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## LEGISLATION, REGULATIONS & STANDARDS

### FDA Issues Supplemental Guidance for Menu Nutrition Labels

The U.S. Food and Drug Administration (FDA) has announced the availability of “Menu Labeling: Supplemental Guidance for Industry,” which includes an advisory of FDA’s intent to exercise discretion regarding nutrient declarations for calories from fat. FDA has taken this position “because the current science supports a view that the type of fat is more relevant to the risk of chronic disease than the overall caloric fat intake.”

The guidance also addresses concerns about the implementation of nutrition labeling, includes “expanded and new examples of alternatives to aid in compliance” and details the criteria for considering natural variations in foods when determining nutritional labels.

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## LITIGATION

### Wine Needs No Additional Prop. 65 Warning for Arsenic, Appeals Court Confirms

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**M. Katie Gates Calderon**

A California appeals court has affirmed a lower court's dismissal of a lawsuit asserting that Sutter Home Winery Inc.'s wine should feature a warning about arsenic content pursuant to the state's Safe Drinking Water and Toxic Enforcement Act of 1986 (Prop. 65). *Charles v. Sutter Home Winery Inc.*, No. B275295 (Cal. App. Ct., 2nd Dist., entered May 9, 2018). While Sutter Home's wines feature the "safe harbor" alcohol warning pertaining to cancer and birth-defect risks, the plaintiffs argued that the labels should also reference risks associated with consuming inorganic arsenic. Failing to disclose the inorganic arsenic level, the plaintiffs asserted, amounted to a Prop. 65 violation.

"Plaintiffs contend the safe harbor warning for alcoholic beverages is incomplete because it does not alert consumers to the presence of inorganic arsenic, and by this omission, the warning misleads consumers into believing their exposure is limited to a single listed chemical, alcohol," the court noted. "But the purpose of Proposition 65 is to warn consumers of the two health risks—cancer and reproductive harm—associated with exposure to a listed chemical, and the alcoholic beverage warning complies with the regulations drafted by [the Office of Environmental Health Hazard Assessment (OEHHA)] to accomplish that objective."

"OEHHA does not require defendants to provide two separate warnings for alcoholic beverages that contain an additional listed chemical. In the new warnings that will take effect on August 30, 2018, OEHHA requires the disclosure of only one listed chemical per health risk and allows each business to decide whether to list additional chemicals in the warning they choose to provide. Under the current regulatory scheme, the failure to provide a separate arsenic warning is not a violation of the regulations or the initiative itself. Whether an additional warning should be required for inorganic arsenic in wine is a matter for the Legislature or OEHHA to consider."

## Florida Challenges Restaurant's "Farm-To-Table" Claim

The Florida attorney general has filed a [lawsuit](#) alleging Miami-based Icebox Cafe violated the state's Deceptive and Unfair Trade Practices Act by advertising its food and beverage items as locally sourced and "farm-to-table" while the ingredients were purchased

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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.

from traditional commercial vendors. *Office of the Attorney Gen. v. Icebox Cafe LC*, No. \_\_\_ (Fla. Cir. Ct., Miami-Dade Cty., filed May 4, 2018). The state alleges that Icebox Cafe “represented that it purchased products from specific Florida farms and suppliers when such was not the case.”



According to the [complaint](#), Icebox Cafe’s invoices indicate that most of its ingredients were purchased from commercial distributors while its advertising stated that its food was made from products purchased from a local farm and a local seafood distributor. The cafe also allegedly represented that its menu items contained wild salmon and same-day-caught fish, but its invoices did not show purchases of those items. Claiming deceptive representation, the state seeks injunctive and equitable relief, civil penalties and attorney’s fees.



## Trader Joe’s in Mislabeled, Trademark Disputes

A consumer has filed a putative class action alleging Trader Joe’s Co. falsely advertises its Sour Gummies by failing to disclose that the product contains d-l-malic acid. *Wong v. Trader Joe’s Co.*, No. 18-0869 (S.D. Cal., removed to federal court May 4, 2018). The plaintiff asserts that under California law, “any artificial flavor must be identified on both the front-of-package label and the product ingredient list. Defendants fail to do either.”

According to the complaint, “Trader Joe’s maintains a pervasive national marketing campaign guaranteeing that all its house-brand products are only naturally flavored,” including the statement “when you see our name on a label, you can be assured that the product contains: YES quality ingredients NO artificial flavors.” Alleging unfair competition, false advertising and negligent misrepresentation, the plaintiff seeks class certification, damages, corrective advertising and attorney’s fees.

In addition, Trader Joe’s has filed a notice of opposition to an application for the trademark “Trader Schmo,” to be used for a line of kosher foods. *Trader Joe’s Co. v. Glassover*, No. 91240886 (T.T.A.B., notice filed April 27, 2018). Trader Joe’s alleges that the “identified goods are identical to those goods sold, distributed, marketed and advertised” in connection with the Trader Joe’s mark. Moreover, the notice states, the company uses its own

“structurally identical marks” to identify house-brand food products, such as Trader Giotto’s for Italian foods, Trader José for Mexican foods and Trader Ming’s for Chinese food.

## Plaintiff Alleges Hazelnut Coffee Lacks Front-of-Package Flavoring Disclosure

A consumer has filed a putative class action alleging New England Coffee Company (NECC) mislabels its Hazelnut Crème Coffee by failing to include a front-label disclosure that the product contains natural and artificial flavors. *Dumont v. Reily Foods Co.*, No. 18-10907 (D. Mass., filed May 7, 2018). “Rather, buried on the back side of the label in the far-left corner in tiny print was the only indication that the Product did not contain its characterizing ingredient [hazelnut],” the complaint asserts.

The plaintiff argues that the front-label disclosure is a legal requirement and “a material term on which a reasonable consumer would rely.” The complaint points to examples of competitors’ hazelnut coffees that contain front-of-package disclosures as well as similar disclosures on other varieties of coffee sold by NECC. The complaint asserts that after the plaintiff sent a notification-and-demand letter to NECC in 2017, the company added the disclosure to 15 of the 27 flavored coffees it sells.

Alleging violation of Massachusetts laws prohibiting deceptive acts or practices and unfair competition, untrue and misleading advertising and unjust enrichment, the plaintiff seeks class certification, damages, restitution, disgorgement and attorney’s fees.

## Employee Files Biometric Privacy Suit Against Beverage Retailer

Binny’s Beverage Depot faces a putative class action alleging the company violated the Illinois Biometric Information Privacy Act (BIPA) by collecting and sharing employee biometric information without informed consent. *Burger v. Gold Standard Enters., Inc.*, No. 2018CH05904 (Ill. Ch. Ct., Cook Cty., filed May 7, 2018).

The plaintiff alleges that Binny's established a fingerprint-based time-clock program and shared the collected data with third-party payroll processors and data-storage vendors without providing its employees "informed written consent, and without informing them through a publicly available written policy of how it was going to store and dispose of this irreplaceable information," and "failed to maintain lawful data retention practices which reduce the risk of theft or other misappropriation of its workers' biometrics by unauthorized third parties." The risk was compounded, the complaint asserts, because the biometric data was linked to Social Security numbers, addresses, birth dates and "potentially other relevant financial information."

Claiming violations of BIPA, fraudulent inducement, negligence and intrusion upon seclusion, the plaintiff seeks class certification, damages, attorney's fees and an injunction requiring Binny's to destroy all biometric information in its possession.

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