



FIRM NEWS

## Silverman Analyzes Increase in "Shake the Box" Lawsuits for *Law360*

Shook, Hardy & Bacon Partner [Cary Silverman](#) explains in an April 17, 2017, [Law360 article](#) that a six-fold growth in slack-fill lawsuits stems from a "precise template" developed by plaintiffs' lawyers seeking to pressure companies into out-of-court settlements. "I call them 'shake the box' lawsuits," reports Silverman. "If you can hear the product shake, you've got a lawsuit. You just plug it into your template, take a photo, and you're ready to go."

*Law360* quotes Silverman's [report](#) on food lawsuits for the U.S. Chamber Institute for Legal Reform, "[The Food Court: Trends in Food and Beverage Class Action Litigation](#)," which he co-authored with Shook Partner [Jim Muehlberger](#). Silverman also presented "All You Can Eat Lawsuits: Restoring Sanity to Food Litigation," discussing the report's findings, for a CLE at the University of Cincinnati College of Law on April 13, 2017.

LEGISLATION, REGULATIONS & STANDARDS

## Proposed SSB Tax Withdrawn in Mass.

A Massachusetts house bill proposing a one- and two-cent tax per fluid ounce of sugar-sweetened beverages (SSBs) has been withdrawn during a state budget hearing. The tax would have applied to SSBs containing more than five grams of sugar but excluded 100-percent juice, milk substitutes, infant formula and beverages for medicinal use. Although sponsor [Kay Khan](#) (D)

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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.

For additional information about Shook's capabilities, please contact



**[Mark Anstoetter](#)**  
816.474.6550  
[manstoetter@shb.com](mailto:manstoetter@shb.com)

withdrew the proposal, a spokesperson for her office told *Bloomberg* that she has filed [legislation](#) to pursue the tax. *See Bloomberg BNA*, April 25, 2017.



**Madeleine McDonough**

816.474.6550

202.783.8400

[mmcdonough@shb.com](mailto:mmcdonough@shb.com)

## U.S.-Canada Trade Dispute Centers on Milk

President Donald Trump has indicated that he will attempt to renegotiate the North American Free Trade Agreement after making several negative comments about Canada's dairy pricing. The dispute centers on ultrafiltered milk, a product used in the production of cheese that U.S. dairy farmers previously sold to Canadian companies. After Canadian dairy farmers in Ontario dropped their prices low enough to compete with U.S. farmers, many Canadian cheesemakers canceled contracts with their U.S. suppliers to pursue the Ontario farmers' supply. Trump tweeted, "We will not stand for this," and later announced that he will attempt to renegotiate the trade agreement with Canada. *See USA Today*, April 25, 2017; *Washington Post*, April 27, 2017.

## WTO Rules Against U.S. in Tuna Controversy, Awards Mexico \$163 Million

The World Trade Organization (WTO) has held that Mexico can impose \$163 million in trade sanctions against the United States for enacting tougher "dolphin-safe" requirements on fish caught in a part of the Pacific Ocean used primarily by Mexican fishers. The decades-long dispute began when international conservation efforts pressured countries to protect dolphins, which commonly swim with yellowfin tuna in that area. In response, the United States implemented stringent rules for tuna catches and imports, which Mexico argues has shut its fishing businesses out of an import market worth \$680 million in 2014. The U.S. revised its requirements after WTO found in favor of Mexico in 2012, but Mexico argued that the revisions still improperly restricted tuna imports and asked for \$472 million in sanctions.

WTO rejected a U.S. argument to decide the dispute based on 2016 revisions that expanded the same requirements to all countries, but an expected July 2017 ruling may consider those revisions and affect the sanctions award.

### 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.



## NAD Recommends Changes to Beech-Nut Baby Food Ads

After reviewing a challenge by the maker of Gerber baby foods, the National Advertising Division (NAD) has recommended that Beech-Nut Nutrition discontinue several advertising claims but rejected complaints that Beech-Nut’s ads implied its baby foods are fresh. NAD warned Beech-Nut against use of the term “coldpuree” unless it “conspicuously” explains that foods are cooked after they are pureed cold. It also recommended that Beech-Nut stop making unsupported claims that “glass is the ultimate in sustainability” and that “glass is nature’s safest container.”

Beech-Nut challenged NAD’s jurisdiction, arguing that most of the ads are no longer used, but NAD rejected the challenge and noted that the challenged claims continued to appear on Beech-Nut’s website, in a YouTube video and on product packaging.

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## LITIGATION

### Court Denies Environmental Groups’ Intervention in Seafood Traceability Case

A federal court has ruled that three environmental groups lack standing to intervene in a lawsuit to block implementation of the Seafood Import Monitoring Program. *Alfa Int’l Seafood v. Ross*, No. 17-0031 (D.D.C., order entered April 17, 2017). The court held that the Natural Resources Defense Council, Oceana and the Center for Biological Diversity failed to establish concrete or particularized injuries “fairly traceable” to the possible vacating of the proposed program, known as the Seafood Traceability Rule. Even if they could, the court found, the groups still had not made a minimal showing that defendant U.S. Department of Commerce was unable to adequately represent their interests in the case.

The groups argued that the new administration “might adopt policies that negatively affect the force of the Rule,” but Commerce reported that it supported the program. The court also dismissed the groups’ disagreements with Commerce about the program’s scope and timing because those program aspects are not at issue in the litigation, which challenges only the government’s authority to adopt the rule and the process by which it did so. Additional details about the litigation appear in Issue [627](#) of this *Update*.

### Wisconsin Butter Ban Violates Constitutional Rights, Lawsuit Alleges

An Ohio company has filed a lawsuit alleging Wisconsin's ban on sales of ungraded butter violates the Commerce Clause, due process, equal protection and free speech. *Minerva Dairy, Inc. v. Brancel*, No. 17-299 (W.D. Wis., filed April 20, 2017). In early 2017, Wisconsin began enforcing a 1954 law requiring all butter sold in the state to bear either a state or a U.S. Department of Agriculture (USDA) grade mark, telling retailers and producers to remove out-of-state butter from store shelves or risk fines and imprisonment. Minerva Dairy, Inc. argues that the ban serves no rational or legitimate governmental interest. "In contrast to butter inspection, which ensures that the butter comports with health and safety regulations, butter grades are used only to ensure a government-mandated taste," the complaint argues. Minerva alleges that small companies are unable to afford obtaining USDA grading and creating separate labels solely for Wisconsin sales. Accordingly, the complaint alleges, the Wisconsin law violates Minerva's right to compete in interstate commerce, arbitrarily shields Wisconsin butter producers from out-of-state competition and deprives Minerva employees of their right to earn a living in their chosen profession.

A related consumer lawsuit alleges that Wisconsin's enforcement violates their state constitutional rights by preventing residents from buying Irish-made Kerrygold butter within the state. Kerrygold's maker, Ornu Foods, filed a trademark lawsuit alleging a Wisconsin creamery adopted a similar appearance after enforcement of the ban led retailers to remove Kerrygold from shelves. Additional details on Ornu's lawsuit appear in Issue [631](#) of this *Update*.

## Court Dismisses "No Preservatives Added" Claims Against Herr Foods

A Pennsylvania federal court has dismissed without prejudice a consumer lawsuit alleging Herr Foods Inc. labels its snack products as free from added preservatives despite containing citric acid. *Hu v. Herr Foods, Inc.*, No. 16-5037 (E.D. Pa., order entered April 24, 2017). Additional information on the complaint appears in Issue [609](#) of this *Update*.

Herr moved for a judgment on the pleadings, arguing that the citric acid in its products was not serving as a preservative. The court dismissed the claim for unjust enrichment but granted leave to amend claims for alleged violations of New York laws governing deceptive acts and practices, noting that the deficiency "is a lack of allegations supporting plaintiff's conclusory statement that citric

acid functions as a preservative in the products, which plaintiff could remedy by pleading appropriate supporting facts.”

## “Technically Correct” Labels Can Be Misleading, Ninth Circuit Holds

The Ninth Circuit has reversed the dismissal of a putative class action alleging that Gerber’s baby food labels misled consumers about the nutritional value of its baby foods despite being “technically correct.” *Bruton v. Gerber Prods. Co.*, No. 15-15174 (9th Cir., order entered April 19, 2017). The plaintiff argued that the presence of impermissible nutrient claims on Gerber labels combined with the absence of such claims on competitors’ products misled the public into believing Gerber products were of higher quality. The district court dismissed the action, finding no genuine dispute of material fact because the labels were accurate, but the Ninth Circuit found that “even technically correct labels can be misleading.” The appeals court also reversed the lower court’s dismissals of claims for unjust enrichment and class certification.

## Eighth Circuit Upholds Convictions in Halal Mislabeling Scheme

The U.S. Court of Appeals for the Eighth Circuit has upheld the convictions of Midamar Corp., founder William Aosse and his son Jalel Aosse, perpetrators of a scheme to falsely label meat as halal. *U.S. v. Aosse*, Nos. 16-1611, 16-1688, 16-1761 (8th Cir., order entered April 14, 2017). The court rejected the defendants’ arguments that the Department of Agriculture has sole jurisdiction over criminal prosecutions pursuant to the Meat Inspection Act, ruling that the federal statute did not include a “clear and unambiguous” expression that the Agriculture Department’s authority is exclusive. Additional details on the case against Midamar and the Aosses appear in Issues [550](#), [572](#) and [596](#) of this *Update*.

## Ginger Ale Labeling Suit to Proceed Against Dr Pepper

A federal court has reportedly refused to dismiss a mislabeling class action alleging Dr Pepper’s Canada Dry Ginger Ale contains “real ginger” but dismissed the plaintiffs’ fraud claims with leave

to amend. *Fitzhenry-Russell v. Dr Pepper Snapple Grp., Inc.*, No. 17-0564 (N.D. Cal., motion hearing April 19, 2017). While the court found the plaintiffs' labeling claims "plausible," it rejected the fraud allegations for a lack of precision. The complaint asserts that the ginger ale's label does not include "real ginger root" as an ingredient but lists chemical flavoring instead. A similar class action against Dr Pepper was transferred to California's Northern District in April 2017; details on that action appear in Issue [628](#) of this *Update*. See *Law360*, April 19, 2017.

## Putative Class Action Alleges GMO Foods Are Not "Natural"

A Florida plaintiff has filed a putative class action against the maker of Tabatchnick soups, alleging its products cannot be called "natural" because they contain genetically modified organisms (GMOs). *Ramsaran v. Tabatchnick Fine Foods, Inc.*, No. 17-60794 (S.D. Fla., filed April 24, 2017). The complaint asserts that 19 Tabatchnick soups labeled or advertised as "all natural," containing "highest quality, natural ingredients," actually contain GMO soy, corn, canola or their derivatives. The plaintiff alleges that GMOs, which have "undergone sophisticated bioengineering," cannot be described as "minimally processed" or natural and are therefore artificial. For alleged violations of the Florida Deceptive and Unfair Trade Practices Act, negligent misrepresentation and breach of express and implied warranties, the plaintiff seeks declaratory judgment, class certification, injunctive relief, damages and attorney's fees.

## Ketchup Cap Maker Sues Kraft Heinz For Trade-Secret Misappropriation

Kraft Heinz Foods faces a trade-secret suit alleging it distributed documents containing confidential and proprietary drawings and specifications for plastic caps created by one of its long-time vendors. *AptarGroup, Inc. v. Kraft Heinz Foods Co.*, No. 17-521 (W.D. Pa., filed April 21, 2017). AptarGroup argues that Kraft distributed engineering and customer drawings providing detailed specifications for its bottle cap and closure designs documents after removing Aptar's logos and confidentiality warnings. Aptar also asserts that among other disclosures, Kraft released specifications for its "breakthrough" snap-top cap used for Heinz' inverted, top-down ketchup bottles. The complaint alleges that previous disclosures have included only "one or two ornamental designs, with no detailed specifications, and that Aptar notified

Kraft of their breach of contract and asked Kraft to demand the return of the confidential information from all recipients. Claiming trade secret misappropriation and breach of contract, Aptar seeks a temporary restraining order, injunctive relief, damages and attorney's fees.

## Second Circuit Upholds Milk Price-Fixing Settlement

The Second Circuit has upheld the \$50-million settlement of an alleged milk price-fixing conspiracy, holding that “[b]y their nature, settlements are compromises that do not provide either side with all that they might have hoped to obtain in litigation.” *Haar v. Allen*, No. 16-1944 (2d Cir., order entered April 18, 2017). The class action asserted that Dairy Farmers of America, Inc., Dairy Marketing Services and Dean Foods Co. conspired to suppress competition and fix prices of raw milk in the Northeast. The appellants argued that the settlement was the result of collusion between class counsel and opposing counsel and that members of the class were coerced into participation. The Second Circuit disagreed, finding the appellants confused “counsel’s willingness to negotiate in good faith toward a settlement with collusion,” noting that the district court found no evidence of impropriety after a lengthy hearing into claims of misconduct. The court also rejected allegations of coercion, pointing to evidence of substantial support for the settlement by other litigants and noting that the district court had rejected as insufficient an earlier settlement that failed to expressly provide farmers the right to opt out.

## Chobani Sues Alex Jones for Defamation

Chobani LLC has reportedly filed a libel suit against Alex Jones, radio host and founder of *Infowars*, alleging Jones defamed the company with a report that its Idaho factory was linked to a child sexual assault case and a rise in incidents of tuberculosis. *Chobani LLC v. Jones*, No. 42-17-1659 (Idaho 5th Jud. D. Ct., filed April 24, 2017). Jones’ *Infowars* video apparently asserted that Chobani’s policy of hiring refugees caused several negative effects in Twin Falls, Idaho, including a sexual assault case involving refugee minors. See *Bloomberg* and *New York Times*, April 25, 2017.

## Omaha Steaks Faces Shipping Charges Class Action

A California plaintiff has filed a projected class action against Omaha Steaks alleging the company's shipping and handling charges "greatly exceed" the actual cost of shipping items to consumers. *McCoy v. Omaha Steaks Int'l*, No. BC658076 (Sup. Ct. Cal., Los Angeles Cty., filed April 14, 2017). The plaintiff asserts that he was charged \$15.99 in shipping and handling fees for a jar of dry rub, allegedly twice what he would have paid had the product been shipped by the U.S. Postal Service. The complaint relies on the Direct Marketing Association's ethical guidelines on shipping charges, which purportedly recommend charges be "reasonably related" to actual costs and disclosed early in the order process.

## Jagermeister Files TTAB Opposition to Application for Deer Head Mark

Mast-Jagermeister SE has filed an opposition to a trademark application by apparel company Offseason Outdoors for a logo featuring a deer's head. *Mast-Jagermeister SE v. Offseason Outdoors*, No. 91234087 (T.T.A.B., opposition filed April 19, 2017). Jagermeister, which marks its alcohol products with deer head images, filed its notice of opposition to Offseason's trademark application, claiming Jagermeister has owned deer head marks since 1968.

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### SCIENTIFIC / TECHNICAL ITEMS

## Study Alleges Diet Soda Linked to Increased Stroke and Dementia Risk

A study examining the health effects of sugary and artificially sweetened beverages has allegedly concluded that consumption of the latter was associated with an increased risk of stroke and dementia. Matthew P. Pase et al., "[Sugar- and Artificially Sweetened Beverages and the Risks of Incident Stroke and Dementia](#)," *Stroke*, May 2017. Based on data from more than 4,000 adults enrolled in Framingham Heart Study Offspring cohort, the study followed health outcomes for 10 years and purportedly accounted for confounding factors such as "age, sex, education (for analysis of dementia), caloric intake, diet quality, physical activity, and smoking."



The results apparently suggested that, when compared to those who abstained from artificially sweetened beverages, participants who imbibed up to six servings per day were at greater risk of stroke or dementia, with the strongest associations for ischemic stroke.

“To our knowledge, our study is the first to report an association between daily intake of artificially sweetened soft drink and an increased risk of both all-cause dementia and dementia because of AD,” state the authors, who nevertheless note that other studies have raised questions about whether individuals with a higher risk for dementia tend to consume more diet beverages. “Because our study was observational, we are unable to determine whether artificially sweetened soft drink intake increased the risk of incident dementia through diabetes mellitus or whether people with diabetes mellitus were simply more likely to consume diet beverages.... Clinical trials are needed to establish whether the consumption of artificially sweetened beverages is causally related to dementia or surrogate end points, such as cognitive decline or brain atrophy.”

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