.

- Product liability litigator **Kurt Weaver** has **joined Shook** as a partner. Kurt's more than three decades of experience includes advising clients on advertising and marketing regulations, including practical guidance to navigate overlapping federal, state and industry requirements.
- Shook Partners **Jay Schleppenbach** and **Matt Bernstein** and Senior Counsel **Arianna Berg** have published an article in **Bloomberg Law** on customs and trade fraud in supply chains. "As criminal liability for trade violations rises, companies will need to adapt their supply chain audits to ensure that suppliers have complied with trade laws by sharing accurate information about products and paying the correct tariffs," they explain in the article.

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As the food and beverage industries become more complex, they require effective legal representation that can quickly evaluate potential liability and craft the most appropriate responses to suspected product adulteration, alleged foodborne outbreaks or environmental contamination claims. For decades, manufacturers, distributors and retailers at every link in the food chain have come to Shook, Hardy & Bacon to partner with a legal team that understands the issues they face in today's evolving food production industry. Shook attorneys work with some of the world's largest food and beverage companies to establish preventative measures, conduct internal audits, develop public relations strategies, and advance tort reform initiatives.

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