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FIRM NEWS

## Kellogg Settlement Highlights Sugar Litigation Focus, Shook Attorneys Explain

Shook Food, Beverage & Agribusiness Practice Group Co-Chair [Lindsey Heinz](#) and Associate [Elizabeth Fessler](#) have authored an [article for Law360](#) on a [settlement](#) between Kellogg Sales Co. and a plaintiff who alleged that the company's cereals were misleadingly marketed as "healthy." The settlement is "a prime example of the shifted focus toward sugar," they explain, "and the agreement may cause companies to question whether simply following regulations on sugar is worth the risk."

Heinz and Fessler track how the U.S. Food and Drug Administration (FDA) has regulated the use of "healthy" to describe foods and provide an overview of the Kellogg case. "Although labeling claims may be consistent with regulations, the industry should be wary of making claims inconsistent with current thoughts on what constitutes a healthy food. While the cereals at issue were in line with the FDA's definition and guidance on 'healthy' — which does not reference sugar — the litigation still resulted in a significant monetary settlement and labeling changes, reflecting the consumer concern about added sugars," they conclude. "As with other frequently challenged label claims, the industry should be reviewing its labels to determine if the claims align with scientific consensus and consumer

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Shook offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

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expectations. If a product has added sugar, its manufacturer may benefit from evaluating whether claims about the healthy aspects of the product are appropriate and consistent with consumers' current understanding of the term.”

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## LEGISLATION, REGULATIONS & STANDARDS

### USDA Receives Hundreds of Comments on Hemp Interim Rule

Two weeks after opening a comment period on an interim final rule on hemp farming, the U.S. Department of Agriculture (USDA) has received more than 600 comments. The rule set limits for the amount of tetrahydrocannabinol (THC) that can legally be produced by the crop, and farmers have reportedly told the agency that the limit is unmanageable. One issue is that the regulations do not acknowledge a difference between Delta-9 THC and THC-A, according to a former hemp farmer interviewed by Law360 who also reportedly said he had never seen a test result as low as the limit set by USDA. Another possible issue is that the crop must be tested by a laboratory registered with the Drug Enforcement Administration, which may reduce the number of qualified firms to a single laboratory. Comments on the interim final rule will be accepted until December 31.



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### CSPI Releases Report on Children's Food Marketing

The Center for Science in the Public Interest (CSPI) has released a report on television ads targeting children with food marketing. The organization assessed the advertisements shown during six hours of television airing on 12 channels that show children's programming and compared the results to a similar assessment from 2012. The comparison purportedly showed that the percentage of ads marketing food and beverages is up from 14% to 23%, and “two thirds of food and beverage advertisements during children's television programming are unhealthy according to the food industry's own [Children's Food and Beverage Advertising Initiative] standards and virtually all are unhealthy according to

## 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.

the more evidence-based, expert [Interagency Working Group] standards.”

## Olive Oil Group Seeks Standard of Identity from FDA

The American Olive Oil Producers Association has filed a citizen petition urging the U.S. Food and Drug Administration (FDA) to “promulgate regulations for the standards of identity for olive oil and olive-pomace oil.” The lack of standard of identity has led to “widespread mislabeling of grades, adulteration, consumer mistrust, and unfair and unethical industry business practices,” the petition asserts, and the “continued absence of an enforceable standard is harming consumers. Off the shelf product testing demonstrates that U.S. consumers are frequently misled by mislabeling of grades and marketing tactics that leave them unable to differentiate between high quality extra virgin olive oil and low-quality, old or rancid oils, as well as cheap by-products that are chemically and mechanically refined and colored to resemble olive oil.” The petition urges FDA to regulate “various grades of olive oil”—“extra virgin olive oil, virgin olive oil, olive oil composed refined oils”—to “promote honesty and fair dealing in the interest of consumers.”

## EFSA Proposes Animal Welfare Measures in Poultry Slaughter

The European Food Safety Authority (EFSA) has published a scientific opinion on animal welfare considerations during the slaughter of poultry for food. The opinion provides a “comprehensive overview” of “the entire slaughter process from arrival and unloading of birds through stunning to bleeding and killing.” The opinion also identifies hazards that “give rise to welfare issues—such as pain, thirst, hunger or restricted movement—and proposes preventive and corrective measures where possible.” Many of the identified hazards relate to the lack of training in personnel; the “advice highlights the importance of staff being adequately trained in the different phases of slaughter and for clear identification of roles and responsibilities.”

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.



The [press release](#) notes that EFSA will publish further opinions on animal welfare in slaughter for pigs, cattle and other species in 2020.

## “Suicyder” Complaint Upheld

The Portman Group, a U.K. alcohol industry self-regulatory group, has [upheld a complaint](#) against the Bearded Brewery for the name of its high-alcohol cider, Suicyder. A member of the public complained about the beverage name’s reference to suicide, calling Suicyder “clearly irresponsible” because it purportedly targets young men—“the group at highest risk of suicide”—and uses associated iconography, such as the tagline “juice from the noose.” The company asserted that the “name of the cider was based on a wordplay with the intention being to indicate the strength of the alcohol content” and explained that the tagline was a reference to the founders’ previous work with the Forestry Commission that required them to use a noose to dismantle unsafe trees.

The panel was unpersuaded by tagline explanation, noting that “a consumer would have to understand this inside knowledge to displace the main connotation portrayed by the product name and imagery on the front label,” which were “unequivocally creating a direct link to suicide.” Agreeing with the complaint, the panel found the marketing “highly irresponsible” and concluded that “the product name ‘Suicyder’, when used in combination with imagery that depicted a hanging method of suicide, created a direct link between suicide, alcohol and dangerous behaviour.” Bearded Brewery “decided not to work with the Portman Group advisory service to amend their product in line with the Panel’s ruling,” so Portman Group issued a [retail alert bulletin](#) requesting that retailers avoid placing orders for stocks of Suicyder after January 20, 2020.

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### LITIGATION

## Advocacy Group Sues for Info on Pork Inspections System

Food & Water Watch Inc. (FWW) has filed a [lawsuit](#) alleging that the U.S. Department of Agriculture (USDA) has “engaged in dilatory and obstructionist tactics” to avoid fulfilling the organization’s Freedom of Information Act (FOIA) requests on documents related to the establishment of the New Swine Inspection System (NSIS). *Food & Water Watch Inc. v. USDA*, No. 19-3362 (D.D.C., filed November 7, 2019). FWW argues that USDA has “actually or constructively and unlawfully denied” its requests for “data and other agency records justifying” the NSIS rules “that replace government inspectors with plant employees in performing certain crucial animal and carcass inspections.” The complaint alleges that the defendants “have failed to disclose records responsive to close to half of the originally requested items; have repeatedly ignored attempts to clarify what they have released; have released inaccurate, non-responsive records; have forced FWW to jump over the procedural hurdle of submitting an additional FOIA request instead of amending the one already being processed; and ignored FWW’s requests altogether.”

## Ocean Spray Settles “No Artificial Flavors” Suit

Ocean Spray Cranberries Inc. has agreed to pay \$5.4 million to settle [claims](#) that it misleadingly advertised its beverages as lacking artificial flavors despite containing malic acid. *Hilsley v. Ocean Spray Cranberries Inc.*, No. 17-2335 (S.D. Cal., filed November 8, 2019). Under the agreement, the company will stop using the phrase “no artificial flavors” on its labeling or in other marketing materials within 12 months. Class members may receive \$1 per bottle up to 20 bottles, and no proof of purchase will be required.

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### MEDIA COVERAGE

## Australia, New Zealand Fight Over Rights to “Manuka Honey”

According to the [New York Times](#), Australia and New Zealand are disputing over the rights to produce manuka honey, a honey

product that sells for about \$100 per 500 grams. New Zealand producers seek to establish a protected designation of origin for manuka honey, but Australian producers argue that their production process creates the same resulting product. The New Zealand version of the product is created by bees that pollinate the manuka bush, while the bees in Australia create the honey with the nectar of the manuka bush as well as dozens of species in the same genus. One New Zealand producer reportedly said that calling the Australian product manuka honey is like “generalizing all the almonds and apricots and calling them plums”; the Australians argue that the related bushes are “nearly indistinguishable” because the species developed when Australia and New Zealand were part of the same land mass 65 million years ago.

“I think it is absolutely ludicrous that two countries so blessed with such a wonderful product should be going to court and bastardizing the name manuka,” one New Zealander told the *Times*. “Rather, we should put those funds together, collaborate and put all that money into science and research to supply the world with more honey.”

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