



# FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 612 | JULY 22, 2016

**SHOOK**  
HARDY & BACON

## CONTENTS

### LEGISLATION, REGULATIONS AND STANDARDS

UK Advertising Watchdog Censures Special K® General Health Claims. . .	1
OEHHA Proposes Extension of Emergency Measure Governing BPA Disclosure .....	1

### LITIGATION

Ninth Circuit Revives “Pucker” Trademark Dispute .....	2
Wendy’s Data Breach Class Action Dismissed.....	3
Olive Oil False Ad Class Certified. . .	4
Illinois Lawsuit Claims Contaminated Feed Killed Horses .....	4

### OTHER DEVELOPMENTS

Bud Light “Caucus” Super Bowl Ad Not Lewd, Beer Institute Review Finds .....	5
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### SCIENTIFIC/TECHNICAL ITEMS

Report Claims Alcohol Consumption Causes Cancer .....	5
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## LEGISLATION, REGULATIONS AND STANDARDS

### UK Advertising Watchdog Censures Special K® General Health Claims

The U.K. Advertising Standards Authority (ASA) has upheld two complaints alleging that advertisements touting Kellogg Co.’s Special K® products as “full of goodness” and “nutritious” violated broadcast (BCAP) and non-broadcast (CAP) advertising codes for food, food supplements and associated health claims. The complaints targeted a TV ad for Special K® porridge that included supported health claim related to vitamin B2, as well as website claims regarding the product’s “unique Nutri K™ recipe.”

According to ASA, the agency “shared Kellogg’s view that the claim ‘full of goodness’ was a reference to a general, non-specific health benefit of the product and as such, we agreed that Kellogg was required to accompany it with a specific authorized health claim.” But because the authorized vitamin B2 claim did not immediately follow the general health claim, ASA found the ad in breach of BCAP Code Rule 13.4.3. The watchdog also felt that the website advertisement violated CAP Code Rule 15.2 because it made a general health claim that was not accompanied by “a specific authorized health claim.”

“From the home page (on which the claim first appeared), consumers must click through a further two pages to reach the dedicated page for Nutri K™ flakes,” notes ASA in its July 20, 2016, ruling. “That page listed a specific authorized health claim alongside a list of nutrients found in the flakes. However, accompanying specific health claims should appear next to or immediately following the general health claim.”

### OEHHA Proposes Extension of Emergency Measure Governing BPA Disclosure

The California Environmental Protection Agency’s Office of Environmental Health Hazard Assessment (OEHHA) has proposed initiating a regular rulemaking process to extend until December 30, 2017, an emergency measure that allows retailers to use standard point-of-sale warning



## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 612 | JULY 22, 2016

messages for bisphenol A (BPA) exposures from canned and bottled foods and beverages. Under Proposition 65 (Prop. 65) regulations, consumer products that contain any chemical known to the state to cause reproductive toxicity or cancer must display a “clear and reasonable” warning on “labeling, shelf tags, shelf signs, menus or any combination thereof as long as the warning is prominent and conspicuous.”

Taking into account comments received on the emergency measure, OEHHA believes that the proposed regulation “will provide consistent, informative, and meaningful warnings to consumers about significant exposures to BPA.” These warnings will include a link to OEHHA’s website, “which will contain fact sheets, links to informational materials on BPA from other authoritative organizations, and a searchable list of food and beverage products where BPA is intentionally used in the can or lids.”

The agency will hold a public hearing on the proposed amendment on September 12, 2016, and will accept written comments through September 26, 2016. Additional details about the emergency measure appear in Issue [598](#) of this *Update*.

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## LITIGATION

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).

### Ninth Circuit Revives “Pucker” Trademark Dispute

The Ninth Circuit Court of Appeals has reversed a lower court’s grant of summary judgment in favor of Jim Beam Brands Co. in a lawsuit alleging the company infringes JL Beverage’s Johnny Love Vodka® trademarked logo, an image of puckered lips. *JL Beverage Co. v. Jim Beam Brands Co.*, No. 13-17382 (9th Cir., order entered July 14, 2016). Details on the complaint appear in Issue [387](#) of this *Update*.

Bottles of Johnny Love Vodka® feature the name of the brand with a set of puckered lips replacing the “O” in “Love,” which are then colored to represent the flavor of the alcohol. In 2010, Jim Beam Brands redesigned the Pucker® Vodka brand to emphasize a similar set of puckered lips and variety of colors alternated to coordinate with the flavor of the vodka. JL Beverage filed an infringement lawsuit after the company’s customers reported confusion about Pucker’s redesign; the district court denied JL Beverage’s request for a preliminary injunction, then granted summary judgment for Jim Beam.

The Ninth Circuit focused on the lower court’s reasoning for granting summary judgment, finding the court erred by applying the standard for



## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 612 | JULY 22, 2016

a preliminary injunction to the summary judgment decision. “The district court’s failure to apply the correct standard is significant: on motion for preliminary injunction, the plaintiff—as the moving party—bears the burden of establishing the merits of its claims,” the court noted. “In contrast, on a defendant’s motion for summary judgment, not only does the movant carry the burden of establishing that no genuine dispute of material fact exists, but the court also views the evidence in the light most favorable to the non-moving party.” The lower court “ignored the important distinctions between the two standards,” the Ninth Circuit found.

### Wendy’s Data Breach Class Action Dismissed

A Florida federal court has dismissed a putative class action against The Wendy’s Co. alleging the company failed to adequately secure its customers’ financial information but granted the plaintiff leave to amend. *Torres v. Wendy’s Co.*, No. 16-0210 (M.D. Fla., order entered July 15, 2016).

The court found that while the plaintiff’s financial information had been fraudulently used to complete two transactions, “other district courts have concluded that mere fraudulent charges on debit or credit cards do not rise to the level of actual identity theft sufficient to establish standing.” Further, because the charges were reimbursed by the plaintiff’s credit union, he had “not alleged any monetary harm stemming from the two fraudulent charges.”

The plaintiff also argued that he and the putative class had standing because of the threat of future harm because they must monitor for future identity theft. The court distinguished the facts at issue from a similar case in which the threat of future harm after a data breach was considered sufficient to support standing, noting that “in that case, over 9,200 customers’ credit cards experience fraudulent charges following the breach. [] In the instant case, it is unclear the size of the Data Breach and how many other customers were affected. The Class Action Complaint indicates that, to date, only Plaintiff was affected by the Data Breach, and he has not asserted any out-of-pocket losses that current case law is willing to recognize.” Accordingly, the court dismissed the case but granted the plaintiff leave to amend the complaint. Addition information about the original complaint appears in Issue 594 of this *Update*.



## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 612 | JULY 22, 2016

### Olive Oil False Ad Class Certified

A California federal court has granted certification to a class of consumers alleging that Salov North America Corp., maker of Filippo Berio olive oil, misleads consumers by labeling its oil as “Imported from Italy” even though most of the oil is produced in Tunisia, Greece and Spain. *Kumar v. Salov N. Am. Corp.*, No. 14-2411 (N.D. Cal., order entered July 15, 2016). The court dismissed Salov’s arguments against the plaintiff serving as class representative because of her felony record and her friendship with class counsel, finding that the charge of driving under the influence does not call her honesty and integrity into question and that the plaintiff’s friend is one of several class counsel in the case. Additional details about the case appear in Issues [554](#) and [590](#) of this *Update*, while details on class certification in the plaintiff’s lawsuit against Safeway involving similar allegations appear in Issue [606](#).

### Illinois Lawsuit Claims Contaminated Feed Killed Horses

Two horse owners have filed a lawsuit against Archer Daniels Midland Co. alleging feed produced by its subsidiary, ADM Alliance Nutrition, was contaminated with monensin, a cattle-feed additive poisonous to horses. *Berarov v. Archer Daniels Midland Co.*, No. 16-7355 (N.D. Ill., filed July 19, 2016).

The plaintiffs argue that ADM knowingly manufactured cattle feed containing monensin in the same facility as its horse feed and supplement production, resulting in cross-contamination between the two. The complaint details the effects of monensin on horses, including equine heart failure and other major organ damage, which the plaintiffs argue can occur with doses as low as 1.38 mg/kg of body weight. In a statement, ADM disputed this toxicity level, arguing that a horse can safely consumer 9.5 mg/kg of body mass, according to the complaint. For allegations of negligent misrepresentation, strict product liability, unjust enrichment, breach of warranties and violations of Illinois consumer-protection laws, the plaintiffs seek class certification, an injunction, a corrective advertising campaign, changes to ADM’s manufacturing process, restitution and damages.



## FOOD & BEVERAGE LITIGATION UPDATE

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ISSUE 612 | JULY 22, 2016

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### OTHER DEVELOPMENTS

#### Bud Light "Caucus" Super Bowl Ad Not Lewd, Beer Institute Review Finds

Following a consumer complaint, the Beer Institute has reviewed Anheuser-Busch Companies, LLC's Super Bowl ad featuring comedians Seth Rogen and Amy Schumer discussing the "biggest caucus in the country" and determined the ad does not violate the industry group's marketing standards. Under the standards, "advertising and marketing materials should not contain languages or images that are lewd or indecent in the context presented and the medium in which the material appears." The consumer argued that the use of "caucus" could be interpreted as sexually suggestive in context, but the review board disagreed, finding, "From the perspective of a reasonable adult consumer of legal drinking age, the mere use of a sexually suggestive pun would not be seen as 'vile,' 'inciting to lust or lechery,' patently offensive, or offending recognized standards of good taste." The board pointed to similar puns appearing on "Live with Kelly & Michael" and "comments from Marco Rubio and Donald Trump about Mr. Trump's allegedly small hands and the supposed implications of such" as examples of innuendo permeating mainstream culture. "Our society simply is not so sensitive as to view any such reference as being 'lewd' or 'indecent,'" the board concluded. *See Advertising Age*, July 19, 2016.

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### SCIENTIFIC/TECHNICAL ITEMS

#### Report Claims Alcohol Consumption Causes Cancer

Taking issue with language that only loosely links alcohol consumption to increased cancer incidence, an article in the July 2016 issue of *Addiction* suggests that 5.8 percent of all cancer deaths worldwide are caused by alcohol-attributable cancers of the oropharynx, larynx, esophagus, liver, colon, rectum, and female breast. Jennie Connor, "Alcohol consumption as a cause of cancer," *Addiction*, July 2016. After reviewing "meta-analyses identified from the Medline database and the archives of the International Agency for Research on Cancer," a researcher with the University of Otago's Department of Preventive and Social Medicine reports a "dose-response relationship" between alcohol consumption and cancer, "without evidence of threshold of effect" and regardless of beverage type.



## FOOD & BEVERAGE LITIGATION UPDATE

ISSUE 612 | JULY 22, 2016

### 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.

"Expressions such as 'alcohol-related cancer', 'alcohol-attributable cancer' and the effect of alcohol on 'the risk of cancer' incorporate an implicit causal association, but are easily interpreted as something less than cancer being caused by drinking," opines the study author, who cites the example of a U.S. scientist purportedly employed by "an alcohol industry body" to dispute the effect of moderate alcohol consumption on cancer risk. "In this context, some confusion and skepticism about whether alcohol causes cancer may seem understandable, but in some cases doubt is also being generated by dissemination of misinformation, which undermines research findings and contradicts evidence-based public health messages."

In addition, the article calls into question research that describes the protective effect of alcohol on cardiovascular disease (CVD). Connor notes the limitations of such studies, including the use of self-reported consumption measures; lack of consumption pattern measurements; the inclusion of former or occasional consumers of alcohol in an abstainer reference group; and residual confounding factors that vary by cancer types. As the article explains, "While residual confounding of the alcohol and cancer associations may reduce or increase the magnitude of the harmful effect, residual confounding of the CVD association is plausibly responsible for the whole of the observed protective effect, and particularly in combination with the bias caused by misclassification of former drinkers as abstainers."

"The highest risks are associated with the heaviest drinking, but a considerable burden is experienced by drinkers with low to moderate consumption, due to the distribution of drinking in the population," concludes Connor. "Thus, population-wide reduction in alcohol consumption will have an important effect on the incidence of these conditions, while targeting the heaviest drinkers alone has limited potential."

