



Having trouble reading this email? [View it in your browser.](#)

ISSUE 711 | April 25, 2019



## SPOTLIGHT

Shook, Hardy & Bacon is partnering with American Lawyer Media to conduct a [legal industry survey](#) on the introduction of industrial hemp, cannabis and cannabidiol (CBD) oil into commerce. We are particularly interested in learning about the legal challenges and opportunities faced by agribusiness, animal health, food and beverage, and retail companies in this market. The results will be reported in a white paper to be released by the firm later this year.

The survey will take 5-7 minutes to complete. As thanks for participating, you may enter your name and email address at the end of the survey for a chance to win one of two \$100 American Express gift cards.

Your answers will remain confidential.

[Access the survey >>](#)

SHARE WITH [TWITTER](#) | [LINKEDIN](#)

SUBSCRIBE

PDF ARCHIVES

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.

For additional information about Shook's capabilities, please contact

## FSMA, Prop. 65 and Supply Chain Issues Among Subjects of Food Law Conference

In-house and outside counsel joined representatives from the U.S. Food and Drug Administration (FDA), Department of Agriculture (USDA) and Federal Trade Commission (FTC) in Chicago for the American Conference Institute's Food Law Conference on April 9-



**[Mark Anstoetter](#)**

11, 2019. The conference covered a number of key topics, including the impact of Food Safety Modernization Act (FSMA) implementation, changes to California's Safe Drinking Water and Toxic Enforcement Act (Prop. 65) and emerging issues such as hemp and cannabis ingredients, blockchain and 3D-printed foods.

Shook Partner Lindsey Heinz presented with Matt Dornauer, general counsel for Phusion Projects, LLC, on how to navigate the unique challenges of marketing and advertising through social media. Heinz and Dornauer discussed a wide array of issues, including what food and beverage companies can glean from FDA social media guidance in the pharma space, how to draft a comprehensive social media policy and overarching best practices to ensure that companies are getting the most out of social media marketing while still mitigating risk.

The conference also highlighted the increasing importance of thoroughly understanding supply chains. A number of sessions touched on the various ways supply chains are important in dealing with recalls and hazard analyses, foreign supplier verification requirements, and insurance and contracting issues. Speakers also covered the upcoming implementation of the intentional adulteration requirements under FSMA and genetically modified organism content disclosures being implemented by USDA. Douglas Stearn, deputy director for regulatory affairs at FDA's Center for Food Safety and Applied Nutrition, provided insight on the agency's priorities, including the continuing focus on proactive approaches based in science. David O'Toole, senior staff attorney with the FTC, discussed the potential impact of having a fully staffed Commission and possible trends in FTC actions, including the potential for assessing economic harms related to false or misleading "Made in the USA" claims. The speakers also discussed litigation issues and trends in class actions and Prop. 65 enforcement actions.

The conference also provided an opportunity to hear from and engage with in-house counsel from a number of industry leaders, including The Hershey Co., KIND Snacks, Jelly Belly Candy Co., Legal Seafood, LLC, and Campbell Soup Co. The speakers discussed a variety of concerns in the industry as well as best practices in several areas, including supply chain management, allergy labeling, food safety issues and recall management.

*Reporting provided by Shook Associate Elizabeth Fessler.*

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.

---

## LEGISLATION, REGULATIONS & STANDARDS

### FDA Draft Guidance Excludes Allulose from Added Sugar Disclosure

The U.S. Food and Drug Administration (FDA) has issued draft guidance allowing food manufacturers to exclude allulose when calculating the amount of added sugars a product contains. Allulose is “approximately 70 percent as sweet as sucrose,” according to a comment FDA received, and “does not have the metabolic properties of fructose or other sugars and does not contribute calories or raise blood sugar levels like other sugars.” FDA has proposed to “exercise enforcement discretion for the exclusion of allulose from the amount of ‘Total Sugars’ and ‘Added Sugars’ declared on the label and the use of a general factor of 0.4 calories per gram for allulose when determining ‘Calories’ on the Nutrition and Supplement Facts labels pending review of the issues in a rulemaking.” Comments on the draft guidance will be accepted until June 17, 2019.

### Consumer Reports Tests Bottled Water for Arsenic

*Consumer Reports* has published an article detailing its purported findings from a series of tests on several brands of bottled water, reportedly finding some bottles with levels of arsenic that could be “potentially dangerous to drink over extended periods of time.” Most samples apparently tested below the federal limit of 10 parts per billion (ppb); Peñafiel, a product imported from Mexico, tested higher than 10 ppb but has reportedly been pulled from the market to resolve the issue. *Consumer Reports* also identified brands that sell water containing levels of arsenic that are legal but above the organization’s recommended limit of 3 ppb.

### FDA Releases Guidance on Initiating Voluntary Recalls

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 U.S. Food and Drug Administration (FDA) has issued draft guidance on initiating voluntary recalls of food and other agency-regulated products. The guidance discusses (i) “what preparations firms in a distribution chain, including manufacturers and distributors, should consider making to establish recall initiation procedures”; (ii) “preparations firm in the distribution channel should consider making to ensure timely responses to a recall communication”; and (iii) “how FDA assists firms with carrying out their recall responsibilities to protect the public health from distributed products in violation of the Federal Food, Drug, and Cosmetic Act (FD&C Act) and other laws administered by the FDA.” Comments on the draft guidance will be accepted until June 24, 2019.

---

## LITIGATION

### Appeals Court Declines to Reopen Aspartame Lawsuit

The U.S. Court of Appeals for the Second Circuit has denied a plaintiff’s appeal aiming to overturn a lower court’s dismissal of a lawsuit alleging that Diet Dr Pepper is misleadingly named because it does not cause weight loss. *Excevarria v. Dr Pepper Snapple Grp., Inc.*, No. 18-1492 (2nd Cir., entered April 17, 2019).

“Plaintiffs argue that the use of the word ‘diet’ in Diet Dr Pepper is misleading because it conveys certain promises about the beverage’s usefulness in assisting with weight loss or healthy weight management, when in fact (Plaintiffs allege, based on a number of studies) the aspartame in Diet Dr Pepper likely causes weight gain,” the appeals court stated in its brief opinion.

“However, even assuming (without deciding) that Plaintiffs are right that a reasonable consumer would understand the word ‘diet’ to convey promises about weight loss or management, they have still failed to state a claim here. None of the studies cited by the Complaint or the [Proposed First Amended Complaint (PFAC)] establish a causal relationship between aspartame and weight gain, as has been determined by a number of courts in substantially identical cases involving complaints that cite the same studies. [] As a result, neither the Complaint nor the PFAC

state a claim, because Plaintiffs cannot raise a plausible inference that ‘Diet Dr Pepper’ as a brand name is false or misleading.”

## Court Dismisses “Natural” Lawsuit Against Rachael Ray’s Dog Food

A New York federal court has dismissed a putative class action alleging that celebrity chef Rachael Ray’s brand of dog food, Rachael Ray Nutrish, is misleadingly marketed as “natural” because it contains traces of pesticides. *Parks v. Ainsworth Pet Nutrition, LLC*, No. 18-6936 (S.D.N.Y., entered April 18, 2019). The court found that the plaintiff could not show that trace amounts of a pesticide would make the marketing of a “natural” product misleading.

The plaintiff “asserts that the Products contain trace amounts of glyphosate, but not that the Products are composed of unnatural ingredients,” the court found. “Moreover, Plaintiff does not set forth in his complaint the amount of glyphosate in the Products or whether that amount is harmful or innocuous. He argues that ‘[if] glyphosate is in the Products at any level . . . then the Products cannot be called ‘Natural.’ [] But a reasonable consumer would not be so absolutist as to require that ‘natural’ means there is no glyphosate, even an accidental and innocuous amount, in the Products.” The court granted the plaintiff “leave to replead facts supporting an inference that there was a material amount of glyphosate in the Products.”

## Lawsuit Challenges Cocoa Content in Oreos

A plaintiff has filed a putative class action alleging that Mondelez Global’s Oreos—marketed as “always made with real cocoa”—are misleadingly marketed because they contain cocoa processed with alkali. *Harris v. Mondelez Global LLC*, No. 19-2249 (E.D.N.Y., filed April 17, 2019). The complaint describes the alkali processing method, which “reduces the acidity of cocoa powder,” “detracting from the ‘real cocoa’ taste.” The plaintiff asserts that the phrase “‘always made with real cocoa’ is intended to differentiate the cocoa in the Products from other cocoa ingredients bearing the standard cocoa designation, i.e., ‘cocoa’ or ‘cocoa processed with

alkali,' and implies the cocoa present in the Products is nutritionally and organoleptically superior.” Further, “[n]o reasonable consumer would expect the cocoa in the Products to have been made with and contain alkalis because ‘real,’ in modifying the word ‘cocoa,’ represents the cocoa powder is included in its most simplified form.” The plaintiff seeks class certification, preliminary and permanent injunctive relief, damages, costs and attorney’s fees for allegations of negligent misrepresentation, breach of warranties, fraud and unjust enrichment.

SHB.COM

CHICAGO | DENVER | HOUSTON | KANSAS CITY | LONDON  
LOS ANGELES | MIAMI | ORANGE COUNTY | PHILADELPHIA  
SAN FRANCISCO | SEATTLE | TAMPA | WASHINGTON, D.C.

The choice of a lawyer is an important decision and should not be based solely upon advertisements.

© Shook, Hardy & Bacon L.L.P. All rights reserved.

**[Unsubscribe](#) | [Forward to a Colleague](#) | [Privacy Notice](#)**