



LEGISLATION, REGULATIONS & STANDARDS

## FDA Commissioner Questions Milk Standards Enforcement

At a speaking engagement, U.S. Food and Drug Administration (FDA) Commissioner Scott Gottlieb reportedly expressed that the agency's standards of identity for milk have not been enforced. According to the standard of identity, milk is "the lacteal secretion, practically free from colostrum, obtained by the complete milking of one or more healthy cows," a definition that does not include non-dairy beverages produced from almonds, soy, rice or coconuts that are labeled as milk. Admitting that "an almond doesn't lactate," Gottlieb reportedly indicated that FDA will begin collecting public comments before determining its approach to the issue.

## Cattle Producer Receives Warning on Antibiotic Use

The U.S. Food and Drug Administration (FDA) has sent a warning letter to Roorda Dairy advising that an investigation of its premises revealed cattle sold for food that tested positive for unapproved antibiotics. The agency purportedly tested muscle tissue and found antibiotics used contrary to the approved label use and found no evidence of veterinary supervision.

FDA's approach to antibiotics in cattle use has been criticized, including a March 2018 New York Times report on the agency's distinction between antibiotics for growth, which is not allowed, and antibiotics for disease prevention, which is acceptable under

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FDA standards. In 2017, the World Health Organization recommended ending the routine use of antibiotics in healthy animals.

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## LITIGATION

### Philadelphia SSB Tax Upheld

The Pennsylvania Supreme Court has affirmed a lower court's ruling upholding Philadelphia's tax on sugar-sweetened beverages (SSBs), holding that the tax is not preempted by state law. *Williams v. Philadelphia*, Nos. 2 EAP 2018, 3 EAP 2018 (Pa., entered July 18, 2018). The 1.5-cents-per-ounce tax, which took effect in January 2017, applies to SSB distributors rather than buyers and thus does not duplicate consumer sales tax, the court held.

### Trader Joe's Manuka Honey Is Impure, Lawsuit Alleges

Three plaintiffs have filed a projected class action alleging Trader Joe's Co.'s "100%" Manuka Honey contains about 60 percent manuka honey. *Moore v. Trader Joe's Co.*, No 18-4418 (N.D. Cal., Oakland Div., filed July 20, 2018). The consumers allege that they paid a premium for the honey, which purportedly provides antibacterial benefits, because the jars were labeled as containing "100%" manuka honey and listing manuka honey as the sole ingredient. The complaint asserts that the plaintiffs' testing found that the product "only contains between 57.3% to 62.6% manuka honey," with other types of honey allegedly filling the remainder. The plaintiffs seek damages, class certification and attorney's fees for alleged violations of California's, North Carolina's and New York's consumer-protection statutes.

### Plaintiff Alleges "Natural," "No Preservatives" Chips Contain Citric Acid

Diamond Foods LLC faces a putative class action alleging Kettle Foods potato chips are marketed as "Made with Natural Ingredients" and "No Preservatives" but contain citric acid. *Mason v. Diamond Foods LLC*, No. 18-6423 (S.D.N.Y., filed July 16, 2018). The complaint identifies several flavors of chips that allegedly contain the "synthetic compound," purportedly produced from mold strains and sulfuric acid. Claiming violations



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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

of several states' consumer-protection statutes, the Magnuson-Moss Warranty Act, breach of warranties and common law fraud, the plaintiff seeks class certification, injunctive relief, damages and attorney's fees.

## Complaint Alleges Blizzard Coupon Was Bait-and-Switch

International Dairy Queen Inc. faces a potential class action alleging it violated consumer-protection laws with a "bait-and-switch" scheme by advertising a free Blizzard without verifying that all store locations would honor the coupon. *Spencer v. Int'l Dairy Queen, Inc.*, No. 18-1252 (D. Ore., filed July 13, 2018). The complaint alleges that the plaintiffs viewed an advertisement promising a "special treat for fans with our new mobile app," which displayed a coupon for a free small Blizzard, directed users to choose a store location and displayed a promotional code valid for 15 minutes. The complaint contends that hundreds of people posted online comments complaining that several locations refused to honor the coupons. Claiming violations of Oregon's Unlawful Trade Practices Act and unjust enrichment, the plaintiff seeks damages, restitution, attorney's fees and a judgment against Dairy Queen "for the monetary value of at least five Blizzards per class member."

## Fruit Snacks Maker Alleges Infringement by Sunkist Gummies

Promotion in Motion Inc., which produces Welch's Fruit Snacks, has filed a lawsuit alleging that Kervan USA's packaging and product design for Sunkist Fruit Gummies infringe its trademarks and trade dress. *Promotion in Motion Inc., v. Kervan USA LLC*, No. 18-11670 (D.N.J., filed July 16, 2018). Although Sunkist Fruit Gummies have not been released, Kervan has publicly displayed the intended packaging at trade shows and online, Promotion in Motion alleges, and it asserts that the packaging "closely copies" the Welch's packaging by using similar design elements and color as well as the identical claim "Fruit is our 1st Ingredient." Promotion in Motion also contends that Kervan imports and distributes a wedge-shaped sour watermelon candy under various product labels that violates the trade dress of its Sour Jacks, which is advertised with the slogan "Respect the Wedge" and an emphasis on the candy's shape.

Alleging trademark infringement, trade dress infringement, false designation of origin and unfair competition under the Lanham

inspections, subject to FDA, USDA and FTC regulation.



Act and state law, the plaintiff seeks injunctive relief, destruction of all infringing advertising and packaging materials, accounting of profits, damages and attorney's fees.

## Plaintiff Challenges “Natural” Orange Juice

A consumer has filed a putative class action alleging that Florida's Natural Orange Juice is not “natural” because it is “highly processed” and contains pesticide residues. *Axon v. Citrus World Inc.*, No. 18-4162 (E.D.N.Y., filed July 20, 2018). The complaint alleges that Citrus Inc. markets Florida's Natural with illustrations on the packaging of “green leaves and orange blossoms as well as fresh-sliced oranges with juice visibly dripping from the fruit,” which conveys to consumers that “the juice is in fact natural and similar in result if consumers had squeezed the oranges themselves.” For alleged violations of New York's consumer-protection statutes, the plaintiff seeks class certification, damages, restitution and attorney's fees.

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