A federal court decision finding that sugar content does not make a beverage less "nutritional," a bill that would allow FDA to destroy imported food products that pose a significant risk to public health, a complaint asserting matcha was falsely sold as "ceremonial grade," and more.

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LEGISLATION, REGULATIONS & STANDARDS

Makary Resigns from FDA Commissioner Post

U.S. Food and Drug Administration (FDA) Commissioner Marty Makary has announced his resignation from his position following clashes with the White House and heightened scrutiny for agency decisions, according to a *Reuters* report. His successor is FDA Deputy Commissioner for Food Kyle Diamantas, who will lead the agency in an acting capacity.

Agency IQ by POLITICO reported that Diamantas' leadership may usher in a heightened focus on food chemical safety and other Human Foods Program priorities. "As deputy commissioner for food, Diamantas has been a driving force behind many of the FDA's recent food reform efforts, including the agency's

newly finalized food chemical postmarket assessment framework and reviews begun on a growing number of substances," the outlet said in its *FDA Today: Food* newsletter. "His new role at the very top of the agency could potentially add weight to these activities and accelerate them."

Vermont Senate Scraps School Chemical Additive Bill

Despite advancing out of committee in the Vermont State Senate, the legislative body has abandoned S.26, a bill that would have banned certain chemical additives from schools after receiving school district pushback, *VTDigger* has reported. The bill's sponsor said the bill will not advance before the end of session and indicated that she did not want to override the wishes of school nutrition leaders, who said the bill would create more administrative work and would change little in school meals.

Wisconsin Gov. Vetoes Lab-Grown Meat Bill, Appeals Court Denies Bid to Enjoin Florida Lab-Grown Meat Ban

Wisconsin Gov. Tony Evers has vetoed AB 554, a bill that would have required companies to label cultured protein products. In a letter to the Assembly, Evers said he vetoed the bill in its entirety because he objected to its vagueness and arbitrary drafting, as well as the potential confusion it could cause. “By way of one absurd example, under the bill, lab-grown meat can only be sold to a customer if it is ordered by that customer,” he said. “However, the bill also prohibits offering to sell lab-grown meat. It would appear the bill authors have not considered how a customer could know to order lab-grown meat if it is prohibited from being offered for sale to them.” Evers also noted that certain animals were included—oysters, mussels, scallops—while others such as lobsters, shrimp and crabs were not. He also objected to the potential of a grocer or restaurateur being held criminally liable or face jail time for product mislabeling.

U.S. Reps. Introduce Bill to Combat Contaminated Seafood Imports

U.S. Reps. Clay Higgins and Troy Carter have introduced the Destruction of Hazardous Imports Act (H.R. 2715), a bill that would give the U.S. Food and Drug Administration (FDA) the authority to destroy imported food products that pose a significant risk to public health. Sen. Rick Scott (R-Fla.) has filed a related bill in the U.S. Senate, S. 3213. According to a press release, the legislation would ensure that contaminated seafood imports would not reach American consumers and cause harm. The bill would allow FDA to destroy food products that fail initial inspection, which would prevent importers from port shopping. The representatives argue that FDA has jurisdiction to destroy imported medical devices and medications that pose a health risk to the public, but that power does not extend to imported food products.

"By granting the FDA the necessary authority to destroy food products that fail to meet our strict health and safety standards, we are closing a dangerous loophole that has allowed contaminated seafood to enter our markets," Carter said in a statement. "This bill protects consumers from potential health risks and upholds the integrity of our food supply chain, while supporting Louisiana fishermen and seafood processors."

Carter and Higgins also sent a letter to U.S. Trade Representative Ambassador Jamieson Greer arguing for a Section 301 investigation into what they allege are unfair practices harming the U.S. seafood industry. The letter has the backing of several seafood industry associations.

LITIGATION

California Court Dismisses Carnation Breakfast Drink Labeling Suit

A California federal court has dismissed a plaintiff's claims that Nestlé deceptively advertises and sells its Carnation Breakfast Essentials as a "nutritional drink" with high levels of protein when the first two ingredients are water and 11 grams of sugar. *Testori v. Nestlé Health Sci. U.S. Holdings, Inc.*, No. 25-1318 (E.D. Cal., entered May 11, 2026). The court said that because the plaintiff's case turns entirely on allegedly misleading "health" and "nutritional" messages conveyed by the product, all state law claims are preempted by federal laws and regulations.

The court further found that the plaintiff failed to plausibly state a claim upon which relief could be granted, noting that the product does not make assertions about overall "health" or "balanced/healthy diet." The court said the product does not become less "nutritional" due to added sugar and the plaintiff failed to plausibly allege the front label is literally false.

"Moreover, the front label suggests that the Product is 'breakfast essential' because it contains '10g protein,' '21 vitamins + minerals,' '3x vitamin vs. milk,' and '2x calcium vs. Greek Yogurt,'" the court held. "Contrary to Plaintiff's arguments, the Court finds no plausible indication that Defendant is 'unambiguously' representing that the Product is 'nutritionally balanced' on the front label."

Sixth Circuit Finds Ohio Out-of-State Wine Restrictions Unconstitutional

The U.S. Court of Appeals for the Sixth Circuit has struck down Ohio laws prohibiting out-of-state retailers from shipping wine directly to Ohio residents and prohibiting Ohio residents from personally transporting more than six bottles of wine into the state during any 30-day period. *Block v. Canepa*, No. 25-0330 (6th Cir., entered May 6, 2026). The plaintiffs, an Ohio resident and an Illinois business, asserted that the laws discriminate against out-of-state businesses in violation of the Commerce Clause. The lower court initially upheld the laws, finding that they constituted a valid exercise of the state's power to

regulate the sale of alcohol within its borders and that the plaintiffs lacked standing to challenge the transportation restriction.

On appeal, the Sixth Circuit reversed that determination, clarifying that a court must apply a test developed by the U.S. Supreme Court in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas* to determine if a discriminatory alcohol law is constitutional. The Sixth Circuit remanded with instructions to the district court to apply the test; the district court again sided with the defendants, holding that they had presented evidence showing the state's three-tier system for regulating the sale and distribution of alcohol could be justified for public health and safety reasons. When the case was appealed again to the Sixth Circuit, the appeals court found the provisions unconstitutional under the Dormant Commerce Clause.

"Based on the record as a whole, and analyzing the constitutionality of the Restrictions under the correct legal framework, we conclude that neither Restriction can be justified as a legitimate health and safety measure," the court held. "Because the connection between both Restrictions and Ohio's purported health and safety objectives is tenuous or nonexistent, the predominant effect of both Restrictions is protectionism."

California Residents Sue MatchaBar for "Ceremonial Grade" Labeling

A matcha company faces a proposed class action alleging it mislabels its products by selling matcha labeled as "ceremonial grade" when it is of a lower quality. *Morris v. MatchaBar, Inc.*, No. 26-21261 (S.D. Cal., filed April 6, 2026). The plaintiffs allege that reasonable consumers believe that MatchaBar's products are "ceremonial grade," of the highest quality and fit for use in a Japanese tea ceremony. "However, unbeknownst to consumers, and confirmed by independent testing, the Products are of an inferior quality as compared to other matcha," they assert. "The Products are not of a quality or grade that would be sufficient for use in a Japanese tea ceremony, and they are therefore not 'ceremonial grade.'"

Consumer Alleges Target Tuna Sustainability Claims Are Misleading

A California plaintiff has filed a putative class action alleging Target misleads consumers as to the sustainability of its Good & Gather tuna. *Kim v. Target Corp.*, No. 26-02910 (C.D. Cal., filed March 18, 2026). The plaintiff alleges that Target's sustainable seafood marketing campaign—including a "Sustainably Caught" front-of-label representation and back-of-label statements that the products are "sustainable seafood" and "wild caught using sustainable practices"—are misleading because the fisheries do not provide promised protections and engage in harmful conduct with respect to other wildlife. "Despite representing to consumers that it has 'full traceability' of the Tuna Products, Target turns a blind eye to the unsustainable fishing practices used in sourcing its Tuna Products and boldly uses the Sustainability Promise as proof of sustainable fishing methods," the plaintiff alleges. "However, as Target knew, or should have known, its suppliers of the Tuna Products use industrial fishing

methods that injure marine life as well as ocean habitats with destructive fishing."

Court Trims Nutrish Preservative Labeling Suit

A federal court has dismissed in part a plaintiff's proposed class action alleging Post Consumer Brands LLC misleads consumers about preservatives in its Nutrish pet food. *Krikorian v. Post Consumer Brands, LLC*, No. 25-2122 (C.D. Cal., filed March 18, 2026). The plaintiff alleged he purchased Rachael Ray Nutrish dog food relying on labeling and advertising claims, including representations stating "No Artificial Preservatives" and "Natural Food," but later learned that the products contain citric acid. Post moved for dismissal, which the court granted in part "because Plaintiff disavows any claims based on an omissions theory of liability and concedes that he cannot proceed on a claim for breach of implied warranty," the court held. The court allowed the plaintiff's remaining claims to proceed.

More to Explore

- The April issue of ***Material Concerns: Legal Updates on Substances of Emerging Concern*** includes coverage on the latest in microplastics, PFAS labeling, and more.
- Shook's **Product Liability** team was a *Litigation Daily* **Litigator of the Week Runner-Up** for the defense of what is believed to be the first ADAS/autonomous technology class action trial and the largest automotive product trial of any type.
- The previous issue of the ***Food and Beverage Litigation and Regulatory Update*** focused on the denial of a motion to dismiss a "cage free" eggs lawsuit, updates on marketing plant-based products with meat- and dairy-related terms in Europe, dismissal of a lawsuit alleging a restaurant's salsa was excessively spicy, and more.

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