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## LEGISLATION, REGULATIONS & STANDARDS

### Virginia Law Limiting Use of “Milk” Advances

Following a vote in the Virginia House Agriculture Subcommittee, the state’s House of Delegates will reportedly consider a bill that would limit the use of “milk” to describe the “lacteal secretion” from specific animals, including cows, sheep, goats, yaks, reindeer, water buffalo, horses and donkeys. During the subcommittee discussion, one delegate reportedly suggested adding “dairy” instead of removing “milk” because the term and associated words are used regularly for products that are not milk substitutes, such as “milk of magnesia” or “body butter.” If enacted, the bill would not take effect until 11 states have passed similar legislation.

### Missouri Bill on Slack Fill Introduced

A Missouri state senator has introduced a bill that would deem product containers not misleading for including some slack fill if they meet one of fifteen criteria. The criteria that would allow a container to be “filled to less than its capacity” include (i) for protection of the contents; (ii) compliance with reasonable industry standards; (iii) settling of the contents during handling;

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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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(iv) a specific function of a package, such as where the packaging plays a role in the preparation or consumption of the product; (v) inability to increase the level of fill or reduce the size of the package; or (vi) the provision of significant value independent of the packaging's function of holding the product, such as gift packaging or a container provided for reuse.

## FDA Closes Production Facility After Violations

A U.S. federal court entered a consent decree of permanent injunction prohibiting Home Style Foods, Inc., and its owner and quality manager from selling food products until the company complies with federal regulations. U.S. Food and Drug Administration (FDA) inspections reportedly found *Listeria monocytogenes* in the company's food preparation area and documented violations of seafood safety regulations.

"After repeated food safety violations, the FDA worked with the U.S. Department of Justice to obtain this injunction in order to prevent potentially contaminated food from reaching consumers. The company failed to take the appropriate corrective actions resulting in this action," an FDA official said in a press release. "When a company fails to follow the law, the government will take action to protect the food supply."

## Codex Meetings Announced on General Principles, Pesticides

The U.S. Codex Office has announced public meetings that will be held on February 21 and February 27, 2020, to discuss and receive comments on U.S. positions for upcoming Codex Alimentarius meetings. The February 21 meeting will focus on general principles, while the February 27 meeting will include discussions on pesticide residues.

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### LITIGATION

## "Grains of Paradise" Lawsuit Dismissed

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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.

A Florida federal court has dismissed a lawsuit alleging that Bacardi U.S.A.'s Bombay Sapphire contains a botanical classified as an adulterant in the state. *Marrache v. Bacardi U.S.A.*, No. 19-23856 (S.D. Fla., entered January 28, 2020).

“Numerous class actions have greatly benefited society, such as *Brown v. Board of Education*, *In re Exxon Valdez*, and *In re Agent Orange Product Liability Litigation*,” the court’s decision began. “This is **not** one of those class actions.” The plaintiff “does not allege that the bottle of gin he bought containing grains of paradise caused him any health issues or other harm,” the court noted. “He instead alleges that the product was ‘worthless’ because it was adulterated with grains of paradise.”

The court found that the 1868 Florida law prohibiting grains of paradise in alcohol was preempted by federal regulations finding that the botanical is generally regarded as safe. The plaintiff argued that the 21st Amendment granted states the right to regulate liquor, but the court disagreed, finding that the Supreme Court has stated that the amendment “does not in any way diminish the force of the Supremacy Clause.” The court dismissed the complaint without leave to amend.

## FTC Closes Instant Coffee Pyramid Scheme

An Arizona federal court has granted the U.S. Federal Trade Commission’s (FTC’s) request to temporarily shut down “Success By Health,” an alleged pyramid scheme premised on the sale of instant coffee. The coffee, “MycoCafe,” is touted as containing health benefits from mushrooms. “However, the FTC alleges that selling the product to coffee drinkers took a back seat to recruiting more affiliates,” according to an agency press release. “The complaint alleges that when affiliates did try to sell the product to other consumers, they found themselves in competition with the company itself. Success By Health sells its products directly to the public for the same ‘wholesale’ price paid by affiliates, severely limiting affiliates’ ability to follow the defendants’ instructions to apply a 50 percent ‘markup’ before selling to the public.”

## Consumers Argue Sports Drink is Soda

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.



# Equivalent

Four consumers have filed a putative class action alleging that BA Sports Nutrition's BodyArmor SuperDrink sports drinks are "unlawfully fortified junk food." *Silver v. BA Sports Nutrition LLC*, No. 20-0633 (N.D. Cal., filed January 28, 2020).

"BodyArmor does not provide 'superior' or 'better' hydration to Plaintiffs and other consumers than other beverages, nor are the Plaintiffs or the general public hydration deficient and/or in need of its characteristics to replenish them from dehydration," the complaint asserts. The plaintiffs argue that BodyArmor is a sugar-sweetened beverage "that scientifically links to serious medical conditions, including obesity, type 2 diabetes, and cardiovascular disease, when regularly consumed." They allege that they "would not have purchased BodyArmor, purchased as much of it, or paid as much for it, had they understood that consumption does not provide them with a drink comprised of natural ingredients and/or that was more, natural, better for them than other drinks." Alleging violations of New York, California and Pennsylvania consumer-protection statutes, the plaintiffs seek class certification, injunctive relief, damages and attorney's fees.

## Court Declines Approval for Chicken of the Sea Settlement

A California federal court has refused to approve a \$6.5 million settlement between Tri-Union Seafoods and commercial food preparers. *In re Packaged Seafood Prods. Antitrust Litig.*, No. 15-2670 (S.D. Cal., entered January 17, 2020). The court found that the proposed \$6.5 million, half of which would go to attorney's fees and \$2 million to costs and expenses, "would provide at most \$1.5 million" to the class. The gross settlement amount "is approximately one-third of the damages," the court noted, and "a rough calculation suggests that [the class] will collectively receive approximately 6.85% of the damages they attribute to [the defendant]."

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