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SPOTLIGHT

Tracing the Trends Through 15 Years of the Food and Beverage Litigation Update

For our final edition of 2017, the *Food and Beverage Litigation Update* is highlighting stories that have changed the industry over the *Update's* [first 15 years](#). With help from our archives, we have tracked how these stories have evolved and continue to affect food and beverage companies.

Thank you for joining us each week—we hope you have a happy holiday season and wonderful 2018.

LEGISLATION, REGULATIONS & STANDARDS

Proposition 65

After California voters approved the Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65), the state's Office of Environmental Health Hazard Assessment (OEHHA) began publishing a [list of chemicals](#) "known to cause cancer or birth defects or other reproductive harm." Under the statute, companies must warn consumers about potential exposure to a listed chemical unless the exposures are low enough to pose "[no](#)

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significant risk” of the harms targeted by the provision. OEHHA’s Prop. 65 actions can often precede similar efforts in other states, making California a primary battleground for regulations and bellwether cases.

Prop. 65’s list of chemicals must be updated annually to add chemicals “known to the state to cause cancer or reproductive toxicity,” supported by “scientifically valid testing.” The addition of a chemical can be a contentious process as the science supporting the addition is debated. For example, bisphenol A (BPA), a chemical found in plastics and epoxy resins, was proposed as an addition to the list in 2013 as a developmental toxicant. The American Chemical Council sued OEHHA, arguing that the document OEHHA cited did not conclude that BPA satisfied Prop. 65 list requirements, but the chemical was listed in April 2013. One week later, a court enjoined OEHHA from enforcing the addition and the agency removed BPA from the list. The injunction remained until January 2015, when a court found that OEHHA did not abuse its discretion by relying on studies only examining BPA’s effects on animal subjects rather than humans. Months later, OEHHA added BPA to the list based on its effects on female reproductive toxicity, although it remains delisted in connection with developmental toxicity.

In addition to governmental enforcement, Prop. 65 creates a cause of action for private individuals or organizations acting “in the public interest.” Advocacy groups regularly file lawsuits challenging companies’ compliance with the statute, often focusing on headline-grabbing chemicals such as lead—with targets ranging from baby food, candy and snack bars to meal replacement shakes and balsamic vinegar—as well as acrylamide, arsenic and 4-methylimidazole (4-MEI). A chemical’s inclusion on the Prop. 65 list can also spur consumer putative class actions, such as the consolidated claims against PepsiCo Inc. for its products’ 4-MEI content.

Some companies have successfully fought Prop. 65 enforcement actions. During a two-month trial in 2006, the makers of Chicken of the Sea, StarKist and Bumble Bee tuna products persuaded a court that their products were exempt from Prop. 65 because the mercury content in the tuna was naturally occurring, the levels were too insignificant to require warnings and federal law preempted Prop. 65 on regulating mercury in fish. The decision was later upheld on appeal.

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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.





In August 2016, OEHHA amended the Clear and Reasonable Warnings section of Prop. 65 to adjust the warning text on labels, including adding distinctions between the harms targeted by the law. The amendments are scheduled to take effect on August 30, 2018.

LITIGATION

“Unnatural” Ingredients

While food companies and consumer advocacy groups agree that Americans have the right to know the contents of their food, the ideal level of transparency has been debated in legislatures, before courts and in comments to the U.S. Food and Drug Administration (FDA). Consumers have been attracted to foods labeled as “natural,” but they can turn litigious when they learn that “natural” foods may contain ingredients they to be “unnatural.”

Despite requests, FDA has long resisted defining how “natural” may be used in food and beverage marketing, resulting in confusion for companies and consumers alike. “The ‘natural’ thing has always been such a morass,” one Consumers Union analyst said in 2007. While FDA has sought information on the use of the term and promised to provide guidance, the lack of definition has led to companies regularly facing allegations that they intentionally mislead consumers by marketing their products as “natural.” Controversial ingredients include:

- *Genetically modified organisms (GMOs)*. Consumers have worried about “Frankenfoods” for more than a decade, and advocacy groups and legislators have urged the federal government to adopt legislation mandating the disclosure of GMOs in food products. Studies have purported to show that consumers misunderstand GMOs and the implications of their presence in the food supply, and companies have resisted mandates to disclose GMO ingredients to avoid unnecessary consumer fear. Targeted foods include crackers, chips, yogurt, soups, sauces and vinegar. Some plaintiffs have extended GMO lawsuits to products derived from animals fed GMOs, such as a lawsuit challenging Sargento Foods’ cheeses and another alleging Chipotle Mexican Grill’s meats and dairy products are not “GMO-free.”

- *Synthetic or artificial chemicals.* Preservatives, artificial coloring and other synthetic ingredients are frequently targeted in “natural” putative class actions. High fructose corn syrup (HFCS) was regularly challenged for many years. In 2008, an FDA administrator reportedly said that the agency would object to the inclusion of the ingredient in a “natural” food, but a letter months later backtracked on that position. Some courts presiding over HFCS lawsuits stayed cases while waiting for FDA guidance.
- *Pesticides.* Plaintiffs have alleged that consumers interpret “natural” to mean that pesticides were not used in the food or beverage’s production. Some courts have been persuaded by the argument, while others have demurred on determining the meaning of “natural” by finding the question preempted by the federal Food, Drug, and Cosmetic Act.

New “natural” lawsuits are filed nearly every week, but the number may begin to taper off as more courts continue to dismiss or defer claims. While some “natural” lawsuits settle with an agreement to change packaging or for large sums, many claims are ultimately dismissed. Some courts have dismissed cases on the grounds that the plaintiffs failed to define “natural” in the absence of an FDA definition, and courts also frequently deny requests for injunctive relief because plaintiffs fail to show that they may purchase the product again. While these adverse decisions may eventually dissuade plaintiffs’ attorneys from filing new lawsuits, the onslaught of “natural” litigation seems unlikely to end until FDA demarcates “natural” and “unnatural.”

SCIENTIFIC / TECHNICAL ITEMS

Obesity and Food Addiction

As the number of obese and overweight Americans has climbed, many people have searched for causes and prevention strategies, with some noting that fat may be “the next tobacco” as researchers continue to find links between obesity and a variety of health issues. Questions have arisen about whether some ingredients, such as cheese, cause behaviors that amount to addiction, and one study compared the neurological effects of high-fat foods to those of cocaine or heroin. Many have pointed to sugar-sweetened beverages (SSBs) as a significant cause of rising obesity rates in children. Researchers and health experts have sought an entity to

blame—including food companies, marketing, grocery checkout lanes, genetics, neurobiology, environmental exposure, immunology and hormones.

As consumers filed lawsuits alleging companies are to blame for the ill health effects associated with eating their products, state governments introduced and, in some cases, passed legislation to protect companies from lawsuits alleging weight gain as an injury. Agencies of the federal government coalesced to launch a campaign to curb obesity while the Equal Employment Opportunity Commission pursued litigation protecting obese people from discrimination. Courts were persuaded to recognize some levels of obesity as a disability.

Food addiction models have been controversial, with some questioning whether the premise is useful. The American Psychiatric Association declined to include food addiction in the fifth edition of its *Diagnostic and Statistical Manual of Mental Disorders* despite including arguably comparable addictions such as gambling. In recent years, much of the public policy focus has centered on taxing SSBs to reduce obesity rates. Several U.S. cities have approved SSB taxes—including Chicago, Philadelphia, San Francisco and Seattle—while other proposed taxes have failed, such as in Massachusetts and Santa Fe. Although several of the approved taxes faced potential barriers in the latter half of 2017, with Chicago repealing its tax after two months of enforcement and a California court barring San Francisco from enforcing part of its regulation, SSB taxes are expected to continue gaining traction in the United States and internationally in 2018.

MEDIA COVERAGE

The Future of Food'

In a December 2017 series of articles, *Financial Times* explored issues projected to affect the global food and beverage industry in the future. The *Update's* previous coverage of the issues examined can provide additional context to these evolving subjects.

Genetically Modified (GM) Crops. Experts reportedly anticipate an increase in GM crop cultivation, which currently covers 185 million hectares worldwide. Makers of GM crops have faced

opposition from a number of areas as use of their products has spread, sometimes inadvertently. In the United States, multiple jurisdictions have banned GM crops, but courts have invalidated some bans on the grounds of preemption. The U.S. Food and Drug Administration (FDA) has provided guidance on voluntary labeling of foods derived from GM crops, and Congress has directed the U.S. Department of Agriculture (USDA) to create a standard for mandatory disclosure. Europe has largely resisted GM crop cultivation; in April 2017, a majority of EU countries voted against allowing GM maize. The European Parliament gave member states the authority to regulate GM cultivation, but the European Court of Justice confirmed in September 2017 that countries must provide evidence of a “serious risk to human health, animal health or the environment” to restrict crop growth because the “precautionary principle” is not sufficient.

Genetically Engineered (GE) Animals. The introduction of AquaBounty’s GE salmon into Canada’s food supply has reportedly caused experts to predict the development and sale of other GE animals. Canada’s decision to allow the salmon sparked a lawsuit, and many advocacy groups have resisted the possibility of GE animals sold for consumption. Although FDA concluded in 2015 that GE salmon is safe to eat and has little effect on the environment and provided guidance on voluntary labeling, a bipartisan group of senators introduced a bill in July 2017 to require GE salmon labeling. The European Food Safety Authority (EFSA) also published guidance assessing potential risks of GE and GM animals, emphasizing the need for a scientific review of environmental risks. In addition, gene-editing technique CRISPR has advanced scientists’ capabilities to customize animal DNA, a development the National Academies of Sciences, Engineering and Medicine called “both encouraging and concerning.”

Salt, Sugar and Fat Reduction. *Financial Times* asserts that consumers will continue to exert pressure on food and beverage companies to reduce the amount of fat, salt and sugar in their products. *The Washington Post* reported that attempts to change sugar and salt content in recipes can result in rises in saturated fats, and a *New York Times* editorial argued against panics about single ingredients in foods. Taxes on sugar-sweetened beverages are expected to gain further momentum around the world as the benefits and drawbacks of existing taxes become clear.

Edible Insects. As food security experts worry about the sustainability of the current food supply for the rising global population, their recommendations are reportedly turning to underutilized food sources—notably, insects. In 2014, the *New York Times* and *NPR* predicted that crickets and other edible insects would be “the next quinoa” as soon as Americans can overcome the “ick factor.” EFSA issued an assessment in 2015 on the use of insect protein in food and animal feed, concluding that risks depend on insect species, production method and the type of substrate used.

Food Waste. While food security experts eye underexploited proteins for the future, as much as one-third of the current food supply is lost or wasted, according to the UN. Some food waste can be attributed to product labeling that indicates a “best by,” “sell by” or “use by” date, which can lead consumers to discard edible food based on a date that may have been selected arbitrarily. Sweden and the Netherlands have criticized the European Union’s mandates on the practice, arguing that some foods should be allowed to be sold without dates, and the Natural Resources Defense Council argued a similar position for the U.S. system. Citing food-waste reduction as his goal, a U.S. senator introduced a bill in February 2016 that would establish uniform standards for date labeling on food. Later that year, USDA’s Food Safety and Inspection Service announced guidance encouraging food manufacturers and retailers to use “Best if Used by” on their labels to consistently communicate the dates on which the food should be disposed.

Grocery Shopping Innovation. China’s food-retail industry has demonstrated how the rest of the world will likely be buying groceries in the future, *Financial Times* reports. Alibaba Group has created stores that allow customers to scan items as they shop and pay via app, a concept similar to the cashier-free grocery store Amazon is developing in Seattle. The percentage of customers who buy groceries online is expected to continue rising, although U.S. online grocery shopping reportedly accounts for only 2.1 percent of grocery purchases, a fraction of the United Kingdom’s 6.2 percent and China’s 8.5 percent. Some grocery companies have faced legal issues for their online ordering practices; for example, a court found that Safeway breached its contract with consumers by charging them a 10 percent markup for online-only sales. The store ultimately paid \$41.9 million to the class,

including \$31 million in damages and \$10.9 million in prejudgment interest.

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