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FIRM NEWS

Shook Attorneys to Join Panel on Food Litigation Trends at ABA Conference

Shook Partner [Greg Wu](#) will join “Recent Trends in Food and Beverage Labeling Litigation,” a panel moderated by Partner [Amir Nassihi](#), at the American Bar Association’s (ABA’s) [Hot Topics in Toxic Torts and Environmental Law](#) conference in Coronado, California, on April 6, 2019. The panelists will “take a broad look at the types of cases being filed, the key legal issues currently in play, and recent developments impacting litigation of these high exposure cases.” Conference registration is open to members and non-members of the ABA.

LEGISLATION, REGULATIONS & STANDARDS

FDA Announces Webinar on Genome Editing in Animals

The U.S. Food and Drug Administration has [announced](#) an April 25, 2019, public webinar about “genome editing in animals, an innovative and rapidly evolving technology that offers significant public health benefits.” The webinar will focus on “current

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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



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scientific evidence, promising uses of this technology in animals, and the potential risks.” FDA intends the webinar to help “those using genome editing to develop animals with genomic alterations,” but registration is open to the public.

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WHO Report Again Recommends Limits on Marketing “Unhealthy Products” to Children

The World Health Organization (WHO) has issued a report calling for “greater monitoring” of “unhealthy food products, especially those high in salt, sugar and fat.” The report asserts that “exposure of children to the online marketing of unhealthy food products” remains “commonplace”—despite the organization’s 2010 recommendations on limiting such exposure—and “urgently calls for developing and implementing a set of tools for monitoring the exposure of children to digital marketing.” The establishment of a tool to monitor exposure could help “strengthen the case to national governments” for stronger measures limiting children’s exposure to digital marketing of “unhealthy products,” WHO states.



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NOSB Issues Call for Nominations

The U.S. Department of Agriculture (USDA) has announced that it will accept nominations for five vacancies on the National Organic Standards Board (NOSB). Each position on the board is categorized under the Organic Foods Production Act. USDA will accept nominations for:

- “One individual with expertise in areas of environmental protection and resource conservation”;
- “one individual who owns or operates an organic farming operation or employees of such individuals”;
- “one individual who owns or operates a retail establishment with significant trade in organic products or an employee of such individuals”; and
- “two individuals who own or operate an organic handling operation or employees of such individuals.”

The chosen candidates will serve on the NOSB from January 24, 2020, to January 23, 2025. Nominations will be accepted until



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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.

May 20, 2019.

LITIGATION

Second Circuit Confirms Diet Soda Dismissal

The U.S. Court of Appeals for the Second Circuit has affirmed a lower court's dismissal of a lawsuit alleging that the name "Diet Pepsi" misleads consumers into believing that the product will assist with weight loss. *Manuel v. Pepsi-Cola Co.*, No. 18-1748 (2nd Cir., entered March 15, 2019). "The studies cited by the complaint establish, at most, that people who drink beverages containing non-nutritive sweeteners continue to gain weight," the appeals court found. "None of the studies purports to establish a causal relationship between non-nutritive sweeteners and weight gain to a degree that is sufficiently strong. Therefore, Plaintiffs cannot raise a plausible inference that the use of the word 'diet' is false, inaccurate, or misleading. Accordingly, the district court properly dismissed the complaint."

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.



Whole Foods Settles Kombucha Lawsuit

Whole Foods Market Inc. and Health-Ade LLC have agreed to pay \$4 million to settle allegations that Health-Ade labels its kombucha as non-alcoholic despite containing "more alcohol than permitted for non-alcoholic beverages." *Bayol v. Health-Ade LLC*, No. 18-1462 (N.D. Cal., filed March 15, 2019). Under the agreement, class members can receive \$4 for each bottle of kombucha purchased, with a limit of 20 claims with proof of purchase and 10 without. Health-Ade also agreed to change its formula to better control the variability of alcohol and sugar content and update its labels to notify purchasers that "[d]ue to natural fermentation, there may be trace amounts of alcohol and small pieces of culture."

Restaurant Owners Sue San Diego Over Polystyrene Ban

Three restaurant owners, along with the California Restaurant Association (CRA) and Dart Cardboard Corp. of California, have reportedly filed a lawsuit challenging San Diego's ban on polystyrene food containers, alleging that the city failed to conduct an environmental review before instituting the ban. "The CRA has filed a legal challenge to hold city government accountable for following a legally-required process. The lack of an environmental study in San Diego prior to the city considering a ban on polystyrene food packaging is alarming," CRA stated in a tweet. "The City ignored a critical step in evaluating the environmental impact that replacement products will have at local landfills, along beaches and to air and water quality. We have all the confidence in the legal process and that the court will validate our complaint."

Meanwhile, Maryland may reportedly become the first state to ban polystyrene food containers. The Maryland legislature has sent a bill to the governor that would prohibit the provision or sale of expanded polystyrene food service products on or after July 1, 2020. Violators would be subject to fines of \$250.

Hot Sauce Company Alleges Infringement By THC-Containing Sauce

Tapatio Foods has filed a trademark infringement lawsuit alleging that Tiowaxy Hot Sauce is sold with a similarly designed label, confusing consumers and causing brand tarnishment to Tapatio's hot sauce. *Tapatio Foods v. Alfarh*, No. 19-0335 (E.D. Cal., filed March 11, 2019). Tapatio alleges that Tiowaxy's label infringes because it also features a man in a sombrero with the brand name above the image. Further, Tiowaxy contains THC—which is derived from cannabis—and Tapatio alleges that "the association of the Infringing Marks with marijuana," "a Schedule 1 controlled substance," has tarnished Tapatio's reputation. Tapatio seeks an injunction, corrective advertising, disgorgement and damages for alleged Lanham Act and California consumer-protection statute violations.

SCIENTIFIC / TECHNICAL ITEMS

Study Correlates SSB Consumption and Early Death

Researchers in *Circulation* reported finding a correlation between a higher risk of total mortality in American adults and regular consumption of SSBs. Malik et al., “Long-Term Consumption of Sugar-Sweetened and Artificially Sweetened Beverages and Risk of Mortality in US Adults,” *Circulation*, March 18, 2019.

“Consumption of SSBs was positively associated with mortality primarily through [cardiovascular disease] mortality and showed a graded association with dose,” the researchers concluded.

Hip-Hop-Listening Cheese Tastes Better, Swiss Researchers Report

Swiss researchers have reportedly found that cheese exposed to hip-hop music during production had enhanced flavors compared to cheese exposed to opera, rock, techno or ambient music. The researchers apparently used mini-transmitters to “conduct the energy of the music” into nine 22-pound wheels of Emmental cheese. The wheels were separated and exposed to music by hip-hop collective A Tribe Called Quest, rock group Led Zeppelin, Mozart’s “Magic Flute,” techno artist Vril and “dark ambient” artist Yello along with soundwaves at high, medium and low frequencies. The hip-hop sample “was the strongest of these in terms of smell and taste,” the researchers reported. The taste tests were reportedly conducted twice and yielded approximately the same results. “The differences were very clear, in term of texture, taste, the appearance, there was really something very different,” one taste-test judge told *Reuters*.

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