



# FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 601 | APRIL 22, 2016

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## LEGISLATION & REGULATION

### Boulder Public Health Group Advocates Excise Tax on Sugar-Sweetened Beverages

Healthy Boulder Kids has submitted to the city of Boulder, Colorado, a draft initiative that would impose on distributors a 2-cent per-ounce excise tax on beverages that contain at least 5 grams of sweeteners per 12 fluid ounces. Pending review and approval by the city clerk, the public health coalition would then have until June 28, 2016, to collect the requisite number of signatures to get the measure on the November ballot. Revenue from the proposed tax would reportedly be directed to health and nutrition programs aimed especially at low-income residents of the Boulder community. *See Boulder Daily Camera*, April 21, 2016.

## LITIGATION

### French Court Overturns Ban on GMO Maize; Later Ban Still in Effect

France's highest administrative court, the Conseil d'État, has reportedly invalidated a 2014 decree banning Monsanto's MON810 maize, a genetically modified organism (GMO), because the decree did not demonstrate that the maize would cause serious health or environmental risks, a standard determined by EU rules. The ruling will not allow GMO maize to be cultivated in the country; in 2015, an EU directive allowed member nations to prohibit GMO crops, and France passed legislation complying with the directive's standards. The later law bans cultivation of all GMO maize in France.

The French maize seed federation sought to appeal the earlier rule despite the symbolic nature of the action to argue that the ban was not based on sound science. "It was more a matter of principle that we conduct this appeal to show there was no scientific basis to the ban," the organization's managing director told *Reuters*. "In concrete terms, it will not change the situation in France." *See Reuters and The Connexion*, April 15, 2016.



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### Seventh Circuit Finds P.F. Chang's Customers Have Standing to Sue for Data Breach

The Seventh Circuit Court of Appeals has revived a data-breach lawsuit against P.F. Chang's China Bistro, Inc., finding that the two plaintiffs have standing to sue despite eating at a restaurant apparently not linked to the breach. *Lewert v. P.F. Chang's China Bistro, Inc.*, No. 14-3700 (7th Cir., order entered April 14, 2016). Additional details about the breach appear in Issue [526](#) of this *Update*.

The plaintiffs ate at an Illinois location of P.F. Chang's two months before the company announced its payment system had been hacked, revealing personal information and credit card numbers. One plaintiff noticed fraudulent charges on his card and purchased credit-monitoring services, while the other alleged that he spent time and effort monitoring his card statements and credit report. Each brought separate lawsuits, which were later consolidated then dismissed for lack of standing. Following its announcement about the data breach, P.F. Chang's identified 33 restaurants affected, excluding the Illinois location at which both plaintiffs had eaten.

Citing a similar data-breach lawsuit against Neiman Marcus, the appeals court found that the plaintiffs had standing to sue despite the discrepancy in location. "In its June statement, P.F. Chang's addressed customers who had dined at *all* of its stores in the United States and admitted that it did not know how many stores were affected," the court noted. "It is easy to infer that it considered the risk to all stores significant enough to implement a universal, though temporary, switch to manual card-processing." The later finding that only 33 stores had been affected creates a factual dispute but does not destroy standing, the court said. "P.F. Chang's will have the opportunity to present evidence to explain how the breach occurred and which stores it affected. Perhaps it can trace which specific data files were stolen. Perhaps each individual location's data is behind a separate firewall. Or perhaps it is being too optimistic and the breach was greater than it suggests. At this stage, no one knows." Accordingly, the court reversed the lower court's dismissal and remanded the case for further proceedings.

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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If you have questions about this issue of the *Update* or would like to receive supporting documentation, please contact Mary Boyd at [mboyd@shb.com](mailto:mboyd@shb.com).

### Gerber Graduates® Puffs Lawsuit Preempted by Federal Law

An Oregon federal court has dismissed a lawsuit alleging Gerber's Graduates® Puffs is mislabeled because its packaging displays fruits and vegetables not contained in the product. *Henry v. Gerber Prods. Co.*, No. 15-2201 (D. Ore., order entered April 18, 2016).



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The court first denied the plaintiff's request to remand the case to state court, then turned to Gerber's motion to dismiss the claims based on preemption by the federal Food, Drug, and Cosmetic Act. Gerber argued that U.S. Food and Drug Administration (FDA) regulations allow the company to provide visual depictions of the product's "characterizing flavor," even if the product does not actually contain any of the depicted fruit, or indeed any fruit at all." The court agreed, finding that the law is "clear," even if the "wisdom of the FDA's regulations on this topic is a different question for a different day." The court dismissed the case but granted leave to amend the complaint.

### Chipotle GMO Proposed Class Action to Continue

A Florida federal court has denied Chipotle's motion to dismiss a putative class action alleging the company misrepresents its food as free of genetically modified organisms (GMOs) despite selling meat produced from animals fed GMOs. *Reilly v. Chipotle Mexican Grill, Inc.*, No. 15-23425 (S.D. Fla., order entered April 20, 2016). Chipotle argued that the plaintiff had no standing to sue because she did not specify which products she purchased; the court found she had sufficiently pleaded her claims to support standing for her consumer-protection claims, but not her request for an injunction. Chipotle also challenged the plaintiff's understanding of "non-GMO" as "nonsensical," but the "reasonableness of her definition, upon which her interpretation of Chipotle's advertisements is based, is a question better decided upon examination of the evidence," the court held. Accordingly, it granted Chipotle's motion to dismiss the request for injunctive relief but denied it as to the rest of the claims.

### Cornucopia Institute Lawsuit Challenges "Unqualified Individuals" on NOSB

Public-interest group Cornucopia Institute has filed a lawsuit against Tom Vilsack in his capacity as Secretary of Agriculture alleging that he and the U.S. Department of Agriculture (USDA) violated the Organic Foods Production Act of 1990 by appointing "unqualified individuals" to the National Organic Standards Board (NOSB), which develops a list of synthetic substances allowed in the production of organic food, the National List of Allowed and Prohibited Substances. *Cornucopia Inst. v. Vilsack*, No. 16-0246 (W.D. Wis., filed April 18, 2016).

Federal law requires the composition of the NOSB to be "balanced and independent," Cornucopia argues, but USDA "inappropriately influenced" the board in a number of ways, including (i) disbanding its



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Policy Development Subcommittee, (ii) allowing the self-appointment of the board's co-chairperson, and (iii) removing the board's ability to set its own work plan. "USDA's unlawful meddling with the composition and rules governing the NOSB has created a NOSB hostile to the public interests it was created to protect," the complaint asserts. Cornucopia also echoes arguments from a lawsuit it filed in partnership with several other consumer groups in April 2015 alleging that USDA violated the Administrative Procedures Act by not following the notice and comment process before changing the Sunset Review Rule, which dictates how often a substance is reviewed for removal from the National List. Details about the complaint appear in Issue [561](#) of this *Update*.

Cornucopia specifically challenges the appointment of Carmela Beck and Ashley Swaffar, who were employees of Driscoll's and Arkansas Egg Company, respectively, at the time of their appointment. The organization asserts that their "votes do not align with the interests of owners or operators of organic farm operations over half the time" despite occupying seats reserved for people representing those interests. The complaint also quotes an email purportedly written by former NOSB chairperson Jean Richardson suggesting that the board change its voting process to "simple hand voting" "so that Cornucopia won't be able to rate our voting record!"

Cornucopia seeks to vacate Beck and Swaffar from the NOSB and requests that the court orders the removal of substances affected by the Sunset rule change. "This type of appointment is part of a pattern of actions taken by the USDA to make the NOSB and the National Organic Program friendlier to the needs of big business interests," Cornucopia's co-director said in an April 19, 2016, press release. "Not only are farmers being denied their voice and right to participate in organic decision-making, but statistics illustrate the corporate representatives sitting in farmer seats have been decisively more willing to vote for the use of questionable and controversial materials in organics, weakening the organic standards."

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### OTHER DEVELOPMENTS

#### ANH Claims Glyphosate Residues Present in Breakfast Foods

The Alliance for Natural Health (ANH) has released a [white paper](#) that allegedly identifies glyphosate residue in common breakfast foods, including "flour, corn flakes, bagels, yogurt, potatoes, organic eggs, and coffee creamers." Part of a campaign seeking to prohibit the herbicide,



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the white paper purportedly relies on the results of ELISA (enzyme linked immunosorbent assay) tests commissioned from an independent laboratory, which reported that 10 samples taken from instant oatmeal, eggs, bagels, and other breakfast products contained glyphosate in detectable amounts. In particular, ANH notes that organic cage-free eggs exceeded the U.S. Environment Protection Agency's (EPA's) tolerance level for glyphosate residue.

The white paper reflects a new trend of consumer groups financing independent laboratory studies to support their campaigns. According to an April 21, 2016, *Beyond Pesticides* blog post, Moms Across America commissioned a report on glyphosate in California wine that allegedly found glyphosate residue in all samples tested.

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### SCIENTIFIC/TECHNICAL ITEMS

#### Phthalate Exposure Allegedly Linked to Fast-Food Consumption

A study has allegedly linked fast-food consumption to higher urinary phthalate-metabolite levels but not to increased bisphenol A (BPA) levels. Ami Zota, et al., “Recent Fast Food Consumption and Bisphenol A and Phthalates Exposures among the U.S. Population in NHANES, 2003–2010,” *Environmental Health Perspectives*, April 2016. Using 24-hour dietary recall data obtained from 8,877 participants from the National Health and Nutrition Examination Survey (NHANES 2003–2010), researchers with George Washington University’s Milken Institute School of Public Health apparently “observed evidence of a positive, dose-response relationship between fast food intake and exposure to phthalates.”

The study authors report that, compared to participants who did not consume fast food, those who received more than 34 percent of their total energy intake from fast food had 23.8 percent and 39 percent higher levels of metabolites of di(2-ethylhexyl) phthalate ( $\Sigma$ DEHPm) and diisononyl phthalate (DiNPm), respectively. In particular, the data suggested that (i) “fast food-derived fat intake was also positively associated with  $\Sigma$ DEHPm and DiNPm”; (ii) “ $\Sigma$ DEHPm was associated with grain and other intake”; and (iii) “DiNPm was associated with meat and grain intake.”

“Participants with high fast food intake had 20-40% higher urinary concentrations of phthalate metabolites than non-consumers,” notes the study. “The complexity and variability of fast food production makes



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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.

it difficult to identify the sources of high-molecular-weight phthalates, though some likely sources have been suggested, including PVC gloves, PVC tubing, and plastic packaging.”

Meanwhile, a separate study has apparently found no evidence associating prenatal phthalate exposure with childhood fat mass in a New York City cohort. Jessie Buckley, et al., “Prenatal Phthalate Exposures and Childhood Fat Mass in a New York City Cohort,” *Environmental Health Perspectives*, April 2016. The authors analyzed the phthalate metabolite concentrations in the third-trimester maternal urine of approximately 400 women, as well as their children’s body composition during multiple follow-up visits. After adjusting for multiple covariates, researchers found “prenatal phthalate exposures were not associated with increased body fat among children 4–9 years of age, though high prenatal DEHP exposure may be associated with lower fat mass in childhood.”

“The finding that high prenatal DEHP exposure was associated with lower body fat in children runs counter to the hypothesis that phthalates are environmental obesogens,” explains a concurrent *editorial*. “This hypothesis is based in part on evidence that phthalates interact with peroxisome proliferator-activated receptors, which are involved in metabolism. However, says first author Jessie Buckley, a postdoctoral research associate in the Department of Epidemiology at the University of North Carolina, ‘This finding is to some extent supported by animal studies of relatively high dose postnatal DEHP exposure that report lower body fat.’”

