



LEGISLATION, REGULATIONS & STANDARDS

## FDA Announces Plan to “Advance Plant, Animal Biotechnology Innovation”

U.S. Food and Drug Administration (FDA) Commissioner Scott Gottlieb has issued a [statement](#) announcing the agency’s [Plant and Animal Biotechnology Innovation Action Plan](#). Gottlieb describes the plan as identifying priorities in three areas: (i) “advancing human and animal health by promoting product innovation and applying modern, efficient and risk-based regulatory pathways;” (ii) “strengthening public outreach and communication regarding the FDA’s approach to innovative plant and animal biotechnology;” and (iii) “increasing engagement with domestic and international partners on biotechnology issues.” The plan indicates that FDA will “adopt a comprehensive policy framework for the development and regulatory oversight of animal biotechnology products, including for intentionally genetically altered animals and the food and drug products derived from them.” The statement also announced that the agency’s Center for Veterinary Medicine will host a [webinar](#) on genome editing in animals on December 3, 2018.

## EU, U.K. Approve Limits on Single-Use Plastics

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**[Mark Anstoetter](#)**

The European Parliament has approved a ban on several types of single-use plastics that is reportedly expected to take effect by 2021. The ban will apply to plastic cutlery, plates, straws and drink stirrers, and the measure also calls for a reduction in plastic cups and other single-use plastic containers used for food and beverages. The United Kingdom will also reportedly target single-use plastics with a tax on plastics that contain less than 30 percent recycled material, with a tax on single-use plastic cups under consideration as well.

## FDA Accepting Data Submissions on Sesame Allergies

The U.S. Food and Drug Administration (FDA) has requested comments on “the prevalence and severity of sesame allergies in the United States and the prevalence of sesame-containing foods sold in the United States that are not required to disclose sesame as an ingredient.” The announcement cites a 2014 petition submitted by the Center for Science in the Public Interest requesting a “rule to require that sesame seeds and sesame products be regulated in a manner similar to the manner in which major food allergens are regulated.”

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## LITIGATION

### Use of Malic Acid is Factual Issue, Court Holds

A California federal court has refused to dismiss a putative class action alleging Ocean Spray Cranberries Inc. misled consumers by marketing its products as free from artificial flavors despite containing malic acid. *Hilsley v. Ocean Spray Cranberries Inc.*, No. 17-2335 (S.D. Cal., entered October 30, 2018). Ocean Spray moved to dismiss the allegations, arguing that “malic and fumaric acids do not function as flavors in their juice products but instead are acidulants used to control the pH and titratable acid levels in their juices.”

816.559.2497  
[manstoetter@shb.com](mailto:manstoetter@shb.com)



**M. Katie Gates Calderon**  
816.559.2419  
[kgcalderson@shb.com](mailto:kgcalderson@shb.com)



**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.

Ocean Spray presented testimony from its vice president of research, development, quality and engineering, who asserted that changing the amount of malic and fumaric acids in the product would not change the flavor but may “create a perceptible difference in mouth feel of the product.” The plaintiff’s expert, a food scientist, argued that the “small quantity of synthetic malic acid in the Cran-Apple juice drink” would “not significantly lower the pH of the juice drink but instead would function as a flavor and flavor enhancer.”

“Based on the competing declarations, the Court concludes that there is a material issue of disputed fact whether malic acid and fumaric acid function as flavors in Defendants’ juice products,” the court held, denying Ocean Spray’s motion to dismiss.

## Lawsuit Alleges Capri Sun Misleads Consumers on Preservative Content

Two consumers have filed a putative class action alleging that Kraft Heinz Food Co. misleads consumers by marketing Capri Sun beverages as free of preservatives despite containing citric acid. *Tarzian v. Kraft Heinz Food Co.*, No. 18-7148 (N.D. Ill., E. Div., filed October 25, 2018). “Citric acid serves as a preservative by functioning as an acidity regulator and acidulant,” the complaint alleges. “[W]hile citric acid can also be employed to impart taste, a greater quantity of it is required to impart taste than to preserve foods and beverages. The preservative effects of citric acid may be reduced at lower levels, but it will still be present. [] Thus, Defendant cannot argue that it includes citric acid in the Products merely to impart added taste, because the quantities required to impart taste are more than sufficient to function as preservatives.” For alleged violations of Illinois and New York consumer-protection statutes, the plaintiffs seek class certification, damages, injunctions, corrective advertising and attorney’s fees.

## Lenny & Larry’s Settles Cookie Class Action

Lenny & Larry’s Inc. has agreed to pay \$1.85 million in cash and \$3.15 million in free products to settle a [lawsuit](#) alleging that its Complete Cookie did not provide the advertised amount of

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.



protein. *Cowen v. Lenny & Larry's Inc.*, No. 17-1530 (N.D. Ill., E. Div., motion filed September 25, 2018). Under the settlement agreement, class members with proof of purchase can obtain up to \$50 in cash or choose to obtain free Complete Cookies with a retail value of up to \$30, while those without a proof of purchase can receive \$10 cash or \$15 of the product. Products that have not been redeemed from the \$3.15 million fund “shall be distributed free via retail locations” in all 50 states.

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