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## LEGISLATION, REGULATIONS & STANDARDS

### CBD Banned from New York Restaurants, in Limbo in Idaho

New York City's health department has reportedly ordered restaurants to stop serving products that contain cannabidiol (CBD) on the grounds that the compound has not been approved as safe for use in food by the U.S. Food and Drug Administration. City inspectors have apparently marked CBD products as embargoed during routine inspections but have not confiscated the products from the restaurants. Maine's state health authorities reportedly began a similar crackdown on edible products containing CBD in late January, informing retailers that the compound is an unapproved food additive. The health departments' actions do not affect CBD sold in non-food products such as in oil or lotion, according to *Eater*.

Industrial hemp, CBD's source, has faced similar regulatory confusion following the passage of the 2018 Farm Bill, which permitted the cultivation of industrial hemp as an agricultural product. An Idaho federal court has determined that when hemp can be transported between states remains unresolved. *Big Sky Scientific LLC v. Idaho State Police*, No. 19-0040 (D. Idaho, entered February 2, 2019). Denying a motion for a temporary restraining order allowing the hemp to pass from Idaho to Colorado, the court found that the Farm Bill seems to require the

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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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**Mark Anstoetter**

establishment of state regulatory frameworks for hemp before the product can cross state lines.

*For more information about cannabis-related legal issues, please contact Shook Partner [Katie Gates Calderon](#).*

## Reps. Tell FDA to Clarify “Milk” as Dairy

A group of members of Congress, led by Reps. John Joyce (R-Pa.) and Anthony Brindisi (D-N.Y.), have urged the U.S. Food and Drug Administration (FDA) to enforce “regulations defining what may be labeled a dairy product, to combat the proliferation of imitation and substitute dairy products in the marketplace that undermine FDA regulations by using standardized dairy terms on non-dairy products.”

“Dairy product terms convey specific information for consumers on nutritional content and ingredient performance. Put simply, imitations and substitutes do not meet these standards, nor do they have any standardized requirements for nutritional content, composition, and processing, unlike the dairy products they seek to imitate. Most importantly, they are not sourced from cows or other lactating mammals as required by the standards we referred to up above,” the letter asserts. “Giving this ongoing problem, we are pleased that FDA now plans to act. We urge you to make crystal clear that dairy imitators will not be considered in compliance with standards of identity if they merely add the name of a plant in front of a standardized dairy term, or otherwise reference dairy terms.”

## FDA Releases Final Guidance on Voluntary Recalls

The U.S. Food and Drug Administration (FDA) has announced the availability of “Public Warning and Notification of Recalls,” final guidance that aims to “increase and expedite the appropriate and accurate use of public warnings and public notification and to increase public health protection by better informing the public about violative products being recalled.”

“We’re taking a new step to help ensure appropriate public warnings and notification of recalls when FDA-regulated products

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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.

are involved,” FDA Commissioner Scott Gottlieb said in a [statement](#). “The final guidance we’re issuing today outlines circumstances when a company should issue a public warning about a voluntary recall, describes the general timeframe for companies to issue such a warning, discusses what information should be included in a public warning, and describes situations where the FDA may take action to issue its own public warning should a company’s warning be deemed insufficient.”

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.

## New York Legislator Proposes Ban on Foie Gras

A councilwoman has [reportedly](#) proposed to criminalize the sale of foie gras in New York City, citing the [U.S. Supreme Court’s refusal](#) to examine California’s force-fed foie gras ban. The bill would make the sale of foie gras a misdemeanor and allow the imposition of a one-year prison sentence and fines up to \$1,000 for each offense. “Force-feeding a bird for the sole purpose of making it sick to create some bizarre delicacy is gruesome and inhumane. This may have been acceptable in 2500 BC but I think we know better now,” a councilman who supports the bill is quoted as saying.



## FDA Reports on Romaine Investigation

The U.S. Food and Drug Administration (FDA) has released a [report](#) detailing its investigation into a 2018 outbreak of *E. coli* in romaine lettuce. The report describes the FDA traceback team’s investigation into farms with potential links to the outbreak that culminated in a December product recall.

“The FDA continues to recommend that leafy green growers, buyer/shippers and retailers be able to trace product back to the specific source in real time and make information about the source, such as harvest date and standardized growing regions, readily available for consumers on either packaging or point of sale signs, or by other means,” FDA Commissioner Scott Gottlieb said in a [press release](#). “We’re pleased to see many companies in the leafy green industry take voluntary steps to quickly respond to our previous recommendations. We believe this is the best

approach to be able to inform consumers should there be any future risks to public health.”

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## LITIGATION

### Consumer Groups Sue Pilgrim's Pride

The Organic Consumers Association and Food & Water Watch Inc. have filed a lawsuit alleging that Pilgrim's Pride Corp. misrepresents the conditions in which it raises its chickens. *Food & Water Watch Inc. v. Pilgrim's Pride Corp.* (D.C. Super. Ct., filed February 4, 2019). The complaint alleges that "Pilgrim's Pride systematically raises, transports, and slaughters chickens in inhumane factory-farm conditions," including "the routine use of antibiotics," "crowding," "the use of toxic chemicals," "the use of artificially selected fast-growing, breast-heavy chicken breeds," and "the abuse of chickens by Pilgrim's Pride contractors and employees." The organizations focus on Pilgrim's Pride's representations that its chickens are fed "only natural ingredients" and are not fed "growth hormones of any kind" as well as its assertions that the company "strongly supports the humane treatment of animals."

The advocacy groups allege that Pilgrim's Pride has violated the District of Columbia Consumer Protection Procedures Act and seek corrective advertising, an injunction, attorney's fees and costs.

### Kind "All Natural" Litigation Stay Lifted

Consolidated litigation to determine whether Kind LLC misleads consumers by marketing its products as "all natural" and made without genetically modified organisms (GMOs) will continue after a two-year delay. *In re Kind LLC "Healthy and All Natural" Litig.*, No. 15-2645 (S.D.N.Y., entered February 11, 2019). The court previously stayed the litigation in anticipation of U.S. Food and Drug Administration (FDA) guidance documents on when the uses of "natural" and "non-GMO" are appropriate on food labeling.

"Given that there is no reason to continue the stay on the 'non-GMO' claims and that neither party wishes to litigate the claims in

piecemeal fashion, it makes sense to begin discovery," the court held. "Moreover, this Court explained that the case for lifting the 'all natural' stay would be 'substantially stronger' if the FDA failed to provide guidance by August 2018. Six months later, guidance is still awaited. It is time for this multi-district litigation to move forward."

## In-N-Out Suit Forces Smashburger to Change Some "Double The Beef" Ads

A California federal court has sided with In-N-Out Burgers in a lawsuit challenging whether Smashburger's Triple Double hamburger has "double the beef." *In-N-Out Burgers v. Smashburger IP Holder LLC*, No. 17-1474 (C.D. Cal., entered February 6, 2019). Smashburger's Triple Double, advertised as "double the beef," contains the same amount of beef as Smashburger's classic burger—five ounces—but the beef is split into two patties instead of one. The complaint alleged that Smashburger's "deceptive" advertising was likely to harm In-N-Out if consumers chose Smashburger's products over In-N-Out's based on inaccurate marketing.

"[T]he claim that the Triple Double burger contains 'double the beef' as compared to the Classic Smash burger is literally false on its face," the court found. "The phrase 'double the beef in every bite' unambiguously refers to the amount of beef in the burger, rather than the number of layers of beef." The court dismissed Smashburger's argument that the "double the beef" tagline references a comparison to competitors' burgers, citing the tagline referencing Smashburger's own product, "Classic Smash Beef build with triple the cheese & double the beef in every bite."

The court declined to find literal falsity for "double the beef" claims made without a specific reference to the Classic Smash, but it declared summary judgment for In-N-Out on "the literal falsity, deceptiveness, and materiality elements of In-N-Out's false advertising claim for Smashburger's use of the phrase 'Classic Smash Beef build with triple the cheese & double the beef in every bite.'"

Russell Stover, Ghirardelli Underfill



# Chocolate Boxes, Consumer Alleges

Following a [settlement with California district attorneys](#) making similar allegations, Russell Stover and Ghirardelli Chocolates have been targeted in a New York putative class action alleging the companies' chocolate packages are "predominantly empty" "through the large void spaces which comprise most of the packaging interior around the actual few items contained therein." *Faison v. Russell Stover Chocolates LLC*, No. 19-0721 (E.D.N.Y., filed February 5, 2019). The complaint asserts that consumers cannot see the chocolates in the opaque packaging, "causing them to believe the chocolate contents filled all, most, or more of the packaging than they actually did." The plaintiff seeks class certification, injunctive relief, damages and attorney's fees for allegations of unjust enrichment, fraud, negligent misrepresentation, breach of warranties and violations of New York's consumer-protection statutes.

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## MEDIA COVERAGE

### “Meat”-Defining Bills Proliferate, New York Times Reports

*The New York Times* has published an [update](#) on proposed state laws defining “meat” as an animal-derived product. In addition to [Missouri’s](#) existing law, several state legislatures—including Arizona, Arkansas, [Nebraska](#) and Washington—will be considering statutes that would prevent purveyors of plant-based or lab-grown meat-replacement products from using the term “meat” on their labels. The policy director of the Good Food Institute, which is [alleging](#) that Missouri’s definition violates the First Amendment, reportedly told the *Times* that she believes the issue will be moot after the U.S. Department of Agriculture provides guidance.

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