



LEGISLATION, REGULATIONS & STANDARDS

## Mass. Governor Vetoes Raw Milk Bill

Massachusetts Governor Charlie Baker has vetoed a state environmental bond bill containing a provision that would allow raw milk sales at farm stands and via home delivery, citing a need for stricter regulation of raw milk. “Consumption of unpasteurized milk can result in foodborne illness and possible death due to bacterial infections, especially among infants, children, pregnant women, immunosuppressed patients, and the elderly,” Baker’s veto states. “The risk of foodborne illness due to consumption of raw milk increases with the number of people handling the raw milk prior to consumption, and the length of time between production and consumption. As such, it is important that any expansion of the sale of raw milk in the Commonwealth be done in such a way that it protects those who choose to consume it.” The veto includes suggested updates that would tighten restrictions on raw milk, including the establishment of licenses maintained by Massachusetts’ commissioner of public health.

## Restaurant Straw Restriction Moves Forward in California

The California Senate has reportedly passed legislation that would prohibit dine-in restaurant employees from offering patrons plastic straws. The restriction, which passed 25-12, would allow for the provision of straws if customers ask for them. Critics of the measure in the legislature purportedly argue that the effects of plastic straws are “a bit overstated,” with one legislator pointing out that plastic straws continue to be offered in the capitol

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building. The measure has been returned to the California State Assembly for concurrence in amendments.

## In-N-Out Sends Brewer Cease-and-Desist for “In-N-Stout”

In-N-Out Burger has reportedly warned brewery Seven Stills that its forthcoming In-N-Stout beer violates the company’s trademarks and trade dress. Seven Stills promoted the beer, a “Neapolitan milkshake stout,” on its social media with a photo of a can featuring red lettering and a yellow arrow similar to In-N-Out’s logo. The brewery also posted a photo of the cease-and-desist letter, encouraging viewers to “find the puns.”

“Please understand that use of our marks by third parties ailes us to the extent that this could cause confusion in the marketplace or prevent us from protecting our marks in the future,” the letter states. “We hope you appreciate, however, that we are attempting to clearly distill our rights by crafting an amicable approach with you, rather than barrel through this. ... Please contact us as soon as possible, so this does not continue to ferment. Thank you for your time and consideration, and we look forward to resolving this in good spirits.”

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### LITIGATION

## Cereal Buyers Granted Certification in Kellogg Class Action

A California federal court has granted certification to buyers of Kellogg Co.’s Raisin Bran, Frosted Mini-Wheats and Smart Start who allege they were misled about the health benefits of the products because they contain added sugar. *Hadley v. Kellogg Sales Co.*, No. 16-4955 (N.D. Cal., San Jose Div., entered August 17, 2018). The complaint also contained an allegation about Nutri-Grain bars, but the court declined to certify that class.

Kellogg argued that the plaintiffs did not meet the predominance standards for certification, asserting that most consumers did not see the challenged phrases “lightly sweetened” and “wholesome goodness” on the product packaging and further that “the health impact of consuming added sugar—and thus the alleged falsity of the challenged statements—differs for each consumer.” The court agreed as to the “wholesome goodness” phrase on Nutri-Grain bars packaging but disagreed that most consumers would not



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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

have seen “lightly sweetened” phrasing based on its prominent placement on the cereals’ packaging. The court further found that the “actual physical ‘impact’” of the product on any specific class member’s health “has no bearing on whether the challenged health statements are false, deceptive, or materially misleading [ ]. Instead, the falsity or deceptiveness of the challenged health statements are likely to deceive or mislead a hypothetical *reasonable consumer* in light of the amount of added sugar that Kellogg puts into those products.”

The court certified a California class of consumers who purchased Raisin Bran, Smart Start and Frosted Mini-Wheats but declined to certify a class of Nutri-Grain purchasers because of the individual inquiries necessary to determine if members of the proposed class saw “wholesome goodness” on the back of the product’s packaging.

## DOJ Alleges Seafood Producer Sells Contaminated Products

The U.S. Department of Justice (DOJ) has filed a complaint alleging Foo Yuan Food Products Co. Inc. distributes seafood products contaminated with *Listeria monocytogenes* and *Clostridium botulinum*. According to DOJ’s [press release](#), the Food and Drug Administration (FDA) inspected the facility several times and documented “significant deficiencies” during each inspection, including the alleged “failure to maintain the cleanliness of food contact sources” and “failure to ensure that all persons working in direct contact with food, food contact surfaces and food-packing materials conformed to hygienic practices to protect against food contamination.”

“The Department of Justice is committed to ensuring that food processors comply with laws designed to ensure food safety,” an attorney for DOJ said in a press release. “The Department of Justice will continue to work with the FDA to ensure that Americans are protected from potentially unsafe food.”

## Consumers Challenge White-Chocolate Content in Clif Bars

Two consumers have filed a putative class action alleging Clif Bar & Co. misleads consumers because its bars do not contain “real white chocolate.” *Joslin v. Clif Bar & Co.*, No. 18-4941 (N.D. Cal., San Francisco Div., filed August 14, 2018). According to the complaint, “U.S., Canadian, and European regulators all define

inspections, subject to FDA, USDA and FTC regulation.



white chocolate as having at least 3.5% milkfat” while Clif’s White Chocolate Macadamia Nut bars do not contain any milkfat. The plaintiffs assert that they relied upon the U.S. Food and Drug Administration’s “rules concerning white chocolate” when purchasing the bars but allegedly learned after purchasing that the bars are “misbranded” because the labels do not clarify that the white chocolate is “imitation.” The plaintiffs seek class certification, damages, restitution, an injunction and attorney’s fees for alleged violations of California and New York consumer-protection laws as well as fraud.

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## MEDIA COVERAGE

### China Allows Trout To Be Labeled As Salmon

According to the *New York Times*, Chinese regulators have announced that rainbow trout can be sold as salmon within the country. Rainbow trout and salmon are closely related, the China Aquatic Products Processing and Marketing Alliance found, and the breeds have apparently been sold interchangeably for several years. Because rainbow trout is cultivated in freshwater, consumers reportedly worry about the threat of parasites, which salmon cultivated in saltwater is less likely to carry. The regulators noted that markets and restaurants must list the species of fish and its origin on the label, such as “salmon (Atlantic salmon)” or “salmon (rainbow trout).”

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