



FIRM NEWS

## Slack Fill Decision Cites Shook Attorneys' Article

An opinion issued by the U.S. District Court for the Eastern District of Missouri has cited Shook Partners [Cary Silverman](#) and [Jennifer Artman's Missouri Bar Journal](#) article "[Two years since MMPA reform: How has it changed Missouri consumer litigation?](#)" in dismissing a lawsuit that alleged Annie's Inc. included impermissible slack fill in its fruit-snack packages. *Bell v. Annie's Inc.*, No. 22-1367 (E.D. Mo., E. Div., entered May 18, 2023).

The court found that the box of fruit snacks "makes no secret of its contents" because it states the number of pouches and the contents of each pouch, along with a net weight and serving size indicator. The court held that the plaintiff "has *not* plausibly alleged that he acted as a reasonable consumer would in light of all circumstances" because the complaint failed to allege why a reasonable consumer would not understand the various displays on the package communicating the amount of the product.

Silverman and Artman's article is cited in footnote 7 as an explanation of a 2020 amendment to the Missouri Merchandising Practices Act. In the 2022 article, the authors provided an overview of the amendments and an examination of the effects of the amendments in the two years following their passage.

LEGISLATION, REGULATIONS & STANDARDS

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For additional information about Shook's capabilities, please contact



**[M. Katie Gates Calderon](#)**

816.559.2419

[kgcalderon@shb.com](mailto:kgcalderon@shb.com)

# FDA Issues Final Guidance for Inorganic Arsenic in Apple Juice

The U.S. Food and Drug Administration (FDA) has issued its final guidance for industry identifying the action level for inorganic arsenic in apple juice.

On June 1, a decade after issuing its draft guidance in 2013, FDA [announced](#) the availability of the guidance, which identifies the action level of 10 parts per billion (ppb) for inorganic arsenic in apple juice. The guidance is in line with the agency's goal to reduce environmental contaminants from foods commonly consumed by babies and young children.

The agency said that while its testing results show reductions in the amount of inorganic arsenic in apple juice on the market to below 3 ppb and 5 ppb, it has identified some samples with levels above 10 ppb. The agency said it considers a 10 ppb level achievable with the use of good manufacturing practices.

“The FDA expects that the 10 ppb action level, though non-binding, will help to encourage manufacturers to reduce levels of inorganic arsenic in apple juice,” FDA said in a news release. “The agency will continue its current practice of monitoring arsenic in apple juice samples and if testing identifies inorganic arsenic in apple juice above 10 ppb, the FDA will consider this action level, in addition to other factors, to determine whether to take enforcement action.”

## “Wood Milk” Ad Campaign Featuring Aubrey Plaza Draws Complaint

The Physicians Committee for Responsible Medicine has filed a complaint with the U.S. Department of Agriculture (USDA) alleging the department’s Agricultural Marketing Service unlawfully approved a viral ad featuring the actress Aubrey Plaza that mocks plant milk.

The ad at issue uses “Wood Milk” as a stand-in for plant-based milks, which the group says disparages plant-based milks. In the group’s [complaint](#), they say the advertising campaign violates laws forbidding federal agricultural promotions from depicting products in a negative light.

“Designed to elicit ‘backlash’ against plant-based milks, the advertising campaign runs afoul of laws designed to prevent agricultural industries with close ties to USDA from maligning agricultural products sold by competitors with less entrenched relationships with regulators,” the group said. “The campaign also



**Lindsey Heinz**

816.559.2681

[lheinze@shb.com](mailto:lheinze@shb.com)



**James P. Muehlberger**

816.559.2372

[jmuehlberger@shb.com](mailto:jmuehlberger@shb.com)

### 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.



violates the statutory prohibition against using fluid milk checkoff funds to influence legislation or government action or policy. In discussing the campaign, a fluid milk checkoff official has repeatedly referenced pending federal guidance on the labeling of plant-based milks, and the campaign’s language mimics that of pending legislation regarding the marketing of plant-based milks. This conduct unabashedly violates the legal guardrails that exist to prevent USDA from promoting one commodity to the detriment of others.”



The group is calling on the immediate retraction of, and an investigation into the approval process for, the advertising campaign.

## FDA Details PFAS Efforts

The U.S. Food and Drug Administration (FDA) has issued a constituent update detailing the agency’s efforts on per- and polyfluoroalkyl substances (PFAS). The update includes information on FDA testing, which has found PFAS in seafood. “The data on PFAS in seafood is still very limited; however, our testing indicates that seafood may be at higher risk for environmental PFAS contamination compared to other types of foods,” the agency stated. “Except for canned clams from China, we have determined that none of the other PFAS exposures with [toxicological reference values (TRVs)] at the levels measured in the FDA’s testing of seafood are likely to be a human health concern.”

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### LITIGATION

## Consumer Alleges Badia Spices Misleads on Chili Peppers' Origin

A New York consumer has filed a putative class action against Badia Spices, Inc., alleging the company misrepresents the origin of peppers it describes as “New Mexico Chili” peppers. *Reyes v. Badia Spices, Inc.*, No. 23-03607 (E.D.N.Y., filed May 15, 2023).

The plaintiff alleges that Badia’s New Mexico Chili peppers are labeled as “New Mexico Chili” peppers, and include imagery associated with New Mexico, including indigenous markings and design. The chilis come from Mexico, however, a fact that is only disclosed on Badia’s website.

“New Mexico chili is not so arbitrary or fanciful so that it is not generally understood by consumers to suggest a geographic origin such as a ‘moon pie,’” the plaintiff said in her complaint. “New

Mexico Chili is not a name whose market significance is generally understood by the consumer to connote a particular class, kind, type, or style of chili rather than to indicate geographical origin, because New Mexico chili refers to a specific type of chili pepper grown only in New Mexico.”

The plaintiff is alleging violations of sections 349 and 350 of the New York General Business Law and other state consumer fraud act laws, breach of express and implied warranties, fraud and unjust enrichment. She is seeking class certification; monetary, statutory and punitive damages; and costs and expenses including attorney’s fees.

## Consumer Alleges Sazerac’s Parrot Bay Malt Beverage is Misleading

A New York woman has filed a proposed class action against Sazerac Co. alleging the company misleads consumers into thinking some of its Parrot Bay-branded beverages contained distilled spirits when they contain malt beverages instead. *Koonce v. Sazerac Co. Inc.*, 23-04323 (S.D.N.Y., filed May 24, 2023)

The product at issue in the suit is the company’s Parrot Bay Malt Beverage. The plaintiff alleges that bottling non-distilled spirits in mini bottles is deceptive because purchasers of small bottles of alcohol expect they are buying stronger alcohol. Her complaint notes that Sazerac’s full-sized Parrot Bay Rum product contains 21% alcohol by volume (ABV), while the mini bottles of Parrot Bay Malt Beverage contain 16.5% ABV.

“Plaintiff, and a class of similarly-situated consumers, purchased the Malt relying on Sazerac’s representations and believing it to be true Parrot Bay Rum; in fact, they purchased a ‘Malt Beverage,’ with lower than 20% ABV and that is not called ‘rum’ at all,” she said in the complaint. “Plaintiff, like all reasonable consumers, relied on this label to her detriment, and suffered injury in the form of the purchase price; indeed, had she known she was not buying real rum, she would not have purchased the Malt beverage at all.”

The plaintiff is alleging violations of sections 349 and 350 of New York’s General Business Law and unjust enrichment. She seeks class certification, declaratory judgment, damages, prejudgment interest, attorney’s fees and restitution.

The suit follows similar proposed class actions against the company regarding its Fireball Cinnamon and Southern Comfort malt beverage products.

## Consumers Allege "Zero Sugar" Chobani Contains Natural Sugar

A group of consumers in Illinois, Kansas and Arizona are suing Chobani, alleging the labeling of its "Zero Sugar" yogurt is deceptive because the products contain allulose, a naturally occurring sugar. *Franco v. Chobani*, No. 23-03047 (N.D. Ill., filed May 15, 2023).

The plaintiffs allege that every serving of Chobani Zero Sugar yogurt is sweetened with four grams of allulose, a naturally occurring sugar found in figs, raisins, wheat, maple syrup and molasses.

"As it turns out, CHOBANI ZERO SUGAR contains quite a lot of sugar," the plaintiffs said in their complaint. "Selling consumers a food product that is intentionally mislabeled and intended to deceive them violates a whole host of laws, including consumer fraud and false advertising laws that have been enacted by state legislatures across the country. It is also just plain wrong."

The plaintiffs alleged the company introduced the Zero Sugar products to maximize sales, pointing to product labeling including "We did it – we took the sugar out of the milk!" and "This one-of-a-kind product has zero sugar."

The plaintiffs allege violations of consumer protection laws in several states, including Illinois, Kansas, Arizona, New York and California, as well as unjust enrichment. In their complaint, they seek class certification, damages, declaratory judgment, disgorgement, the imposition of a constructive trust and attorneys' fees.

## Cream Soda Class Action Settlement Granted Preliminary Approval

A federal court in New York has granted preliminary approval to a settlement agreement between three consumer plaintiffs and defendants Keurig Dr Pepper Inc. and A&W Concentrate Co. in a lawsuit alleging the companies misled purchasers by marketing their cream soda and root beer products as "Made with Aged Vanilla." *Sharpe v. A&W Concentrate Co.*, No. 18-0768 (E.D.N.Y., entered June 5, 2023). Under the agreement, the defendants will pay \$15 million to households of class members, which will receive up to \$25 with proof of purchase and \$5.50 without.

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