



**SPOTLIGHT**

## CBD, FSMA, Class Actions Among Topics at GMA Conference

Class action litigation, the legal landscape for cannabis and the evolving implementation of the Food Safety Modernization Act (FSMA) were trending topics at the 2019 Grocery Manufacturers Association (GMA) Legal Conference. Numerous panels at the conference focused on emerging issues affecting the industry and anticipated trends moving forward, including implications of whole genome sequencing; how courts view the confluence of First Amendment rights and mandated advertising content; and standards-of-identity issues related to non-dairy milks, non-animal meats and cell-grown meats.

Shook Partners [Katie Gates Calderon](#), [Phil Goldberg](#) and [Jim Muehlberger](#) presented with Courtney Ozer, Assistant General Counsel – Litigation for Unilever United States, and Suzanne Werner, Litigation Counsel – The Coca-Cola Company, on strategies for avoiding and defending against claims involving product testing. The panel discussed (i) assembling a crisis-management team, which should include key company stakeholders, inside counsel, public-relations and governmental-relations personnel; (ii) understanding the pending lawsuit, which involves robustly assessing the testing alleged and then determining whether the defendant should perform its own; and

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(iii) avoiding future lawsuits by reassessing supply-chain management and developing a strong working relationship between marketing and legal teams.

Opportunities added in 2019 included Legal Briefs sessions, which were twelve 20-minute breakout sessions covering hot topics for consumer packaged-goods companies in the legal and regulatory landscapes. Legal Briefs presenters discussed insurance complications raised by cross-border and global food disputes, best practices for avoiding major pitfalls while developing and introducing innovative products, risks related to environmental claims on labeling, and what to expect in cannabis law following the removal of hemp from the Controlled Substances Act. These presentations, and the GMA conference as a whole, repeatedly emphasized that prudent manufacturers should seek transparency and regulatory compliance both from themselves and anyone involved in their products' supply chains.

Highlights of the 2019 conference included remarks from U.S. Food and Drug Administration (FDA) Senior Advisor for Policy Sharon Mayl. After speaking on anticipated FSMA developments, she discussed FDA's position on cannabidiol (CBD) derived from hemp. Mayl indicated that FDA is open to reassessing policies if it can be shown that CBD would meet the requirements for approval as a food additive or dietary supplement. Mayl also mentioned the possibility of congressional action but conceded that any avenues to FDA approval of hemp-derived CBD are unlikely to be expedient.

*Reporting provided by Shook Associate [Zac Parker](#).*

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## LEGISLATION, REGULATIONS & STANDARDS

### FDA Commissioner Scott Gottlieb To Resign

U.S. Food and Drug Administration (FDA) Commissioner Scott Gottlieb has indicated that he will resign by the end of March 2019. Gottlieb reportedly said that he no longer wanted to commute between Washington, D.C., and Westport, Connecticut, where his family lives. Commentators have speculated that

#### 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.

Gottlieb's departure may affect FDA initiatives, such as its planned review of the safety of cannabidiol as a food additive.

## USDA To Hold Listening Session on Hemp Cultivation

The U.S. Department of Agriculture (USDA) has announced an online listening session to hear public input about "a new program to regulate hemp production." The agency's Agricultural Marketing Service (AMS) will host the webinar on March 13, 2019, with registration required by March 11 to speak during the session.

"The Secretary of Agriculture and the respective USDA agencies, including AMS, are working to implement the provisions of the 2018 Farm Bill as expeditiously as possible to meet the needs of producers and other stakeholders," the announcement states. "To allow for public input and ensure transparency, it is important to hear from stakeholders regarding their priorities, concerns, and requests."

## USDA, FDA to Jointly Oversee Cell-Based Meats

The U.S. Department of Agriculture (USDA) and Food and Drug Administration (FDA) have announced "a formal agreement to jointly oversee the production of human food products derived from the cells of livestock and poultry." The agreement "describes the oversight roles and responsibilities for both agencies and how the agencies will collaborate to regulate the development and entry of these products into commerce," according to a press release. "This shared regulatory approach will ensure that cell-cultured products derived from the cell lines of livestock and poultry are produced safely and are accurately labeled."

## Bill Clarifying Slack-Fill Uses Introduced in Missouri

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.



A Missouri state senator has introduced legislation that would clarify when slack fill is allowable in food containers. The bill would prohibit slack fill from being deemed as misleading for eight reasons, including (i) protection of the contents, (ii) reasonable industry standards, (iii) a specific function provided by the package, (iv) value added by the packaging, such as a reusable container, and (v) required label messaging.

## CSPI Files FOIA Request on Salmonella Outbreak Sources

The Center for Science in the Public Interest (CSPI) has filed a Freedom of Information Act (FOIA) request seeking to identify the poultry-production plants associated with an outbreak of *Salmonella*. CSPI requested that the U.S. Department of Agriculture (USDA) deliver information on the “name, address, establishment number, and date of positive sample(s)” for poultry products that “tested positive for the outbreak strain of *Salmonella* Infantis” in raw chicken and “*Salmonella* Reading” in raw turkey.

“In addition to granting the current FOIA request, which may be done by delivering the data to CSPI directly or posting it on the USDA website, CSPI also requests that the USDA develop a practice for reporting this information publicly in all similar multi-source outbreaks moving forward,” the request states.

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### LITIGATION

## Magnum Coffee’s “Kona” Blend Challenged

A consumer has filed a putative class action alleging that L & K Coffee Co. misleads consumers by selling a blend of coffee it labels as “Kona,” which allegedly refers to a distinctive geographic region in Hawaii. *Faison v. L & K Coffee Co.*, No. 19-1248 (E.D.N.Y., filed March 3, 2019). The complaint asserts that authentic Kona coffee has identifiable “concentration ratios of strontium-to-zinc and barium-to-nickel,” and testing purportedly found different ratios in L & K’s Kona coffee. “A reasonable

consumer would not expect a product labeled a Kona blend to contain 100% Kona, but would expect an amount significant enough to characterize the overall blend, and that amount is absent from the Products,” the plaintiff argues. For allegations of fraud, negligent misrepresentation, unjust enrichment and violations of New York consumer-protection statutes, he seeks injunctive relief, damages and attorney’s fees.

## Ferrara Settles SweeTart Malic Acid Litigation

A California federal court has preliminarily approved a settlement agreement between a consumer and Ferrara Candy Co. alleging the company misleadingly advertised its SweeTarts as free of artificial flavors despite containing malic acid. *Littlejohn v. Ferrara Candy Co.*, No. 18-0658 (S.D. Cal., entered February 28, 2019). Under the agreement, Ferrara will remove the phrase “no artificial flavors” from its packaging and marketing materials and pay \$272,000 in attorney’s fees.

## In-N-Out Sues Puma for Alleged Infringement

In-N-Out Burgers has filed a lawsuit alleging that Puma North America Inc. infringed its trademarks and trade dress with two pairs of shoes called “California Drive Thru” and “Cali-o Drive Thru.” *In-N-Out Burgers v. Puma N. Am. Inc.*, No. 19-0413 (C.D. Cal., filed March 1, 2019). The shoes feature shades of red and yellow similar to In-N-Out’s trademarked color scheme and liners decorated to look like hamburgers, and Puma allegedly marketed the shoes with images of hamburger-related items such as mustard. In-N-Out alleges that Puma is intentionally confusing consumers into believing that the companies have an agreement and cites multiple news stories mistakenly calling the shoes a collaboration between the brands. For allegations of trademark and trade dress infringement, In-N-Out seeks injunctions, damages, destruction of infringing materials and attorney’s fees.

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