



LEGISLATION, REGULATIONS & STANDARDS

## FDA Announces Intent Not to Enforce Portions of FSMA

The U.S. Food and Drug Administration (FDA) has announced it will not enforce certain provisions of the Food Safety Modernization Act (FSMA) because the agency needs more time to consider “the complex supply chain relationships and resource requirements” related to definitions and required disclosures. Among other issues, FDA stated, are questions about factors such as farm ownership and farm-related activities that affect the determination of what business entities are “farms.” In addition, FDA will delay enforcement of some provisions related to (i) produce safety; (ii) disclosures regarding hazard analyses; (iii) importation of food contact substances under the Foreign Supplier Verification Program; and (iv) human food byproducts used in animal food.

## Switzerland Bans Boiling of Lobsters

The Swiss government has reportedly banned the culinary practice of boiling live lobsters, mandating that the lobsters must be killed instantly by “mechanical destruction” or stunned before they are killed. Passed in response to concerns over studies that suggest crustaceans such as lobsters and crabs can feel pain, the law also outlaws transport of live crustaceans on ice, instead requiring that “aquatic species must always be kept in their natural environment.” Experienced chefs may also use a traditional method of inserting a sharp knife into the lobster’s head to kill it quickly. The law takes effect March 1, 2018.

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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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## EFSA Seeks Comments on Added Sugar

The European Food Safety Authority (EFSA) has launched a consultation on its draft protocol for its scientific opinion on free sugars. The protocol responds to five member states' request seeking "a science-based cut-off value for a daily exposure to added sugars from all sources (i.e. sucrose, fructose, glucose, starch hydrolysates such as glucose syrup, high-fructose syrup and other isolated sugar preparations used as such or added during food preparation and manufacturing) which is not associated with adverse health effects." EFSA will not accept comments "related to policy or risk management aspects, which are out of the scope of EFSA's activity." Comments will be accepted until March 4, 2018.



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### LITIGATION

## Proposed Class Action Filed Over Butter and Corn Syrup Labeling

A consumer has filed a lawsuit alleging Schwan's Co. falsely advertises Mrs. Smith's Original Flaky Crust Pies as made with "real butter" despite allegedly containing a vegetable and butter shortening blend. *Leguette v. Schwan's Co.*, No. 17-7599 (E.D.N.Y., filed December 31, 2017). The plaintiff alleges that she bought a Mrs. Smith's apple pie because the package prominently displayed the statements "Made With Real Butter," "No Artificial Sweeteners, Dyes or Flavors" and "No High Fructose Corn Syrup." The Nutrition Facts panel disclosed that the product contains a "Shortening Butter Blend (Palm Oil, Butter [Cream, Salt])" and corn syrup. Claiming violations of New York's General Business Law, breach of warranties and unjust enrichment, the plaintiff seeks class certification, injunctive relief, damages and attorney's fees.

## Court Rules Organic Labeling Suit Preempted by Federal Law

A federal court has dismissed a lawsuit alleging Earth's Best falsely labels its infant and toddler foods as organic, asserting that the foods contain at least 29 ingredients not permitted to be labeled as such under the Organic Food Production Act of 1990 (OFPA). *Organic Consumers Ass'n v. Hain Celestial Grp., Inc.*,

### 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.



No. 16-0925 (D.D.C., entered January 3, 2018). Although the court found the plaintiff advocacy group had standing to sue because it expended resources to challenge Hain Celestial's labeling practices, it determined that the plaintiff's claims were preempted by the OFPA.

The court found that "in enacting the OFPA, Congress could not have been clearer about its purposes" to establish national standards for organically produced products, ensure organic products met a consistent standard and facilitate interstate commerce of organic foods. The plaintiff's lawsuit, the court held, was premised on an allegation that Hain Celestial violated District of Columbia law by mislabeling infant formula as organic, "but such a claim stands as an obstacle to each of the three stated purposes of the OFPA." A ruling in the plaintiff's favor would change a national standard into a patchwork of state laws that would not promote consistency on which consumers could rely and would interfere with product distribution in interstate commerce, the court ruled.

## ECJ Allows Belgian Co.'s Use of "Champagner Sorbet"

The European Court of Justice has ruled that "Champagner Sorbet," a frozen drink product made in Belgium and sold in Aldi stores, does not infringe the protected designation of wines made in the Champagne region of France. *Comité Interprofessionnel du Vin du Champagne v. Aldi Süd Dienstleistungs-GmbH & Co. OHG*, No. C-393/16 (E.C.J., entered December 20, 2017). The Champagne producers group won an initial injunction, but an appeals court in Germany referred the issue for a preliminary ruling.

Among its ingredients, Champagner Sorbet contains 12 percent Champagne. The court ruled that use of part of a protected designation of origin (PDO) term for the name of a product is not "misuse, imitation or evocation" if the product contains the protected ingredient. Here, the court found, Aldi used part of the PDO to "claim openly a gustatory quality connected with it." As long as the product has, "as an essential characteristic, a taste attributable primarily to the presence of champagne in its composition," the court found the use was neither false nor misleading. However, the issue of whether the specific "taste or aroma" of Champagner Sorbet conveyed the essential characteristics of Champagne falls to the German court to determine, the court ruled.

# Ninth Circuit Finds Idaho “Ag-Gag” Law Overbroad But Upholds Some Restrictions

After secretly filmed footage of an Idaho dairy farm drew national attention and threats against the owners, the Idaho legislature passed a law criminalizing entry, records access and the creation of recordings of agricultural production operations. The Animal Legal Defense Fund, the American Civil Liberties Union and 15 other plaintiffs challenged the law, and a federal district court invalidated it in 2015. On appeal, the Ninth Circuit has held that while two of the law’s provisions are “staggeringly overbroad” restrictions on speech, the other two survive scrutiny and do not violate the First Amendment. *Animal Legal Def. Fund v. Wasden*, No. 15-35960 (9th Cir., entered January 4, 2018).

The panel held that Idaho cannot criminalize misrepresentations made to enter a production facility, partly because the language was overbroad and partly because it was targeted at investigative journalism. “Even assuming Idaho has a compelling interest in regulating property rights and protecting its farm industry, criminalizing access to property by misrepresentation is not ‘actually necessary’ to protect those rights,” the court stated. “If, as Idaho argues, its real concern is trespass, then Idaho already has a prohibition against trespass that does not implicate speech in any way.” The law’s reach was “particularly worrisome,” the court noted, because Idaho’s definition of an “agricultural production facility” is broad enough to include places of business open to the public, such as “grocery stores, garden nurseries, restaurants that have an herb garden or grow their own produce, llama farms that produce wool for weaving, beekeepers, a chicken coop in the backyard, a field producing crops for ethanol and hardware stores, to name a few.” For example, the court stated, if a grocery store held a promotional food-court event for store identity cardholders and an individual used another person’s card to enter the event, the individual could be jailed or fined even with “no fraud, no gain and no valuable consideration.”

The court also held that the state could not ban the creation of audio or video recordings of a facility’s operations because the clause was “a classic example of a content-based restriction.” But the court reversed the lower court’s ruling on two remaining provisions that criminalized obtaining records by misrepresentation or obtaining employment with intent to cause economic or other injury, as both served “legitimate government interests.”

# Winery Opposes BuzzFeed Trademark for Wine

A winery has filed a notice of opposition against BuzzFeed Inc.'s trademark application for Wordy Wine, a wine brand allowing purchases to customize the label. *Kalaris v. BuzzFeed Inc.*, No. 91238653 (T.T.A.B., filed December 29, 2017). Although the words "Wordy Wine" do not appear on the purchaser's custom label, Axios Napa Valley Wines alleges the term is nearly identical to the mark for its line of "Worthy" wines.

# President Commutes Meatpacking Plant Executive's 27-Year Sentence

President Donald Trump has commuted the 27-year sentence of Sholom Rubashkin, a former kosher meatpacking plant executive convicted of 86 counts of federal bank fraud and money laundering. After Rubashkin was sentenced in 2009, politicians, law enforcement officials and legal experts argued that his case was tainted by prosecutorial misconduct, but the Eighth Circuit Court of Appeals upheld his conviction and sentencing in 2011. Rubashkin and his family members were initially accused of a range of charges, including conspiracy to harbor undocumented immigrants for profit and child labor law violations.

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## MEDIA COVERAGE

### Media Warns Against "Raw Water" Trend

An increasing number of companies are selling "raw water," or "unfiltered, untreated, unsterilized spring water," according to the *New York Times*. The companies target consumers seeking to leave the country's water infrastructure over concerns about treatments the water undergoes and the lead pipes that sometimes carry it to its destinations. One "water consciousness movement" start-up offers "fluoride-free," "chlorine-free" and "mineral electrolyte alkaline" options, while another sells a system that pulls moisture from the air to collect water. The founder of Live Water, which sells 2.5-gallon jugs of raw water for about \$37 each, told the *Times* that "real water" should expire: "It stays most fresh within one lunar cycle of delivery," he is quoted as saying. "If it sits around too long, it'll turn green. People don't even realize that because all their water's dead, so they never see it turn green."

“By convincing people to drink untreated water, the proponents of the raw water craze are threatening to undo one of the great public health and sanitation achievements in U.S. history—with a significant risk to public health,” an op-ed in the *Washington Post* asserts. Levels of waterborne bacteria, viruses, parasites and carcinogenic compounds in tap and bottled water are regulated by states and the U.S. Food and Drug Administration, but raw-water companies have received exemptions from states allowing them to sell their water untreated. The *Post* op-ed documents the role that water treatment played in combating cholera, while the *Times* spoke to a doctor with the Mayo Clinic who expressed concern about *E.coli*, viruses and parasites in untreated water. “Without water treatment, there’s acute and then chronic risks,” the doctor is quoted as saying. “There’s evidence all over the world of this, and the reason we don’t have those conditions is because of our very efficient water treatment.”

## Anti-GMO Campaign Called “Anti-Science” and “Immoral”

Mitch Daniels, president of Purdue University and former Indiana governor, argues in a *Washington Post* op-ed that the anti-GMO campaign is “cruel,” “heartless,” “inhumane” and “immoral.” With no credible scientific evidence and no record of adverse effects on human health or the environment to support it, Daniels asserts, the anti-GMO lobby is blocking “lifesaving” advances made by modern science that could help developing countries feed the globe’s rapidly expanding population. “[A] concerted, deep-pockets campaign, as relentless as it is baseless, has persuaded a high percentage of Americans and Europeans to avoid GMO products, and to pay premium prices for ‘non-GMO’ or ‘organic’ foods that may in some cases be less safe and less nutritious,” Daniels writes. “This is the kind of foolishness that rich societies can afford to indulge. But when they attempt to inflict their superstitions on the poor and hungry peoples of the planet, the cost shifts from affordable to dangerous and the debate from scientific to moral.” Daniels argues that GMO science has provided advancements in both plant production and animal husbandry that could not only feed billions but could do so in “far more sustainable, environmentally friendly ways.”

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