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FIRM NEWS

## Shook Attorneys to Present on Prop. 65 with Western Growers

Shook Partners [Paul La Scala](#) and [Naoki Kaneko](#), with Associate [Emily Weissenberger](#), will join Western Growers Vice President and General Counsel Jason Resnick for a [complimentary webinar](#) on the Safe Drinking Water and Toxic Enforcement Act (Prop. 65). The webinar will cover (i) Prop. 65 warnings at facilities; (ii) product labels on packaging and websites; (iii) special considerations for the produce industry; and (iv) the anatomy of a Prop. 65 case.

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LEGISLATION, REGULATIONS & STANDARDS

## FDA Removes 7 Flavorings From Food Additives List

Following a petition from several advocacy groups, the U.S. Food and Drug Administration (FDA) has deauthorized the use of [seven synthetic substances](#) used as flavoring in foods. The agency found that the advocacy groups provided data demonstrating that six ingredients cause cancer in animals—benzophenone, ethyl acrylate, eugenyl methyl ether, myrcene, pulegone and pyridine—and removed styrene from its food additives list, finding that it has been permanently abandoned in that use. In addition, FDA has banned the use of benzophenone as “a plasticizer in rubber

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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.

For additional information about Shook's capabilities, please contact



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articles intended for repeated use in contact with food.” The rule took effect October 9, 2018.

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## LITIGATION

### Seventh Circuit Finds Wisconsin Butter Law Constitutional

The U.S. Court of Appeals for the Seventh Circuit has upheld a Wisconsin law requiring butter sold within the state to bear a grade issued by a Wisconsin-licensed butter grader or the U.S. Food and Drug Administration. *Minerva Dairy Inc. v. Harsdorf*, No. 18-1520 (7th Cir., entered October 3, 2018). The Ohio dairy challenging the law alleged it violated the Due Process Clause, the Equal Protection Clause and the dormant Commerce Clause of the U.S. Constitution, but a lower court granted summary judgment in favor of Wisconsin.

The appeals court first found that the statute does not violate substantive due process or equal protection because the law is “rationally related to at least two conceivable state interests”—consumer protection and promotion of commerce. Turning to the dormant Commerce Clause allegation, the court found that the law does not have a discriminatory effect on interstate commerce. The dairy argued that requiring out-of-state companies to obtain a grade is “cost-prohibitive for artisanal butter makers,” but the court held that in-state and out-of-state dairies face the same costs associated with acquiring a grade. The costs required to create Wisconsin-specific labels also failed to persuade the court, which noted that “a similarly situated artisanal butter-maker in Wisconsin—i.e., one that sells interstate and wants to preserve its brand equity—would face exactly the same costs.” Unconvinced by the dairy’s arguments, the Seventh Circuit affirmed the lower court’s ruling upholding the statute.

### No Trademark For “Corn Thins,” Federal Circuit Holds

The Federal Circuit has affirmed a Trademark Trial and Appeal Board (TTAB) decision refusing to grant a trademark to Real Foods Pty Ltd. for “Corn Thins” and “Rice Thins,” finding the terms to be “merely descriptive.” *Real Foods Pty Ltd. v. Frito-Lay N. Am. Inc.*, Nos. 17-1959, 17-2009 (Fed. Cir., entered October 4, 2018). Frito-Lay North America opposed Real Foods’ trademark



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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

application, but Real Foods argued both that the terms were not descriptive and that even if they were descriptive, they had acquired distinctiveness. The Federal Circuit found significant evidence to support TTAB's conclusion that the terms are descriptive, noting that the first part of the terms is the primary ingredient and the second is the shape. "The composite marks are 'merely descriptive' because they 'immediately convey[] knowledge of a quality or characteristic of the product[s],' specifically the products' main ingredients and thickness," the court held.

The court also found that the marks had not acquired distinctiveness, citing an expert survey conducted by Frito-Lay purportedly showing that "10.3% of respondents stated that they associated CORN THINS with only one company' and, when the pool of respondents was limited to 'only purchasers and prospective purchasers of crispbreads/crispbread slices,' that number increased to only '10.9% of the respondents.'" About half of that ten percent identified a company other than Real Foods as the maker of Corn Thins, the court noted. The Federal Circuit also found that TTAB had been too narrow in its determination for genericness—"corn cakes and rice cakes are the species, not the genus"—and remanded to TTAB to "reconsider its selected genus and conduct its genericness analysis in light of that genus."

inspections, subject to FDA, USDA and FTC regulation.



## Plaintiff Alleges LaCroix Contains Synthetic Ingredients

A consumer has filed a putative class action alleging that several ingredients in LaCroix sparkling water, which is marketed as "always 100% natural," are "non-natural flavorings and synthetic compounds." *Rice v. Nat'l Beverage Corp.*, No. 2018-CH-12302 (Ill. Cir. Ct., Cook Cty., filed October 1, 2018). The plaintiff alleges that the ingredients are synthetic and therefore cause consumers harm. "For instance, limonene causes kidney toxicity and tumors, linalool is used as a cockroach insecticide; and linalool propionate is used to treat cancer," the complaint asserts.

The complaint garnered significant media coverage, including in *CBS News*, *Los Angeles Times* and *USA Today*. A nutritional scientist reportedly told *CBS News*, "These compounds are found in nature, mostly in fruit such as oranges, limes, strawberries, pineapples, bananas....so we consume these compounds every day if we eat any kind of fruit." In addition, *Snopes* noted, "The chemicals identified in the lawsuit [] are both safe and naturally occurring."

## Salmonella Outbreak Prompts Lawsuit Against JBS Tolleson

A consumer has filed a lawsuit alleging that he contracted *Salmonella* from beef supplied to a restaurant by JBS Tolleson Inc. *Rozich v. JBS Tolleson Inc.*, No. 18-1929 (D. Nev., filed October 8, 2018). The plaintiff alleges his infection stemmed from an outbreak of *Salmonella* that resulted in JBS recalling nearly seven million pounds of beef on October 4, 2018. The complaint cites a July 2017 notice from the U.S. Department of Agriculture's Food Safety and Inspection Service purportedly alleging a JBS facility president enabled "'egregious' and 'inhumane' practices with livestock." The plaintiff seeks damages and costs for allegations of strict product liability, negligence and breach of warranty.

## AriZona Teas' "No Preservatives" Claim Misleads Consumers, Lawsuit Alleges

Three consumers have filed a putative class action alleging that Arizona Beverage Co.'s teas, energy drinks and fruit juices are misleadingly marketed as containing "no preservatives" despite containing citric and ascorbic acids. *Kubilius v. Arizona Beverage Co.*, No. 18-9075 (S.D.N.Y., filed October 3, 2018). The plaintiffs assert that they paid a premium for the products believing them to be preservative-free but later discovered that the products contain citric and ascorbic acid, which allegedly "serve as preservatives by functioning as sequestrants, removing compounds and elements from their environment so as to slow the degradation of food and beverages." The complaint also cites a declaration from a food scientist who asserts that "while citric acid and ascorbic acid can also be employed by a manufacturer that intends to impart taste, a greater quantity of these substances is required to impart taste than to preserve foods and beverages. ... Even if imparting taste is Defendant's primary motivation for including these acids, this subjective motivation has no bearing on their objective functioning." For alleged violations of New York and California consumer-protection statutes, breach of express warranties and fraud, the plaintiffs seek class certification, damages, restitution, injunctions and attorney's fees.

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