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## FOOD & BEVERAGE LITIGATION UPDATE

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### LEGISLATION, REGULATIONS & STANDARDS

#### FDA Delays Compliance Date for Nutrition Facts Labeling

The U.S. Food and Drug Administration (FDA) has announced that it will postpone the deadline for food companies to use a revised Nutrition Facts label on packaged foods and beverages that includes added-sugar content and emphasizes calorie content. The FDA guidance document on the changes was updated to note that it received feedback from industry and consumer groups about the compliance dates.

"As a result, the FDA intends to extend the compliance dates to provide the additional time for implementation," the guidance documents states. "The framework for the extension will be guided by the desire to give industry more time and decrease costs, balanced with the importance of minimizing the transition period during which consumers will see both the old and the new versions of the label in the marketplace."

#### FAO Urges Agriculture Cos. To Combat Child Labor

The United Nations' Food and Agriculture Organization (FAO) has published a guide encouraging agricultural companies to enact child-labor policies to combat abuse in the industry. The guide offers "practical steps to ensure that programmes contribute to safe employment and training opportunities for youth and that activities intended to support vulnerable families do not have the

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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.

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unintended consequence of encouraging child labour," according to a June 12, 2017, press release.

"The agriculture sector holds great potential before, during and after crises, to save lives and contribute to livelihoods, support rural households, provide decent employment and alternatives to child labour, including its worst forms," FAO Assistant Director-General Kostas Stamoulis was quoted as saying.



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## FDA Announces Upcoming Science Board Meeting

The U.S. Food and Drug Administration (FDA) has [announced](#) it will hold a public advisory committee meeting of its Science Board on June 26, 2017, in Silver Spring, Maryland. The Science Board will hear an update on FDA's biotechnology activities related to animals and plant-derived food as well as a report from the National Antibiotic Resistance Monitoring System Review Subcommittee. Written submissions of data, information or opinions may be made on or before June 19, 2017.

## APHIS Adds Two Public Meetings on Animal Disease Traceability System

The U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) has [announced](#) two regional public meetings for public comment on the Animal Disease Traceability (ADT) system. The meetings will be in Omaha, Nebraska, on July 18, 2017, and Fort Worth, Texas, on July 20, 2017. APHIS is seeking comment from the cattle and bison sectors and will accept written statements until July 31, 2017.

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### LITIGATION

## Appeals Court Upholds Philadelphia SSB Tax

A Pennsylvania appeals court has upheld Philadelphia's tax on the distribution of sugar-sweetened beverages (SSBs), rejecting arguments that it is a duplicate sales tax or is preempted by state tax laws. *Williams v. City of Philadelphia*, Nos. 2077, 2078 (Pa. Commonwealth Ct., order entered June 14, 2017). The court held that the subject matter of the tax—the non-retail distribution of SSBs—is "distinct" from the sales tax collected when the beverages are sold to a retail purchaser, and thus the distribution tax is not

### 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.



duplicative of an existing tax. In addition, the court said, the tax is not preempted under state law because Pennsylvania cities have the right to tax transactions that are not already subject to state tax or license fees. Nor is it preempted by the federal Food Stamp Act or related tax laws because the tax is levied on the distributors of SSBs and “no recipient of program benefits is ever liable for the payment” of the tax, the court said. “The fact that the [tax] may be passed on to recipients through higher retail prices does not alter” the nature of the tax itself.

Finally, the court rejected arguments that the tax violates the uniformity clause of the state’s constitution because it is a property tax based on SSB inventory of distributors and dealers. The court applied the language of the regulation, finding the tax is imposed only when SSBs are “supplied, acquired, delivered or transported” for retail sale, not upon ownership. Additional details about the Philadelphia tax appear in Issues [607](#), [617](#), [621](#) and [622](#) of this *Update*.

## Consumer Group Files FOIA Lawsuit for List of NPIS Participants

Food & Water Watch, a consumer advocacy group, has filed suit against the U.S. Department of Agriculture (USDA) and the Food Safety and Inspection Service over the agencies’ denial of the group’s Freedom of Information Act (FOIA) requests asking for the names of companies that opted to participate in the New Poultry Inspection System (NPIS). *Food & Water Watch, Inc. v. U.S. Dep’t of Agric.*, No. 17-1133 (D.D.C., filed June 9, 2017).

USDA implemented the optional NPIS in an effort to reduce rates of foodborne illness attributable to chicken and turkey contaminated with *Salmonella* and *Campylobacter*. Food & Water Watch requested the identities of the companies that chose to participate in NPIS, but their FOIA requests were denied on the grounds that “the responsive records consist solely of confidential future business plans.” Alleging violations of FOIA, the plaintiff is seeking an order for disclosure of the requested records and attorney’s fees.

## Plant-Based Products Cannot Be “Milk,” ECJ Rules

The European Court of Justice (ECJ) has ruled that plant-based products cannot use milk- or dairy-related terms for product names or in marketing because the terms are “exclusively”

reserved for animal-milk products under EU law. *Verband Sozialer Wettbewerb eV v. Tofu Town.com GmbH*, Case C-422/16 (order entered June 14, 2017). Verband Sozialer Wettbewerb eV, a German trade group, asked a regional German court for an injunction against Tofu Town, a producer of vegetarian and vegan products marketed with names such as “veggie cheese,” “Soyatoo tofu butter” and “rice spray cream.” The regional court referred the dispute to the Court of Justice for a preliminary ruling.

The court found that EU Regulation 1308/2013 reserves the term “milk” for animal-derived products such as cheese, cream, butter, yogurt and kefir, and further, non-bovine products must specify the animal species from which the milk originates because the regulation defines milk as the product of “the milking of one or more cows.” Accordingly, the court said, the word “milk” “cannot, in principle, be lawfully used to designate a purely plant-based product.” Although the rule specifies some exceptions—including terms for creamed vegetables or soups—it does not exempt references to soy or tofu products, the court said. The court held that milk-related terms can only be used for animal-derived milk and milk products, not for plant-based products “in marketing or advertising, even if those terms are expanded upon by clarifying or descriptive terms indicating the plant origin of the product at issue.”

Information about the U.S. Food and Drug Administration’s regulatory treatment of plant-based “milk” appears in Issue [607](#) of this *Update*.

## Class Decertified in Kraft “Natural” Cheese Suit

A California federal court has decertified a class and granted partial summary judgment in an action alleging Kraft Foods Group falsely advertised its fat-free cheddar cheese as “natural.” *Morales v. Kraft Foods Grp.*, No. 14-4387 (C.D. Cal, order entered June 9, 2017). Details on previous decisions in the case appear in Issues [570](#) and [625](#) of this *Update*.

The court first granted summary judgment for Kraft as to restitution because the plaintiffs failed to provide sufficient evidence about their potential willingness to pay a premium based on the “natural cheese” label and therefore could not establish a basis for calculating restitution for the class.

Turning to the issue of whether the consumers’ belief that the cheese was “natural” was material to their purchasing decisions,

the court determined that the plaintiffs' expert testimony created a triable issue of fact that could not be dismissed during the summary-judgment phase. Denying that portion of the motion for summary judgment, the court requested briefs on whether the class should be recertified to pursue injunctive relief.

## Data Breach Class Action Filed Against Chipotle

A consumer has filed a putative class action alleging Chipotle Mexican Grill, Inc. failed to take measures to prevent an April 2017 data breach in which hackers used malware to steal customer data from the magnetic stripes on payment cards. *Baker v. Chipotle Mexican Grill, Inc.*, No. 17-1134 (C.D. Cal., filed June 9, 2017). The complaint alleges that Chipotle failed to take “adequate and reasonable measures” to protect its data systems, which reportedly contain personally identifiable information in addition to payment card data. The plaintiff seeks class certification, equitable relief, damages and attorney’s fees.

## Bulleit® Bourbon Maker Asserts Trade-Dress Rights to “Canteen-Shaped” Bourbon Bottle

Diageo has filed a trademark-infringement and dilution lawsuit against a competitor that allegedly mimicked Diageo’s Bulleit® bottle shape and labeling. *Diageo N. Am. V. W.J. Deutsch & Sons*, No. 17-4259 (filed June 6, 2017). Diageo asserts that Bulleit® is sold in a “distinctive canteen-shaped bottle featuring embossed lettering” on the label, meant to “evoke the rugged look and feel of the American Frontier.” The complaint alleges that after W.J. Deutsch bought the Redemption whiskey product line, it redesigned the products to have a “clear canteen-shaped glass bottle,” an embossed brand name and a cork bottle cap with a black top. Claiming trademark and trade-dress infringement and dilution, Diageo seeks injunctive relief, damages and attorney’s fees.

## Jelly Belly ECJ Suit Dismissed With Leave to Amend

A plaintiff’s “cursory, formulaic recitation” of her purchase of Jelly Belly Candy Co.’s Sport Beans did not include enough factual

allegations to establish a claim for relief, a California federal court has ruled. *Gomez v. Jelly Belly Candy Co.*, No. 17-0575 (order entered June 8, 2017). The plaintiff had alleged the candy maker's use of the term "evaporated cane juice" (ECJ) on the packaging misled her about the product's sugar content. Additional details on the complaint appear in Issue [629](#) of this *Update*.

"Absent from the Complaint are any factual allegations concerning the circumstances of Gomez's purchase of the product, how she intended to use the product, whether she in fact expected a sugar-free product, whether she thought 'evaporated cane juice' was juice as opposed to sugar, and whether she consumed the product," the court said, granting Jelly Belly's motion to dismiss. However, the court ruled that Gomez had alleged enough facts to establish the possibility that consumers could be misled by the product labeling and granted leave to amend her complaint.

## GMO Complaint Dismissed Against Tabatchnick Soups

A complaint against the maker of Tabatchnick soups that alleged the company's products could not be called "natural" because they contain genetically modified organisms (GMOs) has been voluntarily dismissed. *Ramsaran v. Tabatchnick Fine Foods, Inc.*, No. 17-60794 (S.D. Fla., dismissed June 9, 2017). The plaintiff had argued that he relied on the company's "all natural" representations when he bought the company's prepackaged soups but later learned that they contain GMO soy, corn or canola. Additional details appear in Issue [632](#) of this *Update*.

## Beer Distributor To Pay \$2-Million Fine For Trade Practice Violations

The attorney general of New Jersey has announced an "unprecedented" \$2-million fine in a settlement with a craft-beer and spirit wholesaler accused of trade-practice violations. *Div. of Alcoholic Beverage Control v. Hunterdon Brewing Co. LLC*, No. L0002 (N.J. Dep't of Law Public Safety, consent order filed May 31, 2017). New Jersey alleged that Hunterdon Brewing sold tap systems at below-market prices then overcharged those customers by including "miscellaneous draft charges" on invoices. Further, the company allegedly ignored state credit regulations and entered into discriminatory, "unequal financing" terms of sales with its customers. Hunterdon has agreed to pay the fine in four \$500,000 installments over the next 12 months; \$250,000 of the

final payment will be waived if compliance audits show no further violations.

“Fair market prices exist for a reason,” said Attorney General Christopher Porrino in a June 12, 2017, press release. “Consumers suffer when these laws and regulations are ignored.”

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