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## FIRM NEWS

### Shook Attorneys Obtain Dismissal for Multivitamin Manufacturer

A Missouri federal court has granted a motion to dismiss a lawsuit against Source Naturals, Inc., maker of Life Force<sup>®</sup> multivitamins, alleging the company misrepresented the amount of vitamins and nutrients in the product on the label. *Dougherty v. Source Naturals, Inc.*, No. 15-0574 (E.D. Mo., order entered December 8, 2015).

The plaintiff argued her tests of the multivitamin showed that the nutrient content claims on the product packaging were false, amounting to a violation of the Missouri Merchandising Practices Act. The court disagreed, finding the plaintiff's testing did not meet the methodology mandated by the U.S. Food and Drug Administration (FDA). "Because Plaintiff has failed to allege she followed FDA testing protocols," the court found, "her state law claims that rely on a different methodology to demonstrate such labeling violations are inconsistent with the [federal Food, Drug, and Cosmetic Act] and are thus preempted." Accordingly, the court granted the motion to dismiss in favor of Shook's client.

The Shook team included **Jim Muehlberger**, **Jon Gray** and **Doug Maddock**.

## LEGISLATION, REGULATIONS AND STANDARDS

### Hampton Creek Can Keep "Just Mayo" Name, FDA Announces

The U.S. Food and Drug Administration (FDA) has reportedly reached a deal with Hampton Creek, maker of eggless spread Just Mayo<sup>®</sup>, allowing the company to keep the name of its product but requiring changes to its packaging. Just Mayo<sup>®</sup> labels will now feature larger words touting its features, including "egg-free" and "spread and dressing," and a definition of "just" as "guided by reason, justice, and fairness."

The product has been the target of litigation in recent years, including a lawsuit by competitor Unilever and a putative class action, because of the alleged misrepresentation of the product as mayonnaise despite its noncompliance with FDA's standard of identity for mayo, which requires

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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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the inclusion of eggs. Hampton Creek was also allegedly the target of a smear campaign by the American Egg Board. Additional details appear in Issue [578](#) of this *Update*.

### FDA Report Indicates Rising Use of Antibiotics in Food-Producing Animals

The U.S. Food and Drug Administration (FDA) has **published** its annual report of sales and distribution data for antimicrobial drugs used in food-producing animals.

The report's analysis of 2014 statistics and observed trends of rising antibiotic use immediately drew the ire of consumer advocacy coalition Keep Antibiotics Working (KAW).

"The data released today shows us that, despite industry assurances to the contrary, the use of human antibiotics on the farm have continued to rise, and specifically the use of the critically important antibiotic class cephalosporins (12% increase from 2013 through 2014), which the FDA placed restrictions on in 2012," a KAW policy analyst said.

KAW condemns industry's voluntary cutbacks and calls for FDA to establish mandatory reduction goals. "FDA must set clear targets for the reduction in antibiotic use," according to KAW. "Otherwise, industry will continue to conduct business as usual, while the crisis of resistance continues to loom large and consumers pay the price." See *FDA News Release* and *Keep Antibiotics Working News Release*, December 10, 2015.

### App Developers Settle FTC Charges of Children's Privacy Violations

Two app developers have agreed to pay a combined \$360,000 to settle Federal Trade Commission (FTC) charges that they allegedly violated the Children's Online Privacy Protection Act (COPPA) by producing and selling games allowing third-party advertisers to collect personal information from children. The games, which include My Cake Shop, My Pizza Shop, Ice Cream Jump and Happy Pudding Jump, appeared to target children younger than age 14, but the app developers apparently failed to inform advertisers of that fact, which would have required them to comply with FTC and COPPA regulations.

"It's vital that companies understand the rules of the road when it comes to handling children's personal information online," FTC Bureau of Consumer Protection Director Jessica Rich said in a December 17, 2015,

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press release. "These cases make it clear that we're closely watching this space to ensure children's privacy online is being protected."

### Ad Board Allows String Cheese Maker to Continue Claims

The National Advertising Division (NAD), an arm of the advertising industry's self-regulation system, has concluded Saputo Cheese, USA, Inc. can support its claims that its string cheese is "natural" and "low-moisture part-skim mozzarella cheese" despite challenger Lactalis American Group's argument that Saputo's products contain artificial phosphate and fillers.

Lactalis argued Saputo's products do not comply with the U.S. Food and Drug Administration's (FDA's) standard of identity for "low-moisture part-skim mozzarella cheese" and the products could not be "natural" as their packaging asserts because of the addition of phosphate. Saputo argued phosphate occurs naturally in cheese and the existence of phosphate did not necessarily prove the company added synthetic phosphate.

In its determination, NAD acknowledged that it did not have the authority to deem something "misbranded" under FDA's regulations but noted that the products seemed to fit the standard of "low-moisture part-skim mozzarella cheese" because they contain 30 to 45 percent milk-fat. NAD also found no issue with the description of the products as "naturally nutritious" because "FDA has said it will maintain its policy . . . regarding the use of 'natural,' as meaning that nothing artificial or synthetic . . . has been added to a food that would not normally be expected to be found in that food." Without consumer-perception data, NAD concluded, it could not determine that consumers would be confused or deceived by Saputo's labeling claims.

### British Agency to Hold Workshop on Novel Foods and Processes

The Food Standards Agency's independent Advisory Committee on Novel Foods and Processes (ACNFP) will **host** a February 4, 2016, workshop in London. Breakout sessions will target (i) the food medicine continuum; (ii) alternative proteins, e.g., insects and in vitro meat production; and (iii) engineered nanomaterials. Registrations are requested by January 14, 2016. *See ACNFP News Release, December 14, 2015.*

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### LITIGATION

#### Philippine High Court Bans GMO Imports

The Philippine Supreme Court has reportedly invalidated a 2002 governmental regulation allowing the import of genetically modified organisms (GMOs) after Greenpeace and a farmer's group challenged the field testing of a GMO eggplant (talong). The ruling affirms a lower court's 2013 decision finding "no full scientific certainty yet as to the effects of Bt talong field trials to the environment and to the health of the people" and noting that existing regulations did not do enough to protect Philippine environment and health.

"This decision builds on a wave of countries in Europe rejecting [genetically engineered (GE)] crops, and is a major setback for the GE industry," said a Greenpeace Philippines spokesperson in a December 11, 2015, press release. "The Philippines has been used as a model for GE regulatory policy around the world, but now we are finally making progress to give people a right to choose the food they want to eat and the type of agriculture they want to encourage."

Philippine Agriculture Secretary Proceso Alcala reportedly told *Reuters* the government will file a motion for reconsideration in the case. *See Rappler*, December 8, 2015; *Reuters*, December 17, 2015.

#### FDA Not Negligent in Issuing Tomato Recall, Court Holds

A South Carolina federal court has ruled that the U.S. Food and Drug Administration (FDA) was not negligent in issuing a tomato recall during a 2008 outbreak of *Salmonella*, dismissing a tomato farm's claim of \$15 million in damages. *Seaside Farm Inc. v. U.S.*, No. 11-1199 (D.S.C., order entered December 16, 2015).

The farm had argued that FDA should have been more specific in its recall, while FDA argued it never issued an official recall, only warnings about tomatoes. The court had previously dismissed allegations of defamation and takings against the government.

#### Tuna Price-Fixing Suits Consolidated

Nine putative class actions and 44 related cases alleging that StarKist Co., Bumble Bee Foods LLC and Tri-Union Seafoods LLC conspired to fix prices of canned tuna have been consolidated by the U.S. Judicial Panel on Multidistrict Litigation. *In re Packaged Seafood Prods. Antitrust Litig.*, No. 15-2670 (S.D. Cal., order entered December 9, 2015).

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The court found that the actions "share factual questions arising out of an alleged conspiracy by defendants—the three largest producers of packaged seafood products in the U.S. with an alleged collective market share of more than 70%—to fix prices of packaged seafood products." The court also noted that the issue is "the subject of an ongoing criminal investigation by the U.S. Department of Justice." Additional details about one of the proposed class actions appears in Issue [574](#) of this *Update*.

### Seventh Circuit Upholds Indiana Cold-Beer Sales Ban

The Seventh Circuit Court of Appeals has upheld an Indiana law restricting the sale of cold packaged beer in convenience stores, pharmacies and groceries in incorporated towns, finding that the statute survives a rational-basis analysis. *Petroleum Mktrs. & Convenience Stores Assoc v. Cook*, No. 14-2559 (7th Cir., order entered December 14, 2014).

The court found that although Indiana does not have "nearly absolute" power to regulate alcohol sales as the state had argued, it may prohibit stores from selling cold beer, even if it also allows the same stores to sell chilled beverages with higher alcohol content such as wine coolers. The court distinguishes between the licenses required by liquor stores, which can sell cold beer, and the licenses available to convenience stores and similar retailers; liquor stores "are subject to stricter regulations designed to enhance the State's ability to limit and control the distribution of alcohol," including minimum ages for entry into stores and restricted days and hours of operation. Finding the challenger had failed to argue an equal protection violation, the court dismissed the case.

### MSG False Ad Settlement Denied

A California federal court has denied a proposed settlement in a consumer class action alleging Annie Chun's® soup products, made by CJ America Inc., either contain monosodium glutamate or ingredients that produce the substance during the cooking process despite being labeled as "No MSG Added." *Petersen v. CJ America Inc.*, No. 14-2570 (S.D. Cal., order entered December 16, 2015).

The court rejected the bid to certify the class for purposes of the settlement, finding the plaintiff had shown that the South Korean company was subject to jurisdiction in California but not necessarily other states, thus precluding the approval of a nationwide class. The parties reached the proposed settlement in November 2015. Additional details appear in Issue [584](#) of this *Update*.

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### Jury Finds for Heinz in Lead-Tainted Baby Food Insurance Coverage Dispute

A Pennsylvania jury has found that Starr Surplus Lines Insurance must uphold H.J. Heinz Co.'s \$25-million policy covering damages related to baby cereal tainted with lead. *H.J. Heinz Co. v. Starr Surplus Lines Ins. Co.*, No. 15-0631 (W.D. Penn., jury verdict entered December 16, 2015).

Heinz sought a declaratory judgment that the insurance provider must cover business-interruption costs after China's food-control agency found lead in the company's high-protein dry baby cereal. Starr argued that Heinz had misrepresented the situation when the company applied for the policy because it failed to disclose previous contamination incidents. The jury concluded that although Starr did prove "that Heinz made a misrepresentation of fact(s) in its insurance application which was material," Starr "waived the right to assert a rescission claim" either because it sold the policy with knowledge of the misrepresentation or because it failed to rescind the policy after learning of the misrepresentation.

### Grumpy Cat Sues Beverage Co. for Copyright Infringement

Grumpy Cat Ltd., owner of the Grumpy Cat trademark, has filed a copyright infringement suit against Grenade Beverage LLC alleging the company failed to pay for the sales of authorized merchandise and sold additional unauthorized branded products. *Grumpy Cat Ltd. v. Grenade Beverage LLC*, No. 15-2063 (C.D. Cal., S. Div., filed December 11, 2015). "Ironically," the complaint states, "while the world-famous feline Grumpy Cat and her valuable brand are most often invoked in a tongue-and-cheek fashion, Defendants' despicable misconduct here has actually given Grumpy Cat and her owners something to be grumpy about."

Grumpy Cat agreed to license its trademark to Grenade for use in relation to "a line of Grumpy Cat-branded coffee products," which the complaint asserts was mutually understood to mean a line of iced-coffee beverages called the "Grumpy Cat Grumppuccino." Grumpy Cat alleges that it later learned Grenade also planned to produce a line of roasted coffee grounds products associated with the Grumpy Cat mark, a use of the mark that Grumpy Cat says it did not approve. The beverage company further began producing unauthorized Grumppuccino T-shirts, the complaint alleges, and it obtained the rights to the "www.grumpycat.com" domain and refuses to surrender it. Grumpy Cat alleges claims of copyright infringement, trademark infringement, trademark dilution, cybersquatting and breach of contract and seeks injunctions, treble damages, an accounting of profits and a transfer of the web domain.



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### Photographer Sues Artist Jeff Koons for Infringement of Gin Ad

Photographer Mitchel Gray has reportedly filed a lawsuit against Jeff Koons alleging that one of the artist's works infringes on Gray's copyright to a photo used in a Gordon's® gin advertisement in 1986. The ad portrays a photo of a woman painting on the beach and a man seated next to her, a photo of a bottle of Gordon's® and the tagline "I could go for something cool, crisp and Gordon's."

Koons' version, which uses the photo with slightly adjusted colors, a bottle of Gordon's® in a different spot and the tagline "I could go for something Gordon's," sold for \$2.04 million at auction in 2008. The complaint reportedly asserts that Koons never contacted Gray for permission to use the photo and never provided him any compensation from the proceeds of the auction, citing for added support Koons' testimony from a similar infringement case filed in 1989 involving a different piece of art in which Koons said he did not seek permission to use any of the ads featured in that series of works. Gray seeks damages for three claims of copyright infringement. *See Courthouse News* and *The New York Post*, December 15, 2015.

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## LEGAL LITERATURE

### Journal Article Describes Emergence of Legal Epidemiology

A group of public health policy professionals has proposed a multi-disciplinary approach to public health law, arguing that public health professionals should receive training in a variety of disciplines to "promote full recognition and [the] optimal role of law in public health." Scott Burris et al., "A Transdisciplinary Approach to Public Health Law: The Emerging Practice of Legal Epidemiology," *Annual Review of Public Health*, November 30, 2015.

The article describes a history of the overlap between public health policy and legal expertise, and then proposes a more inclusive model of training that "adds scientific practices to the lawyerly functions of normative and doctrinal research, counseling, and representation."

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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.

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.



## OTHER DEVELOPMENTS

### Organic Egg Production Target of Cornucopia Institute Analysis

A new Cornucopia Institute **report** examines four methods of organic egg production—pasture-based with mobile housing, “pasture raised” using fixed housing with access to adjacent pastures, fixed housing with minimum outdoor access and industrial scale.

Titled “Scrambled Eggs: Separating Factory Farm Egg Production from Authentic Organic Agriculture,” the analysis also discusses animal welfare standards and evaluates animal welfare labels. An accompanying “scorecard” rates various brands of eggs based on 28 criteria, showcasing the “true heroes, including national and local producers that are supplying ethically-produced organic eggs and are worthy of consumer support.” *See Cornucopia News Release, December 15, 2015.*