Perkins Coie

2024 | YEAR IN REVIEW

Food & Consumer Packaged Goods Litigation

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Introduction

Perkins Coie Releases Ninth Annual Food & Consumer Packaged Goods Litigation Year in Review.

In 2024, class action filings against the consumer packaged goods (CPG) industry reached a near high, with close to three hundred lawsuits filed. This year was notable for the wide variety of kind of claims at issue — natural, protein content, multi-function ingredients, packaging fill, and sustainability claims. The combination of the pace and breadth of theories suggests that these current trends will not abate soon.

Once again, litigation activity remained vigorous around microcontaminants in the form of purportedly harmful trace substances—including heavy metals, phthalates, and polyfluoroalkyl substances (PFAS). Because these filings have spread to courts nationwide, 2024 saw some uncertainty come into this area of the law with different courts coming to differing conclusions as to whether and when it is actionable to misleadingly "omit" from the label the potential presence of these trace substances.

As in years past, in 2024, the "reasonable consumer" defense remained a key weapon in defendants' arsenal, with encouraging developments in this area of the law. The Second Circuit explained that when a challenged claim is merely ambiguous, then resort to the full label — and its clarifying effect — is appropriate. Meanwhile, the Ninth Circuit helpfully explained that the use of asterisks on challenged claim, when linked to additional explanatory information, helps guard against potential liability under the "reasonable consumer" standard.

The regulatory arena also remained active in 2024. The U.S. Food and Drug Administration (FDA) issued numerous advisory updates on food traceability, food imports, dietary supplements, food additives, and PFAS. Perkins Coie expanded its regulatory capabilities in 2024 and is actively monitoring these and other developments in coordination with our litigation team to help ensure that today's regulatory guidance does not turn into tomorrow's threatened class action.

In addition to this yearly overview, we monitor filings daily and provide real-time information to clients and key contacts via our Food & Consumer Packaged Goods Litigation updates. To receive a daily email report about cases filed, Proposition 65 notices, and industry decisions, please email KHale@perkinscoie.com.

SECTION 1

Legal Trends in Food and Beverage

Legal Trends in Food and Beverage

Figure 1

FOOD & BEVERAGE CLASS ACTIONS

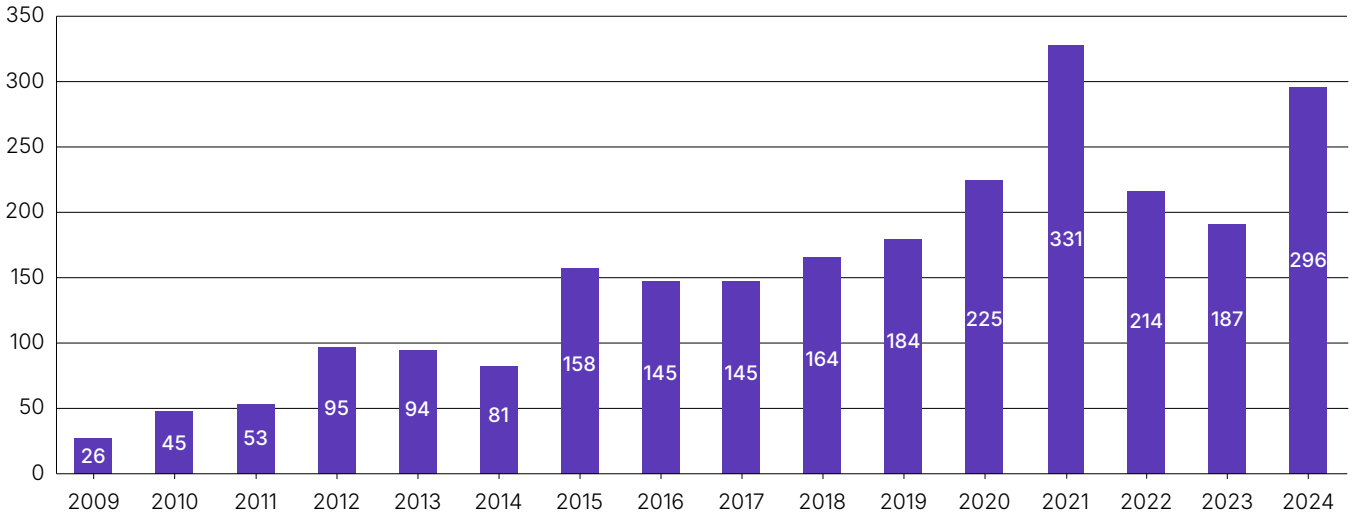
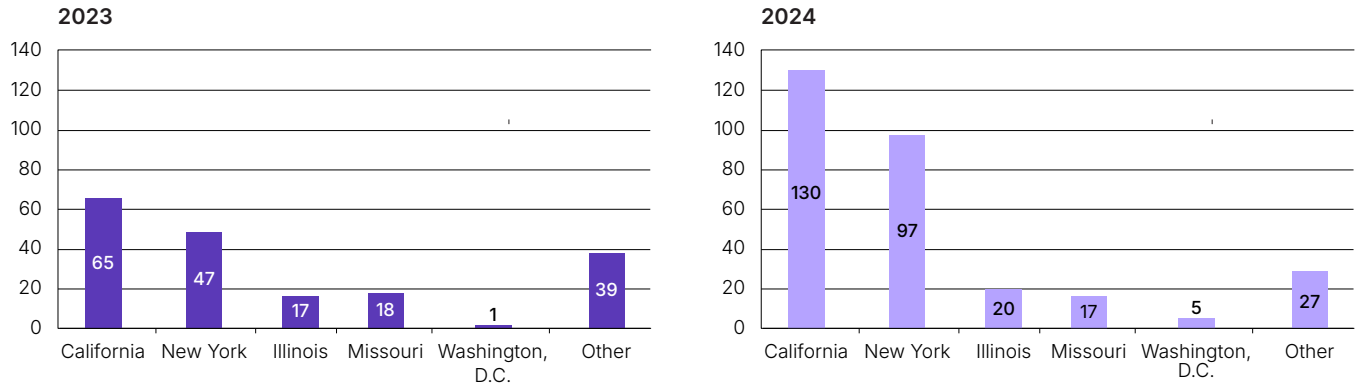


Figure 2

FOOD & BEVERAGE CLASS ACTIONS: FILINGS BY JURISDICTION



Data compiled by Perkins Coie based on a review of dockets from courts nationwide.

"Natural" Claims

In 2024, there was continued attention on "natural" or "all natural" representations.

In a New York federal court, a proposed class action complaint was filed, alleging Ritz Bits cracker sandwiches were misleading because they stated that the cracker sandwich fillings were made with real cheese, when the filling's main ingredient was whey. The challenged representation was "Cheese flavored filling with other natural flavor." See *Fischetti v. Mondelez Global LLC*, Case No. 2:24-cv-01135, U.S. District Court for the Eastern District of New York (E.D.N.Y.).

The same plaintiff's attorneys also filed another class action against Kraft Heinz for allegedly misleading consumers that its Velveeta macaroni and cheese is made with "real cheese," when the primary ingredients are purportedly non-natural or otherwise lack the essential ingredients of "real cheese." *Martin Sisca v. Kraft Heinz Food Co.*, Case No. 2:24-cv-00813, U.S. District Court for the Eastern District of New York (E.D.N.Y.).

We also saw some notable decisions come out in 2024. For example, in New York, a federal judge

denied a motion to dismiss the plaintiffs' claims that the defendants deceptively marketed their POM Wonderful 100% Pomegranate Juice drink as "All Natural," when it actually contained PFAS. *Hernandez v. Wonderful Co. LLC, No. 23-CV-1242 (ER)*, 2024 WL 4882180, (S.D.N.Y. Nov. 25, 2024). Specifically, the judge concluded that there were questions of fact as to the amount of PFAS in the product and whether the amount was substantial. The defendants argued that the plaintiffs' deception theory should be disregarded because "nothing about the challenged representations promises the absolute absence of PFAS, which are not an ingredient, and which are recognized to be ubiquitous microcontaminants in our food and environment." *Id*. at *7. The court distinguished itself from previous decisions that had granted motions to dismiss under similar circumstances, stating that those cases did not involve the presence of PFAS in products, and that in light of recent EPA authority about PFAS and the associated health risks, it could be presumed that consumers are concerned about PFAS in products. *Id*.

> A federal judge in New York denied a motion to dismiss a case against POM Wonderful, ruling that the presence of PFAS in their "All Natural" pomegranate juice could be considered deceptive, especially in light of recent EPA authority on PFAS and associated health risks.

Alternatively, the U.S. Court of Appeals for the Ninth Circuit affirmed a lower court's decision to dismiss a plaintiff's putative class action which involved allegations that the defendant falsely advertised fruit cups as "fruit naturals®," even though they contained synthetic ingredients. *Bryan v. Del Monte Foods, Inc.*, No. 23-3685, 2024 WL 4866952, (9th Cir. Nov. 22, 2024). Specifically, the Ninth Circuit concluded that the front packaging was not misleading but rather "ambiguous" because the phrase "fruit naturals" is a noun (not an adjective), the use of the registered trademark logo suggests that it's simply the product's name, and the accompanying phrase "extra light syrup" signaled to the consumer that while the "fruit itself is natural, the syrup may not be." *Id*. The court also highlighted that the product does not contain promises that the product is fully natural by making claims such as "100% natural" or "all natural." *Id*.

Origin Claims

In 2024, plaintiffs filed only a few geographic origin claims. These cases are generally highly fact- and judge-specific, and with such unpredictability, filings are continuing to slow down.

On September 27, 2024, a plaintiff filed a putative class action for violations of New York General Business Law § 349 and § 350, alleging that the marketing and labeling of defendants' Bronx brand Pasta Sauces were deceptive and misleading. *See Nancy Sarrubbo v. Zidian Manufacturing, Inc.*, 2:24-cv-06863 (E.D.N.Y.). Plaintiff asserted that the products represented themselves to have a place of origin of the Bronx, New York, but they were actually produced in Ohio. Plaintiff relied on the phrases "Little Italy in the Bronx" and "New York's Authentic Little Italy" as well as images of Arthur Avenue in the Bronx. Defendant has filed a pre-motion letter indicating it intends to fight the lawsuit primarily on reasonable consumer grounds.

We did see one ruling on a 12(b)(6) motion out of the Southern District of Florida related to place of origin. *Figueredo v. Tropicale Foods, LLC*, No. 23-CV-24177, 2024 WL 1462404 (S.D. Fla. Apr. 4, 2024). In that case, the plaintiff alleged to be deceived by the origin of defendant's "Helados Mexico" brand of paletas. Plaintiff claimed that the use of "Spanish words without English translations" and references to "paleta's Mexican roots" tricked consumers into believing the product was made in Mexico when it is, in fact, made in California. Largely relying on the unambiguous disclaimer on the back of the packaging "in all capital letters," the court found the label would not mislead a reasonable consumer and granted defendant's motion to dismiss in full. This reasoning was directly in line with a major opinion issued by the U.S. Court of Appeals for the Second Circuit last year, *Hardy v. Ole Mexican Foods, Inc.*, involving similar claims of deception related to tortillas, in which the court found the label not misleading, especially where the back of the

labels stated "Made in U.S.A." *Id.*, 2023 WL 3577867 (2d Cir. May 22, 2023).

Reasonable Consumer Defense

Recent rulings from the Second and Ninth Circuits demonstrate that courts continue to refine the prevailing reasonable consumer standard. Under the reasonable consumer test, courts may appropriately dismiss cases challenging the marketing of products where a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.

The recent rulings further emphasize the ongoing relevance and strength of the reasonable consumer defense in consumer class actions challenging purportedly misleading representations on the labeling of food and consumer packaged goods. Notably, these recent rulings reinforce the importance of the distinction between product labeling that is false or misleading and labeling with qualifying statements.

In *Venticinque v. Back to Nature Foods Company, LLC*, 2024 WL 3385136 (2d Cir. July 12, 2024), the Second Circuit concluded that the labeling of a wheat cracker product was false or misleading. Specifically, the *Venticinque* court noted that the product's labeling included the language "organic whole wheat flour" on its front panel when the product's predominant flour was not "whole wheat." Relying on its prior precedent, the Second Circuit concluded that its decision in *Mantikas v. Kellogg Co.*, 910 F.3d 633 (2d Cir. 2018) controlled the outcome of this "strikingly similar" matter. In *Mantikas*, plaintiffs-appellants alleged that the phrases "whole grain" and "made with whole grain" on the front panel of cheese cracker boxes were misleading because they deceptively implied that the grain content was predominantly or entirely whole wheat, when enriched white flour was actually the predominant flour in those products. *Mantikas* emphasized that a reasonable consumer should not be expected to consult the product's back panel to correct misleading information on the front label. Following in *Mantikas'* footsteps, the Second Circuit in *Venticinque* held that the misleading statements about organic whole wheat flour could not be clarified with reference to the product's ingredient list. In so holding, the *Venticinque* court reversed the district court's earlier dismissal of the matter.

In *Whiteside v. Kimberly Clark Corp.*, 108 F.4th 771 (9th Cir. 2024), the Ninth Circuit made a key distinction between qualified claims and those without a qualifying statement. *Whiteside* involved a challenge to a company's baby wipes being advertised as "plant-based" when the products allegedly contained one or more synthetic ingredients. Specifically, the court reviewed two sets of products: one with an asterisk and qualifying statements and a second set without this language. While both sets of products listed ingredients on their back labeling, the appellate panel reached different conclusions under the reasonable consumer standard. For the products *with* the asterisk and qualifying statement, the panel reasoned that the qualified "plant-based" language would not plausibly be misleading to a reasonable consumer because "the presence of an asterisk alone puts a consumer on notice that there are qualifications or caveats[.]" The panel concluded that these qualified claims were properly dismissed. By contrast, the panel reversed the lower court's dismissal of the unqualified language.

Whiteside builds upon the Ninth Circuit's 2023 decision in *McGinity v. Procter & Gamble Co.*, 69 F.4th 1093 (9th Cir. 2023), which reinforced the principle that the full context of a product's label should be taken into account when the product involves ambiguous language on a front label.

Microcontaminants

PFAS Cases Rise

A favorite microcontaminant of plaintiffs in 2024 was per- and polyfluoroalkyl substances (PFAS), a group of synthetic chemicals which have been used in packaging for decades. In 2022, following a rise in media attention, plaintiffs began to bring consumer class actions against food and beverage companies alleging that the presence of PFAS in their products makes the products' labels false and misleading. There continued to be a steady stream of cases filed in 2024 related to PFAS in food and beverage products. Recently, we have seen plaintiffs argue that claims of healthfulness of the product are false and misleading due to the presence of PFAS.

> A favorite microcontaminant of plaintiffs in 2024 was per- and polyfluoroalkyl substances (PFAS), a group of synthetic chemicals which have been used in packaging for decades.

For example, in *Castillo v. Prime Hydration LLC*, the plaintiff alleged that Prime Hydration sports drink "advertises healthy ingredients but instead contains harmful 'per-and polyfluoroalkyl substances'" (PFAS or "forever chemicals") "rendering various representations false and misleading." *Id.*, No. 23-CV-03885-AMO, 2024 WL 4133815 (N.D. Cal. Sept. 9, 2024). In dismissing the misrepresentation claim, the court found that no reasonable consumer would be misled by the statements on the label. The court explained that statements such as "refresh, replenish, and refuel" and "hydration drink" were vague. Moreover, nowhere on the label was any claim that the products were free from PFAS. The court also dismissed the omission claims finding the plaintiff failed to allege defendant "knew about the existence of PFAS in [the product] when it was sold." The court did, however, allow claims for breach of implied warranty of merchantability to remain.

The Start of "Microplastics" Litigation

In 2024, we began to see cases related to "microplastics" following recent focus in the media. *See e.g., Michael Daly, et al. v. Danone Waters of America, LLC*, No. 1:24-cv-02424 (N.D. Ill.); *Slowinski v. BlueTriton Brands, Inc.*, No. 1:24-cv-00513 (N.D. Ill). So far, these cases have been largely unsuccessful for plaintiffs. For example, on August 9, 2024, a court granted a motion to dismiss the plaintiff's claims that the label "100% Natural Spring Water" was misleading because the water allegedly contained microplastics. The court found that the plaintiff's claims were preempted by the federal Food, Drug and Cosmetic Act, which gave the FDA the exclusive authority to define the term "spring water" and did not require any disclosure of microplastics. Furthermore, the court found that no reasonable consumer would expect a guarantee at the molecular level or think that the presence of microscopic particles rendered the water unnatural.

Heavy Metals Cases Persist

There has been continued litigation related to heavy metals in chocolate. These cases were somewhat successful for plaintiffs in 2024. *See e.g., In re: Theo's Dark Chocolate Litig.*, 2024 WL 4336631 (N.D. Cal); *In Re Lindt & Sprungli (USA), Inc.*, *Dark Chocolate Litigation*, 1:23-cv-01186 (E.D.N.Y). For example, on September 6, 2024, a federal court in the Eastern District of New York denied a motion to dismiss in a putative class action related to heavy metals in chocolate. In this case, plaintiffs alleged to be deceived by the chocolates' labeling due to the presence of lead and cadmium. *In Re Lindt & Sprungli (USA), Inc., Dark Chocolate Litigation*, 1:23-cv-01186 (E.D.N.Y). In denying defendant's motion to dismiss, the court found plaintiffs had adequately pleaded that consumers would have demanded lower prices or not purchased the products at all had defendant adequately warned on its packaging that there was a risk of heavy metal exposure.

Serving Size Litigation

Traditional serving size cases also cooled down in 2024, with a just a handful filed. See e.g., *Landry v. Post Consumer Brands*, LLC, 2:24-cv-01661 (S.D. Ill.). In *Landry*, plaintiff alleged that the defendant misrepresented the number of servings in its Cocoa Pebbles and Fruity Pebbles cereals. Plaintiff alleged that the labels claim 15 servings per box, but actual servings are fewer due to inaccurate serving size weights.

Defendant filed a motion to dismiss on September 9, 2024. The motion is now fully briefed, awaiting a ruling.

In 2024, we started to see serving size cases related to front of the label representations regarding calorie content. Plaintiffs, in these cases, allege that the front of the label representation (such as 45 calories per cup) is misleading because the back of the label serving size is a larger quantity, tricking consumers. Plaintiffs assert that a typical consumer will consume the entire serving, not the highlighted amount. *See e.g., Legrier v. The Hershey Company*, tc241118-33 (New York County filed Nov. 18, 2024). So far, most of these cases have targeted pre-popped popcorn bags that bear front of label representations regarding the calories in a cup of popcorn.

Protein Litigation

In 2024, California plaintiffs brought several lawsuits alleging that food companies overstated the amount of protein in their products by either presenting calculations based on the wrong method, which required additional food products that were sold separately, or providing outright false information.

Like the majority of the protein-related lawsuits filed over the last several years, this year a couple were also primarily based on the federal protein labeling regulation 21 C.F.R. § 101.9(c)(7). That regulation provides that protein content may be calculated using the nitrogen method (i.e., "on the basis of the factor 6.25 times the nitrogen content of the food") and is called the "total protein" figure. A statement of the "corrected amount of protein per serving," calculated using the protein digestibility-corrected amino acid score (PDCAAS) test, is optional unless "a protein claim is made for the product." When required, this statement of the "corrected amount of protein per serving" shall be expressed in the nutrition facts panel as a percent daily value (%DV). In other words, products displaying a front-of-packet (FOP) protein claim must include a %DV for protein in the nutrition facts panel, and that %DV must be calculated using a PDCAAS test. The regulation does not, however, speak to how companies should calculate protein content for purposes of an FOP protein content claim. In fact, in 2023, the Ninth Circuit held that federal law preempted such FOP claims. *See Nacarino et al. v. Kashi Co.*, No. 22-15377 (9th Cir. Aug. 14, 2023) (explaining that FDA regulations specifically allowed food manufacturers to use the nitrogen method to measure protein both on nutrition facts panels and on label claims elsewhere on the packaging); *Brown et al. v. Kellogg Co.*, No. 22-15658 (9th Cir. Aug. 14, 2023) (same); *see also Miller v. Nature's Path Foods, Inc.*, 2024 WL 4177940 (N.D. Cal., 2024) (recognizing same).

Despite those unfavorable rulings, however, plaintiffs continue alleging that these companies violate federal regulations by, in addition to failing to provide the %DV, using a "total protein" figure (nitrogen method) for a FOP protein content claim rather than a "corrected protein" figure calculated with the PDCAAS test. *See, e.g., Myles, et al. v. A Better Brand Inc.*, No. 4:24-cv-00495 (N.D. Cal. filed January 26, 2024) (bagels, buns, and rolls); *Brown v. Baker's Breakfast Cookies Inc.*, No. 3:24-cv-05809 (N.D. Cal. filed August 23, 2024) (granola, granola clusters, and breakfast cookies).

Additionally, two other plaintiffs filed class actions alleging that dietary supplement companies overstated the amount of protein in their products because consumers were required to add separately sold milk products to the protein powder to obtain the full FOP nutritional protein values. Therefore, the actual protein content was substantially lower than the FOP protein content advertised. *See, e.g., Wong v. Iovate Health Sciences USA Inc.*, No. 2:24-at-00346 (E.D. Cal. filed March 21,

2024); *Mencia-Montes v. Fit Foods Distribution Inc.*, No. 5:24-cv-01768 (N.D. Cal. filed March 21, 2024).

Finally, one plaintiff filed a class action lawsuit against a protein bar company alleging that the protein content claims were false and overstated. *Palacios v. Built Brands LLC*, No. 3:24-cv-02234 (N.D. Cal. filed April 16, 2024). There, plaintiff hired independent, third-party laboratories that employed the "AOAC method," which follows established guidelines and protocols used in performing laboratory chemical analysis, to test the protein bars. Plaintiff found that one of the product's stated protein content was overstated by as much as 53% (e.g., 17g stated v. 8g tested).

Flavoring/Ingredient Claims

In 2024, predominant ingredient claims for food and beverage products continued to rise, particularly regarding "100% representation" claims. In fact, predominant ingredient cases are only second to preservative cases, with California being the most popular venue for plaintiffs, followed by New York and Illinois. There has also been an increase in state court filings in these jurisdictions.

Looking at 2024 trends, two are notable:

i. challenges to claims of a product being "whole grain" or containing a predominant amount of "real" butter or cheese

ii. challenges to 100% claims concerning the contents of a plastic container.

In challenging representations that theoretically imply that whole grains are the predominant grain ingredient, plaintiffs target products that highlight the presence of whole grain on the front label but are primarily made from enriched flour. Plaintiffs allege that although the whole grain representation is not false, the relative amount, compared to refined grain content, is significantly less than a consumer would expect. In addition to whole grain representations, similar predominant ingredient challenges have been made to representations related to butter and cheese. 2024 saw several cases where plaintiffs alleged that a butter representation, such as "Made with Real Butter," implied that butter was the predominant and/or exclusive fat ingredient. In other 2024 cases, plaintiffs alleged that a cheese representation, such as "Made with Real Cheese," implied the cheese flavor was exclusively from cheese. *See e.g., Natasha Jones v. Schwan's Consumer Brands Inc.*, Case No. 523357/2024 (N.Y. Sup. Ct., Kings Cty., filed Aug. 29, 2024); *Alex Garcia v. Herr Foods Incorporated*, 717693/2024 (N.Y. Sup. Ct., Queens Cty. Aug. 27, 2024). Given favorable precedent in the Second Circuit—namely *Mantikas v. Kellogg* 910 F.3d 633, 638 (2d Cir. 2018) (holding that "reasonable consumers are likely to understand that [the product is] typically made predominantly ...[of] whole grain" based on the label statement "made with whole grain")—it is unsurprising that there has been a steady, year-over-year uptick in these cases in New York. Notably, 2024 saw courts continue to rely on *Mantikas* to deny Rule 12 motions in cases with similar facts. *See e.g., Frias v. Mars Wrigley Confectionery US LLC*, No. 23-cv-4422, 2024 WL 3988667 (S.D.N.Y. Aug. 28, 2024) (denying a motion to dismiss in part, relying on *Mantikas* to find phrase "made with real cheese" deceptive).

> In addition to whole grain representations, similar predominant ingredient challenges have been made to representations related to butter and cheese.

In a similar vein, claims such as "100% juice," "100% whole," or "100% Mountain Spring Water" on plastic water bottles have been challenged as false or misleading. *See Rauchelle Leyman, et al. v. The Kroger Company*, 24-cv-01001 (S.D. Cal., filed June 7, 2024) (targeting 100% juice claim); *Cindy Pappert, et al. v. Conagra Brands Inc.*, 1:24-cv-04835 (N.D. Ill., filed June 11, 2024) (targeting "100% Whole Fish" claim); *Bruno v. BlueTriton Brands, Inc.*, No. E542085810 (L.A. Super. Ct. filed Jan. 23, 2024); *Daly v. The Wonderful Company, LLC*, No. 2024-CH-0034 (Cook Cty. Cir. Ct., filed Jan. 18, 2024) (alleging that "natural" claims on water bottled in plastic are false because microplastics are not naturally occurring).

2024 has shown, however, that there is a limit to 100% claims: they are not a guarantee of chemical purity. For example, the U.S. District Court for the Northern District of Illinois dismissed a putative class action alleging labeling of spring water with "100% Natural Spring Water" was false or misleading because the water contained microplastics. *Christine Slowinski, et al. v. BlueTriton Brands, Inc.*, No. 1:24-cv-00513 (N.D. Ill. August 9, 2024). The court concluded that no reasonable consumer would expect "100% Natural Spring Water" to be free of microscopic particles like microplastics.

Slack Fill

Toward the end of 2023, we saw a significant increase in slack fill-related cases. 2024 mirrored that trend, with a substantial increase in filings of slack fill-related cases in quarters three and four.

Under both California and federal regulation, "[a] container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack fill." Cal. Bus. & Prof. Code § 12606.2(c); 21 C.F.R. § 100.100(a). "Nonfunctional slack fill" is defined as "the empty space in a package that is filled to less than its capacity for reasons" apart from those enumerated in the statute, otherwise known as the "safe harbor provisions."

Plaintiffs continue to target a wide range of products in slack-fill lawsuits, including packaged chips, candy, and baking mixes. The case outcomes are mixed, with courts granting or denying motions to dismiss based on the specific type of product at issue. For example, in *Reyes v. Just Born, Inc.*, 729 F. Supp. 3d 971, 974 (C.D. Cal. 2024), a case involving Hot Tamales candies, the plaintiff avoided a dismissal by alleging that the Hot Tamales boxes had 40% empty space, and that the empty space was nonfunctional slack fill. *Id*. Additionally, allegations that the consumer could not see the slack fill "due to the opaque packaging," and was forced to rely on the size of the package to determine the amount of candy inside were sufficient that a reasonable consumer could be misled. *Id*.

The *Reyes* court rejected defendant's argument that no reasonable consumer could be misled by the packaging because of its inclusion of the product's net weight, number of pieces per serving, and approximate number of servings in each box. *Id*. at 977. While the court recognized that other courts have granted motions to dismiss based on similar arguments, it also highlighted that the product at issue was distinguishable. *Id*. at 976-77 (distinguishing *Buso v. ACH Food Companies, Inc.*, 445 F. Supp. 3d 1033, 1038 (S.D. Cal. 2020) (holding that "it is unreasonable for a customer to be deceived as to the amount of product contained in the cornbread mix box [where the] package discloses the product's net weight and the approximate number of servings per container.").

Additionally, from a procedural standpoint, courts continue to expect plaintiffs to plead specifically why any alleged slack fill is "nonfunctional" by addressing why none of the safe harbor provisions apply. Accordingly, courts are more likely to grant motions to dismiss where the plaintiff's allegations are conclusory and fail to allege specific facts explaining why the slack fill is nonfunctional. *See Oh v. Fresh Bellies, Inc.*, 2024 WL 4500727, at *9 (C.D. Cal. Oct. 15, 2024) (holding that simply pleading the slack fill is nonfunctional is insufficient).

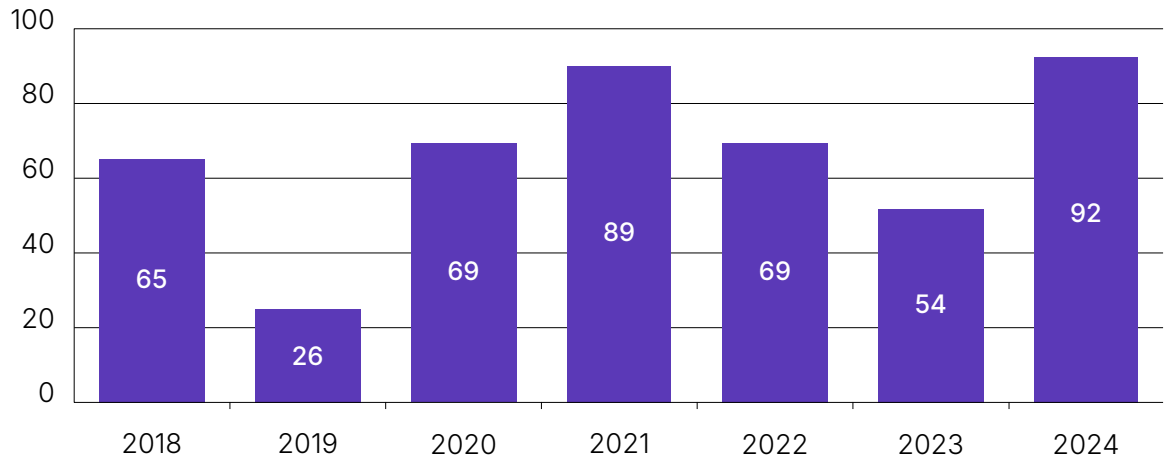
SECTION 2

Legal Trends in Environmental, Social, and Governance (ESG)

Legal Trends in Environmental, Social, and Governance (ESG)

Figure 3

ESG-RELATED CLASS ACTIONS: FILINGS BY YEAR



Data compiled by Perkins Coie based on a review of dockets from courts nationwide.

As 2024 came to a close, environmental issues remained a major legislative and litigation priority.

Environment-Related Legislation

In May 2024, **Minnesota** became the fifth state to pass an extended producer responsibility (EPR) law that encompasses packaging in its Packaging Waste and Cost Reduction Act (PRO). After the producer responsibility organization is appointed, producers must register with the PRO by July 1, 2026. The PRO stewardship plan is due on October 1, 2028. More details on the implementation of this law will likely follow in 2025.

Other states with enacted EPR laws are in the midst of rulemaking and implementation activities.

For example, in **California**, CalRecycle has been hard at work implementing portions of California's Plastic Pollution Prevention and Packaging Producer Responsibility Act (i.e., SB 54). As background, SB 54 requires that by 2032, producers that sell into California cut single-use plastic—including packaging and foodware—by 25%, recycle 65% of single-use plastic, and ensure that 100% of single-use plastic is "recyclable" (as defined in SB 343) or "compostable" (as defined in AB 1201). Regarding the "recyclable" definition, on December 31, 2024, CalRecycle released the SB 343 Material Characterization Study Revised Preliminary Findings Report. Regarding the "compostable" definition, the National Organics Standards Board's Crops Subcommittee did not recommend moving forward with the Biodegradable Products Institute petition to broaden the definition of "compost" in August 2024.

California also selected the Circular Action Alliance (CAA) as the state's sole PRO, although additional PROs may be approved starting in January 2031, and published its updated covered material categories list and source reduction baseline report.

Colorado's Producer Responsibility Program for Statewide Recycling Act establishes a producer responsibility program that focuses on producers of single- or short-term use packaging materials and paper products, including food and beverage packaging. In 2024, Colorado adopted its producer responsibility regulations and required producers to register with CAA by October 1, 2024, unless otherwise exempted.

Maine's Board of Environmental Protection voted to adopted rules in December 2024 for Maine's Stewardship Program for Packaging. Notably, Maine has defined "compostable packaging material" in a manner broader than California's "compostable" definition, further fragmenting the packaging sector.

Oregon finalized its second set of EPR regulations in November 2024 and is set to begin its EPR program implementation on July 1, 2025. In December 2024, Oregon's Department of Environmental Quality (DEQ) received the third revised program plan from CAA, the PRO for Oregon's EPR program.

Textiles

California became the first state in the U.S. to enact an EPR program for apparel and textiles. The Responsible Textile Recovery Act of 2024 (SB 707) is intended to divert postconsumer apparel and textile articles from landfills to be (1) reused, repaired, and recycled into secondary products or (2) disposed of in an environmentally safe manner. Similar to other EPR programs, producers (i.e., manufacturers, brand owners or licensees, and importers/distributors, depending on the exact scenario) of "covered products" must form and join a producer responsibility organization and abide by implementing regulations, including annual reporting of covered products that are sold, distributed for sale, imported for sale, or offered for sale in or into California.

Microplastics

In 2024, California was also active with regard to microplastics. Specifically, California enacted SB 1147, which requires California's Office of Environmental Health Hazard Assessment (OEHHA) to study the health effects of microplastics in drinking and bottled water. OEHHA is required to provide updates every two years on the toxicity characteristics, levels of microplastics that are not anticipated to cause or contribute to health effects, and identify any data gaps.

At the same time, California's Department of Toxic Substances Control (DTSC) has proposed regulations that would add microplastics as a priority chemical under the Safer Consumer Products program and included "products that contain or generate microplastics" as a product category in its 2024-2026 Priority Product Work Plan. DTSC may propose product-chemical combinations that may result in restrictions and sales bans for plastic-containing products in the future.

Other states such as New Jersey and Illinois have also passed legislation related to microplastics and nanoplastics in drinking water.

At the federal level, in July 2024, the U.S. Food and Drug Administration (FDA) published a new webpage on microplastics and nanoplastics in foods. In particular, FDA notes that there is insufficient scientific evidence regarding any migration of microplastics and nanoplastics from food packaging migrating into foods and beverages. The agency found that "current scientific evidence does not demonstrate that levels of microplastics or nanoplastics detected in food pose a risk to human health." FDA plans to monitor the research on microplastics and nanoplastics going forward.

Litigation Challenging Environmental Claims

In 2024, the CPG industry witnessed a surge in lawsuits related to environmental claims, reflecting increased scrutiny from consumers, investors, and regulators demanding greater transparency and accountability. Courts ruled on challenges made to several different environmental claims, including recyclability claims, "plant-based" claims, and "carbon-neutral" claims.

Challenges to Recyclability Claims

In recent years, we've seen a significant increase to challenges regarding product and packaging recyclability. In 2024, the Northern District of California issued a significant ruling in which the court discussed application of the FTC's Green Guides when making recyclability

claims. In *Della v. Colgate-Palmolive Co.*, No. 23-cv-04086-JCS, 2024 WL 457798 (N.D. Cal. Feb. 6, 2024). Plaintiffs challenged Colgate and Tom's of Maine toothpaste labeled with claims like "Recyclable Tube," "First of Its Kind Recyclable Tube," and the "chasing arrows recycling symbol." Plaintiffs alleged these claims were false and misleading because, while the tubes may be technically recyclable, virtually all municipal recycling programs and materials recovery facilities in the United States reject the products.

The court relied heavily on the FTC's Green Guides, which state that "[i]t is deceptive to misrepresent, directly or by implication, that a product or package is recyclable." 16 U.S.C. § 260.12(a). Specifically, "[a] product or package should not be marketed as recyclable unless it can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item." *Id*. Under the Green Guides, "marketers can make unqualified recyclable claims" only "[w]hen recycling facilities are available to a substantial majority of consumers or communities where the item is sold." 16 U.S.C. § 260.12(b)(1).

Analyzing the case under the reasonable consumer standard, the court found that a reasonable consumer would not expect that the products would not be accepted for recycling by any existing recycling program. Consequently, the court denied the defendant's motion to dismiss, acknowledging the potential for consumer confusion.

Challenges to "Plant-Based" Claims

In *Whiteside v. Kimberly Clark Corp.*, 108 F.4th 771, 2024 WL 3435308 (9th Cir. July 17, 2024), the Ninth Circuit partially vacated the district court's dismissal of a class action against Kimberly-Clark that alleged deceptive labeling of "plant-based wipes" containing synthetic ingredients. The plaintiff claimed that the words "plant-based wipes" and "natural care®" on the front label, together with nature-themed imagery on the packaging, suggested that the baby wipes contained only natural ingredients with no chemical modifications or processing, while the wipes actually contained synthetic ingredients.

The appellate panel found that claims without an asterisk and qualifying statements on the label could mislead a reasonable consumer. In other words, the panel concluded a reasonable consumer could interpret the front label as unambiguously representing that the products do not contain synthetic ingredients. The panel reversed the dismissal for these claims. However, the panel upheld the dismissal for claims with qualifying statements, as they were not deemed misleading in context.

Challenges to "Carbon-Neutral" Claims

In *Stephanie Dorris, et al. v. Danone Waters of America*, No. 22-CV-8717 (S.D.N.Y. Nov. 14, 2024), the Southern District of New York dismissed without prejudice a putative class action in which plaintiffs alleged that defendant engaged in "greenwashing" by deceptively labeling and marketing its "Evian Natural Spring" bottled water as "carbon-neutral" leading consumers to believe defendant doesn't produce any carbon dioxide emissions.

In January, the court dismissed the New York GBL §§ 349-350 and breach of implied warranty claims; however, other claims survived with the court finding a reasonable consumer could easily interpret "carbon-neutral" to mean "zero-emissions" due to varied meanings of the term held by the public, and further concluded the term was ambiguous.

In reviewing defendant's motion for reconsideration, the court concluded that the products' back label has the "Carbon Trust" logo, a third-party agency that certifies if a company or product is carbon-neutral, as well as provided a link to defendant's website for consumers to learn more about the "Carbon Trust" certification process. The court reserved its earlier decision and dismissed the remaining state law and common law claims, noting "these sorts of disclosures mitigate concerns of consumers being misled at the point of sale."

SECTION 3

Regulatory Developments Affecting the CPG Industry

Regulatory Developments Affecting the CPG Industry

FDA, USDA, and State Food Regulatory Developments

In 2024, the U.S. Food and Drug Administration (FDA), the U.S. Department of Agriculture (USDA), and various state agencies introduced several regulatory developments that impacted the CPG industry. These changes ranged from food labeling updates to new guidelines on dietary supplements and food additives and reflect a concerted effort to enhance food safety, transparency, and public health.

FDA reorganization established the Human Foods Program (HFP). On October 1, 2024, FDA officially implemented its reorganization into the newly created HFP, following the 2022 findings and recommendations of a Reagan-Udall Foundation expert panel. Since then, the HFP has published its list of priority deliverables for Fiscal Year 2025, including working towards the implementation of the FDA Food Traceability Final Rule, updating the agency's assessment framework for a systematic approach for post-market assessments of chemicals in food, continuing to advance work under Closer to Zero, and issuing a proposed rule on a mandatory front-of-package nutrition labeling scheme, among others.

FDA continued to revise its draft guidance on Hazard Analysis and Risk-Based Preventive Controls (HARPC) for Human Food. Stemming from the Food Safety Modernization Act (FSMA), FDA's HARPC requirements are codified at 21 C.F.R. Part 117, Subpart C. To facilitate compliance with these requirements, FDA first released draft chapters of its HARPC Draft Guidance beginning in 2016, ultimately targeting to include 16 chapters as listed in its Table of Contents. In January 2024, FDA revised the draft Introduction, as well as draft Appendix 1 ("Known or Reasonably Foreseeable Hazards (Potential Hazards)"). In its "Foods Program Guidance Under Development," FDA notes that it is working on food traceability rule Q&As and draft guidances for Chapters 9 ("Validation of Process Controls"), 12 ("Preventive Controls for Chemical Hazards"), and 17 ("Classifying Food as Ready-To-Eat or Not Ready- to-Eat").

FDA published final rule on "healthy." In December 2024, FDA published a final rule updating the criteria

regarding when foods may be labeled with the nutrient content claim "healthy" and derivatives thereof—"health," "healthful," "healthfully," "healthfulness," "healthier," "healthiest," "healthily," and "healthiness." The final rule represents the first update to the definition of "healthy" in 30 years and was drafted to reflect current nutrition science and federal nutrition guidelines. It remains to be seen whether this rule withstands the change in Administration.

FDA outlined a process for post-market assessment of chemicals in food. In September 2024, FDA held a public meeting to discuss the agency's proposed enhanced systematic process for post-market assessment of chemicals in food, including food additives, color additives, generally recognized as safe substances, substances used in contact with food, and chemicals present as unintentional contaminants.

FDA issued draft guidance on new voluntary targets for sodium reduction in food. Published in August 2024, the Draft Guidance sets nonbinding recommendations for sodium content in commercially processed, packaged, and prepared foods. The guidance is intended to reduce sodium intake in the American diet and builds upon FDA's October 2021 Final Guidance on Voluntary Sodium Reduction Goals. The August 2024 Draft Guidance proposes additional sodium reduction targets for 16 food categories and 163 subcategories across three years.

FDA announced updates to its animal food ingredient oversight. FDA's Center for Veterinary Medicine announced the expiration of its longstanding Memorandum of Understanding (MOU) with the Association of American Feed Control Officials (AAFCO), effective October 1, 2024. This MOU—which has been in place for nearly two decades—heralds a significant shift in oversight for animal food ingredients. FDA has released documents regarding the transition period after the expiration of the MOU. More specifically, the agency released draft guidances on FDA Enforcement Policy for AAFCO-Defined Animal Feed Ingredients and Animal Food Ingredient Consultation, along with a Request for Comments on its pre-market animal food ingredient review programs.

FDA issued new guidance documents regarding dietary supplements. In March 2024, FDA issued final guidance regarding New Dietary Ingredient Notifications (NDINs), explaining, among other things, who should submit the NDIN as well as the information it should and should not contain. Subsequently, in April 2024, FDA issued draft guidance about NDIN Master Files that are used to facilitate the submission of identity, manufacturing, and/or safety information regarding a New Dietary Ingredient (NDI). These guidances reinforce FDA's continued interest in evaluating the safety of NDIs and dietary supplements more broadly.

USDA updated its Guideline on Substantiating Animal-Raising or Environment-Related Labeling Claims. Released in August 2024, this nonbinding, updated Guideline strongly encourages the use of third-party certification and more robust documentation to substantiate animal-raising and environment-related claims. USDA's Food Safety and Inspection Service (FSIS) notes in the updated Guideline that the agency has the authority to collect meat and poultry samples "any time it believes a product is mislabeled with any claim covered by the guidance" and points out that "FSIS may consider future additional actions, including random sampling and rulemaking, to further strengthen the substantiation of animal-raising and environment-related claims."

USDA issued a final rule on voluntary "Product of USA" claims. On March 18, 2024, FSIS finalized a rule on Voluntary Labeling of FSIS-Regulated Products with U.S.-Origin Claims. The final rule clarifies USDA's standards to substantiate a "Made in the USA" claim for FSIS-regulated products and imposes new recordkeeping requirements to support the substantiation of these claims.

USDA published a Request for Information soliciting stakeholder input on the electronic or digital link disclosure option for bioengineered foods. This followed a federal district court's decision to invalidate the USDA regulation that allowed bioengineered food disclosures to be made via text message. The court ordered the USDA to reconsider the text message disclosure option and remanded the regulations without vacating the current regulations. The Request for Information sought feedback on several questions, including what challenges exist for consumers accessing information by electronic disclosure, consumer smartphone ownership, and the cycle for updating retail product labels.

Food date labeling. California enacted a mandatory food date labeling law (AB 660), which will go into effect on July 1, 2026. The law requires "food items for human consumption" in California to have specific quality date and safety date labels and expressly prohibits the use of the term "sell by" for food items for human consumption manufactured on or after July 1, 2026. FDA and USDA have since issued a joint Request for Information seeking stakeholder input related to standardizing food date labeling. Specifically, these federal agencies are seeking information on current industry practices and preferences, research results on consumer perception of

food date labeling, and any impact date labels may have on food waste.

Food additive bans. California's AB 2316 prohibits public schools (grades K-12) in California from offering, selling, or otherwise providing any food, outside of school fundraising events, that contains the following substances: (1) Blue 1 (CAS 3844-45-9); (2) Blue 2 (CAS 860-22-0); (3) Green 3 (CAS 2353-45-9); (4) Red 40 (CAS 25956-17-6); (5) Yellow 5 (CAS 1934-21-0); and (6) Yellow 6 (CAS 2783-94-0). This law will go into effect on December 31, 2027. This ban follows the California Food Safety Act, enacted in 2023, that banned the use of brominated vegetable oil, potassium bromate, propylparaben, and red dye no. 3. Other states, such as New York, Illinois, and Pennsylvania, have proposed similar food additive bans in 2024, but these efforts stalled in the respective state legislatures.

Cultivated meat products. In May 2024, state legislatures in Florida and Alabama enacted prohibitions on the manufacture, sale, or distribution of food products made from cultured animal cells. There is ongoing litigation that challenges Florida's cultivated meat ban on constitutional grounds that bears monitoring. *See Upside Foods, Inc. v. Simpson*, No. 4:24cv316-MW/MAF (N.D. Fla.), filed August 4, 2024. In August 2024, Nebraska Governor Jim Pillen issued an executive order that banned Nebraska agencies from procuring "Lab-Grown Meat" and requires state contractors to attest that they "will not discriminate against natural-meat producers in favor of laboratory or cultivated-meat producers." Governor Pillen has also signaled that he is interested in banning the sale of "Lab-Grown Meat" through legislative action in 2025.

PFAS. In February 2024, FDA announced that grease-proofing substances containing PFAS are no longer being sold. Separately, FDA updated the agency's list of chemicals under review, which includes PFAS. States also continued to focus on PFAS in food packaging. New Hampshire passed legislation (HB 1649) banning food packaging and other products that contain intentionally added PFAS. Rhode Island, on the other hand, delayed the implementation date of its food packaging PFAS ban to January 1, 2025, with the ban on intentionally added PFAS processing aids being delayed to July 1, 2027. Meanwhile, California passed legislation (AB 347) requiring California's Department of Toxic Substances Control to enforce its existing PFAS bans by requiring manufacturer registration and testing.

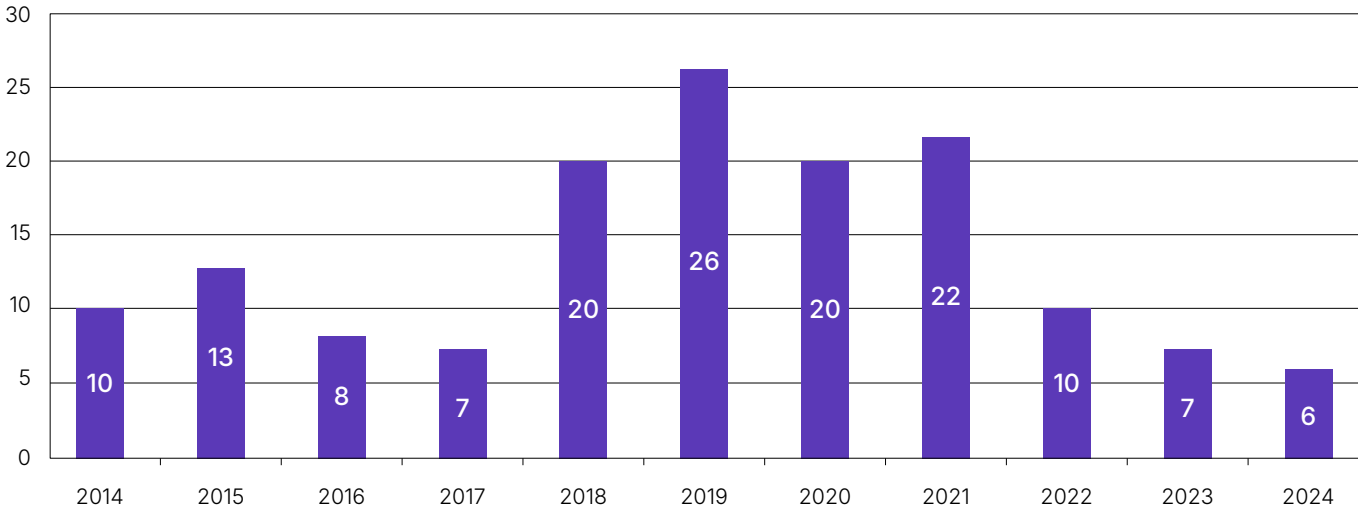
SECTION 4

Legal Trends in Pet Food

Legal Trends in Pet Food

Figure 4

PET FOOD CLASS ACTIONS: FILINGS BY YEAR



Data compiled by Perkins Coie based on a review of dockets from courts nationwide.

Regulatory and litigation activity regarding pet food products continued in 2024.

In terms of pet food regulation, the U.S. Food and Drug Administration (FDA) Center for Veterinary Medicine announced that the Memorandum of Understanding (MOU) between FDA and Association of American Feed Control Officials (AAFCO) was ending. This long-standing MOU expired on October 1, 2024. With that MOU ending, the FDA released two draft guidances on August 8, 2024, along with a Request for Comments on its pre-market animal food ingredient review programs.

The two draft guidances are: (1) FDA Enforcement for AAFCO-Defined Animal Feed Ingredients (GFI #293) and (2) Animal Food Ingredient Consultation (AFIC) (GFI #294). The agency's related request for comments seeks stakeholder feedback on questions specific to the agency's food additive petition and generally recognized as safe notification programs in an effort to help the agency determine what changes, if any, may be needed to facilitate an improved path to market for new animal food ingredients.

Pet Food Litigation

Several new pet food class action cases were filed in 2024. These trends in food and CPG litigation more generally have seen applications to pet food products.

- **Natural and "Real" Ingredients.** Pet food manufacturers have been targeted for challenges to "natural" marketing and labeling. These cases generally allege that products are misrepresented as "natural" when they actually contain synthetic ingredients. For example, a recent filing in the U.S. District Court for the Eastern District of New York alleged that a product marketed as "natural" contained the purportedly synthetic ingredients xanthan gum, thiamine mononitrate, pyridoxine hydrochloride, and menadione sodium bisulfite complex. *Herter v. Merrick Pet Care, Inc.*, No. 1:24-cv-8212 (E.D.N.Y., filed Nov. 26, 2024). In a similar vein, another plaintiff in a New York federal case challenged the labeling and marketing of "Pup-Peroni" dog snacks as containing "real beef" when the products contained "feed grade beef."

Zimmerman v. Big Hear Pet Brands, No. 1:24-cv-8212 (E.D.N.Y., filed Nov. 26, 2024). Both of these cases were voluntarily dismissed, presumably due to settlement.

- **Food Safety.** Pet food products were also subject to litigation over food safety concerns. In 2023, FDA investigated cases of *Salmonella* associated with pet food manufactured by Mid America Pet Food. The foodborne illness incident prompted multiple class action lawsuits in late December 2023 for failure to disclose that the products contained *Salmonella*. *See, e.g., Jackson v. Mid America Pet Food, LLC*, No. 5:23-cv-153 (E.D. Tx., filed Dec. 29, 2023); *Filardi v. Mid America Pet Food, LLC*, No. 7:23-cv-11170 (S.D.N.Y., filed Dec. 22, 2023). These cases were consolidated and are currently pending preliminary approval for class settlement.

In terms of notable rulings, the U.S. District Court for the Northern District of California denied class certification in *Moore v. Mars Petcare US, Inc.*, No. 16-CV-07001-MMC, 2024 WL 4336602 (N.D. Cal. Sept. 27, 2024). *Moore* alleged that the availability of certain pet foods via a veterinarian only prompted consumers to believe that the food was "approved by the FDA, has been subject to government inspection and testing, and has medicinal and drug properties that legally require a prescription for sale." *Id*. at *1. The court denied class certification, reasoning that plaintiffs had failed to show that common questions predominate as to the central issue of whether individual consumers were deceived. The court noted that "what one veterinarian conveys to a pet owner who buys prescription pet food may be markedly different from what is conveyed to another," defeating plaintiffs' predominance arguments.

A sister court in the Northern District of California also denied class certification in the *Flodin v. Cent. Garden & Pet Co.*, No. 21-CV-01631-JST, 2024 WL 4565340, at *1 (N.D. Cal. Oct. 23, 2024). Plaintiffs in *Flodin* alleged that pet food products were misleadingly represented as containing avocados when they did not contain material amounts of avocados. The court denied class certification and concluded that plaintiffs' damages model was inadequate. Specifically, the damages model analyzed whether a product was "made with avocado," not the quantity of avocado that might be material to a reasonable consumer. *Id*. at *8.

SECTION 5

Legal Trends in Supplments

Legal Trends in Supplements

In 2024 we saw several decisions issued, including decisions from the U.S. Court of Appeals for the Second and Ninth Circuits, related to consumer deception involving supplements and a Supreme Court of the United States denial of a petition for review of a First Circuit decision. We highlight them below.

Figure 5

DIETARY SUPPLEMENT CLASS ACTIONS: FILINGS BY JURISDICTION

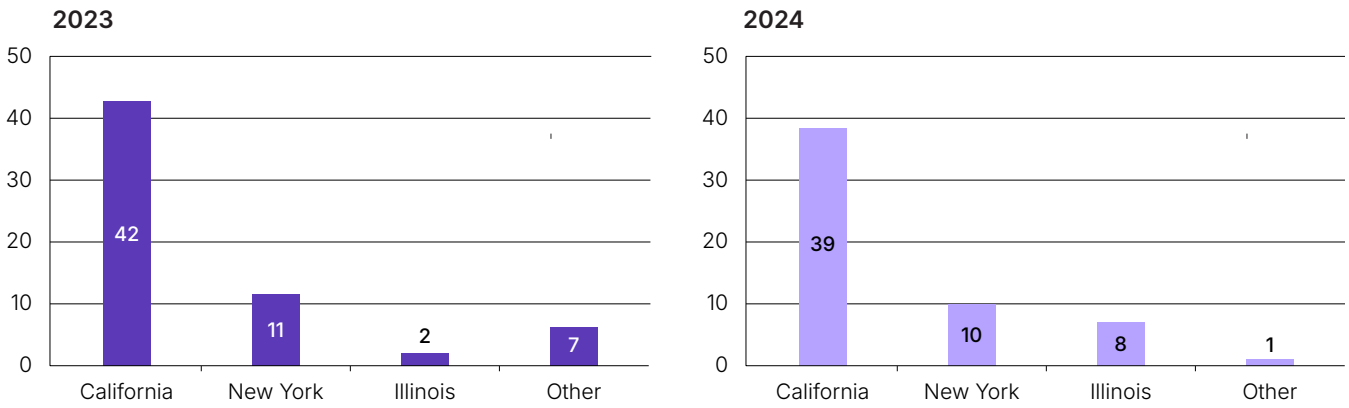
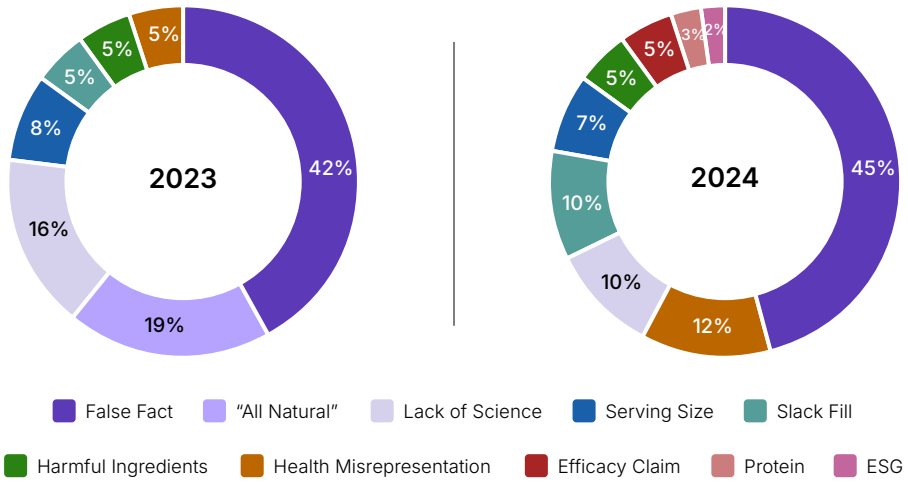


Figure 6

INDUSTRY FILINGS AND TRENDS: CATEGORIES



Data compiled by Perkins Coie based on a review of dockets from courts nationwide.

The year of 2024 saw many cases targeting dietary supplements. In April 2024, the Supreme Court denied a plaintiff's petition for review of the First Circuit's dismissal of a proposed class action. The plaintiff alleged that the defendant misleadingly labeled their Lactaid dietary supplement as a treatment for lactose intolerance in violation of federal requirements for dietary supplement labeling. The First Circuit had held that the claims were preempted by the U.S. Food and Drug Administration due to their authority to enforce the Food, Drug and Cosmetic Act (FDCA). *DiCroce v. McNeil Nutritionals, LLC*, 82 F.4th 35, 41 (1st Cir. 2023), cert. denied, 144 S. Ct. 1382, 218 L. Ed. 2d 443 (2024). The First Circuit also held that the plaintiff's state law claims were preempted because they relied on the theory that the products violated the FDCA. *Id.*

The Second Circuit recently affirmed a lower court's dismissal of claims that a glucosamine product's marketing was false or misleading. *Jackson-Mau v. Walgreen Co.*, 115 F.4th 121 (2d Cir. 2024). In *Jackson-Mau*, the plaintiff alleged that a glucosamine supplement was mislabeled because the description stated it contained "glucosamine sulfate" and "glucosamine sulfate potassium chloride," which signaled to the plaintiff that the product contained "single-crystal" glucosamine when it actually contained "blended" glucosamine. *Id*. at 123-24. However, dismissal was proper because the plaintiff's claims were preempted by the FDCA. *Id*. at 131. Specifically, the plaintiff was attempting to apply a different naming standard than what was required by the FDCA. *Id*. at 131-32. While a supplement manufacturer must state the names of the dietary ingredients on the Supplement Facts panel, ingredients like glucosamine—which do not have an established daily reference value—can be stated by their "common or usual" name. *Id*. at 132. Thus, the plaintiff's allegation that the product should be labeled "glucosamine hydrochloride and potassium sulfate," went beyond what the FDCA requires.

In *Prescott v. TC Heartland, LLC*, No. 23-CV-04192-PCP, 2024 WL 3463826 (N.D. Cal. July 18, 2024), the plaintiffs alleged that the defendant's Splenda products' statement that they provide "diabetes care," "help manage blood sugar," are the "#1 recommended brand by doctors and dietitians," and are "suitable for people with diabetes" were false or misleading because numerous scientific studies have allegedly demonstrated that the primary ingredient in Splenda (sucralose) is harmful to people with diabetes. The *Prescott* court rejected the defendant's argument that the claim should be dismissed because the plaintiffs failed to plausibly allege that sucralose was unsafe. In so holding, the court emphasized that the plaintiffs were only required to "plausibly allege" that the labels could "mislead reasonable consumers with diabetes to believe that sucralose would improve their conditions." *Id*. at *5.

In making this ruling, the *Prescott* court appears to differentiate itself from *Amado v. The Procter & Gamble Company*, No. 22-cv-05427-MMC, 2023 WL 3898984 (N.D. Cal. June 8, 2023). In *Amado*, the plaintiff alleged that Metamucil's label was misleading because it mentioned the benefits of dietary fiber when the added sugar in the product negated any benefits of the fiber. The court determined that the claims were preempted because they were valid structure/function claims. Specifically, the *Amado* court held that the challenged statements ("4-in-1 Fiber Helps Support: Appetite Control[;] Heart Health by Lowering Cholesterol[;] Healthy Blood Sugar Levels[;] and Digestive Health") were "'limited in scope and tone,'" and "'[made] no promises about the supplement's actual efficacy in the product," or "the product's impact on a person's health." *Id*. at *4, *5 (citation omitted).

SECTION 6

Legal Trends in Personal Care Products

Legal Trends in Personal Care Products

2024 witnessed significant developments in the beauty industry driven by evolving regulations, consumer demands, and legal challenges.

Federal Regulations

The Modernization of Cosmetics Regulation Act (MoCRA), signed into law in December 2022, aims to significantly enhance the safety and oversight of the U.S. cosmetics industry. Several of MoCRA's key provisions were put into place as of December 2023, including adverse events and serious adverse event reporting requirements, cosmetic safety substantiation, professional use labeling requirements, and the FDA authority to issue mandatory recalls and access records. In 2024, the following key milestones were reached in MoCRA's implementation:

- **Facility Registration Deadline:** All cosmetic manufacturers and processors were required to register their facilities with the FDA by July 1, 2024. This crucial step allows the FDA to build a comprehensive database of industry players, facilitating better tracking and oversight.
- **Product Listings Submitted:** Cosmetic companies were required to submit product listings to the FDA with ongoing updates mandated annually.
- **Updated Guidance Regarding Registration and Listing of Cosmetic Product Facilities and Products:** FDA issued updated guidance entitled Guidance for Industry: Registration and Listing of Cosmetic Product Facilities and Products in December 2024. The updated guidance finalized frequently asked questions and answers, including adding three new FAQ, which are marked "for comment purposes only" to provide an opportunity for comment before they are finalized.
- **Testing Methods for Detecting and Identifying Asbestos in Talc-Containing Cosmetic Products:** On December 27, 2024, the FDA published a proposed rule to require manufacturers to (1) test talc-containing cosmetic products or any talc ingredient used for the presence of asbestos and (2) maintain certain records regarding this testing. Comments are due to the agency by March 27, 2025.
- **Contact Information on Labels:** By December 29, 2024, cosmetic brand owners are required to include the contact information of the responsible person (i.e., the manufacturer, packer, or distributor) on all new product labels for reporting adverse events.

The industry awaits the implementation of the following provisions of MoCRA:

- **Fragrance Allergen Labeling:** While the FDA was mandated to propose a rule for fragrance allergen labeling by June 29, 2024, the draft rulemaking has been delayed. The industry eagerly awaits clarity on this crucial aspect of MoCRA.
- **Assessment of Per- and Polyfluoroalkyl Substances (PFAS):** The FDA will assess the use of PFAS in cosmetic products and evaluate the scientific evidence regarding their safety. This assessment will inform potential regulatory actions to address any concerns related to PFAS exposure.
- **Proposed Good Manufacturing Practices (GMP) Rules:** The FDA will publish proposed GMP rules to establish standards for the manufacturing, processing, packing, and holding of cosmetic products. These rules will help ensure that cosmetics are produced in a safe and sanitary manner.

It remains to be seen what will come of MoCRA under the Trump administration. There has been concern that cuts to the FDA (either in budget or personnel) could lead to delays or setbacks in the implementation of the Act. However, there is strong bipartisan consensus that the reforms are necessary.

State Regulations

While the federal government oversees the cosmetics industry through the FDA, individual states have also enacted their own regulations. This patchwork of state laws creates a complex landscape for cosmetic manufacturers and retailers.

California has been at the forefront of regulating substances in cosmetics. In 2025, several significant laws take effect, including:

- **Toxic-Free Cosmetics Act of 2020:** This law effectuates a statewide ban of 24 chemicals from personal care products. California's act prohibits the manufacture, sale, delivery, holding, or offering for sale in commerce of any cosmetic product intentionally containing any of the following ingredients: (1) dibutyl phthalate; (2) diethylhexyl phthalate; (3) formaldehyde; (4) paraformaldehyde; (5) methylene glycol; (6) quaternium-15; (7) mercury; (8) isobutylparaben; (9) isopropylparaben; (10) m-Phenylenediamine and its salts; (11) o-Phenylenediamine and its salts; and (12) more than a dozen specific PFAS and their salts. Notably, California was the first state to put a statewide ban on these chemicals, all of which are banned in the European Union. Most of the ingredients are already on California's Proposition 65 list of chemicals.
- **PFAS-Free Beauty Act of 2022:** This act prohibits the sale of cosmetics containing PFAS, often referred to as "forever chemicals."

Fragrance Allergen Reporting

California continues to require cosmetic companies to disclose the presence of certain fragrance allergens to the California Department of Public Health (CDPH). The California Safe Cosmetics Act of 2005 and the Cosmetics Fragrance & Flavor Ingredient Right to Know Act of 2020 outline these reporting requirements. The Reportable Ingredient List (Excel), compiled by CDPH, specifies which ingredients must be disclosed. This reporting requirement aligns with the European Union's list of fragrance allergens. Manufacturers must report listed allergens to the CDPH no later than the timelines required under the Eropean Union law, *i.e.,* 2026 or 2028; however, manufacturers may report at any time prior to the deadlines.

The industry is also grappling with compliance with Washington State's Toxic-Free Cosmetic Act (TFCA), which took effect on January 1, 2025. Washington's TFCA sets forth stringent standards for companies operating within the state, aiming to eliminate the use of toxic ingredients in cosmetics and personal care products. Pursuant to the TFCA, beginning January 1, 2025, no person may manufacture, knowingly sell, offer for sale, distribute for sale, or distribute for use in the state any cosmetic product that contains any of the following intentionally added chemicals or chemical classes: ortho-phthalates; perfluoroalkyl and polyfluoroalkyl substances (PFAS); formaldehyde (CAS 50-00-0) and chemicals determined by the Washington State Department of Ecology (Ecology) to release formaldehyde; methylene glycol (CAS 463-57-0); mercury and mercury compounds (CAS 7439-97-6); triclosan (CAS 3380-34-5); m-phenylenediamine and its salts (CAS 108-45-2); and o-phenylenediamine and its salts (CAS 95-54-5). Additionally, under the Act, beginning January 1, 2025, no person may manufacture, knowingly sell, offer for sale, distribute for sale, or distribute for use in Washington state any cosmetic product that contains intentionally added lead or lead compounds (CAS 7439-92-1), lead or lead compounds at one part per million (ppm) or above, or as otherwise determined by Washington's Department of Ecology through rulemaking.

Recognizing that the 1 ppm lead limit is not feasible for most color cosmetics, on December 19, 2024, Washington's Department of Ecology issued an Interim Policy on Lead in Cosmetics. This policy advised that after meeting with many cosmetic manufacturers, the Department of Ecology learned that a strict 1 ppm limit can be difficult, if not impossible, to achieve in some products. The interim policy provides manufacturers with alternative paths to compliance for cosmetic products that are unable to achieve lead concentrations below 1 ppm, while still requiring manufacturers to work toward the lowest levels possible in products. In 2025, the Department of Ecology anticipates launching a formal rulemaking process to address lead impurities in cosmetics, which will include opportunities for public input.

Regulatory Challenges for the Industry in 2025

Cosmetic companies in 2025 face a dynamic and complex regulatory landscape. Increased scrutiny of ingredients, particularly those with potential health or environmental concerns, such as PFAS, parabens, and phthalates, is a major focus for regulatory bodies. Furthermore, navigating the complexities of global regulatory differences presents significant hurdles.

Finally, the growing emphasis on sustainability and environmental impact requires companies to demonstrate compliance with environmental regulations and address concerns related to packaging waste, carbon emissions, and the sourcing of sustainable ingredients. Companies must also ensure full compliance with MoCRA, which introduces new requirements for safety reporting, adverse event reporting, and cosmetic product registration. Navigating these challenges requires a proactive and adaptable approach, including robust regulatory compliance programs, continuous monitoring of regulatory developments, and proactive engagement with regulatory authorities.

Personal Care Product Litigation Trends in 2024

2024 witnessed a significant rise in class action lawsuits targeting cosmetic companies, with several key trends continuing from previous years:

Figure 7

PERSONAL CARE CLASS ACTIONS: FILINGS BY JURISDICTION

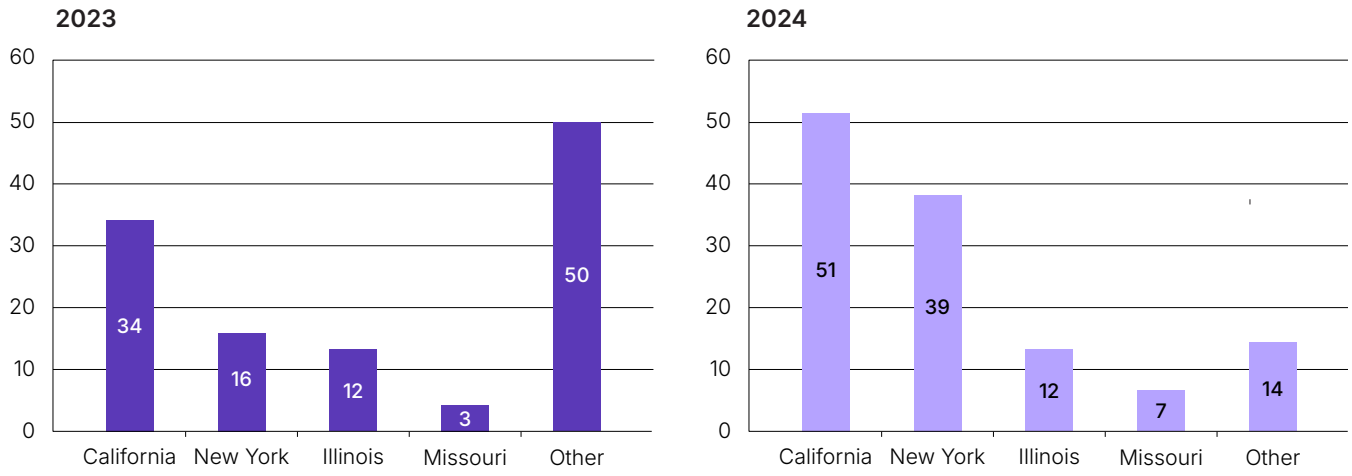
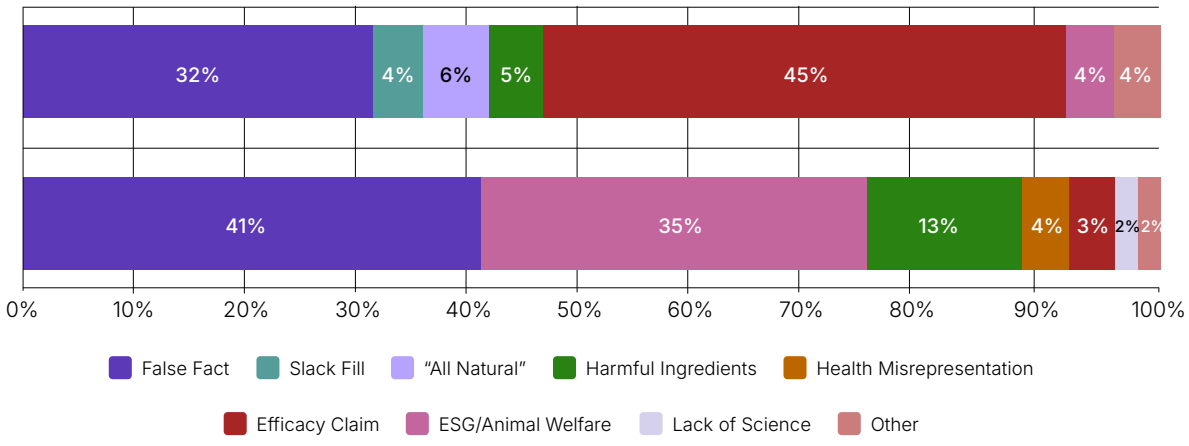


Figure 8

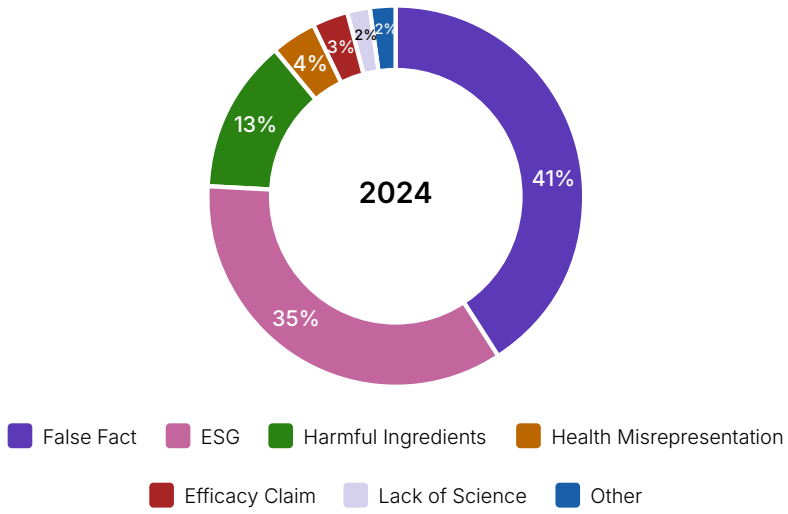
INDUSTRY FILINGS AND TRENDS: CATEGORIES



Data compiled by Perkins Coie based on a review of dockets from courts nationwide.

Figure 9

PERSONAL CARE CLASS ACTIONS: FILINGS BY TYPE



Data compiled by Perkins Coie based on a review of dockets from courts nationwide.

The Attack on "Clean" Beauty Claims

- ***Finster v. Sephora*:** The United States District Court for the Northern District of New York dismissed a class-action lawsuit against Sephora, finding that the company's "Clean at Sephora" program did not materially mislead consumers. The court determined that while the term "clean" lacks a universally defined standard within the beauty industry, Sephora's marketing explicitly listed specific excluded ingredients, thereby distinguishing its "Clean" products without falsely suggesting complete freedom from all synthetic or potentially harmful substances. This ruling establishes a precedent for the use of "clean" beauty claims, emphasizing the necessity of clear and non-deceptive marketing practices. *See Finster v. Sephora USA, Inc.*, No. 22-cv-1187 (N.D.N.Y. Mar. 15, 2024).

- ***Boyd v. Target Corp.*:** Conversely, the U.S. District Court for the District of Minnesota denied Target's motion to dismiss a class action challenging its "Target Clean" products. Here, plaintiffs alleged that Target's marketing and labeling for its "Target Clean" products were deceptive, claiming that the products contained ingredients they were purportedly free from, as well as other harmful substances. The District of Minnesota denied Target's motion to dismiss, finding that factual disputes remained regarding whether a reasonable consumer could be misled by the "clean" claims. The court concluded that " [t]he reasonableness of Plaintiffs' expectations remains up for strenuous debate." *Pearlie Boyd, et al. v. Target Corp.*, No. 0:23-cv-02668-KMM-DJF (D. Minn. September 25, 2024).

The mixed outcomes in these cases highlight the complexities surrounding "clean" beauty claims. Marketers should exercise caution and ensure transparency in their product labeling to avoid potential legal challenges.

The Importance of Qualifying Claims

The *Whiteside v. Kimberly-Clark* case highlights the significance of clear labeling and qualifying statements to avoid misleading consumers about "plant-based" claims. The U.S. Court of Appeals for the Ninth Circuit partially vacated the district court's dismissal of a class action against Kimberly-Clark, which alleged deceptive labeling of "plant-based wipes" that contain synthetic ingredients. The appellate panel found that products without an

asterisk and qualifying statements could mislead a reasonable consumer, reversing the dismissal for these products. However, it upheld the dismissal for products with qualifying statements, as they were not deemed misleading in context. *Whiteside v. Kimberly Clark Corp.*, No. 23-55581 (July 17, 2024).

PFAS Litigation Continues

Lawsuits alleging the presence of PFAS in cosmetics continue to rise. For instance, the plaintiff brought a putative class action in the Los Angeles County Superior Court alleging that the marketing and labeling of a cosmetics company's skincare and cosmetics products, including certain eye shadows, is deceptive and misleading because of representations that the products are suitable for sensitive eyes and have a positive impact on the world. Plaintiff claims that testing has revealed that the products contain PFAS, a category of synthetic chemicals considered to be potentially harmful to health and persistent in the environment.

Additionally, in *Brown v. Covergirl Cosmetics*, the U.S. District Court for the Southern District of New York dismissed a putative class action in which plaintiff alleged that the marketing and labeling of defendants' CoverGirl brand waterproof mascara cosmetics products are deceptive and misleading because the products are not fit for their intended purpose because they allegedly contain PFAS. The court concluded that plaintiff failed to adequately allege that they suffered an injury in fact, reasoning that the plaintiff failed to show adequate detail as to their claims of deception as the plaintiff had not specified which PFAS were allegedly in the mascara and in what quantities.

Sunscreen Scrutiny

Sunscreens continued to face lawsuits challenging "reef-friendly" claims when ingredients included chemicals that are purportedly harmful to coral reefs. Spencer Sheehen filed suit against several major companies in New York in which plaintiffs alleged that the marketing and advertising of sunscreens as "reef-friendly," "reef-conscious formula" are deceptive and misleading because the sunscreens contain chemical ingredients including avobenzone, homosalate, octisalate, and octocrylene, which may cause harm to coral reefs. In addition to reef-friendly challenges, sunscreens were also challenged in putative class action lawsuits for claims such as "waterproof," "sweatproof," and blocks "all UV rays" despite contact with water and sweat. In one case, plaintiffs claim that all sunscreens wash off in the water, and thus there is no such thing as "waterproof" sunscreen and that no sunscreen blocks the UV rays entirely and wearing even the strongest sunscreen will result in some UV exposure. *See Bui v. Able C&C US Inc.*, D.N.J., Case No. 2:24-cv-01157, filed February 28, 2024.

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In addition to these trends, we continued to see lawsuits filed challenging animal testing claims made on cosmetic products, the alleged presence of benzene and titanium dioxide in various personal care products, and "natural" claims made in products that allegedly contained non-natural ingredients. For instance, the Northern District of Illinois dismissed a class action against John Paul Mitchell Systems, which claimed that the marketing of the defendant's dry shampoo failed to disclose the presence of benzene. The court ruled that the plaintiffs did not establish an injury-in-fact, as they did not allege that the product they purchased contained benzene, only that there was a risk. Furthermore, the plaintiffs lacked standing for injunctive relief since they were now aware of the alleged benzene presence and unlikely to purchase the product again. *Nelson et al. v. John Paul Mitchell Systems*, Case No. 1:22-cv-06364 (N.D. Ill.).

Looking Ahead

Cosmetic companies in 2025 face a complex legal landscape. "Clean beauty" claims are under scrutiny, with lawsuits challenging the accuracy and transparency of these labels. Furthermore, the increasing scrutiny of PFAS chemicals and growing consumer concerns about

ingredient safety, such as the presence of parabens and phthalates, will likely drive further litigation.

Beyond product safety, companies making sustainability claims must be prepared to substantiate these claims with concrete evidence to avoid accusations of greenwashing. Navigating these challenges requires a proactive approach, including rigorous risk assessments, transparent communication with consumers, and a strong commitment to ethical and sustainable business practices.

SECTION 7

Proposition 65 Trends

Proposition 65 Trends

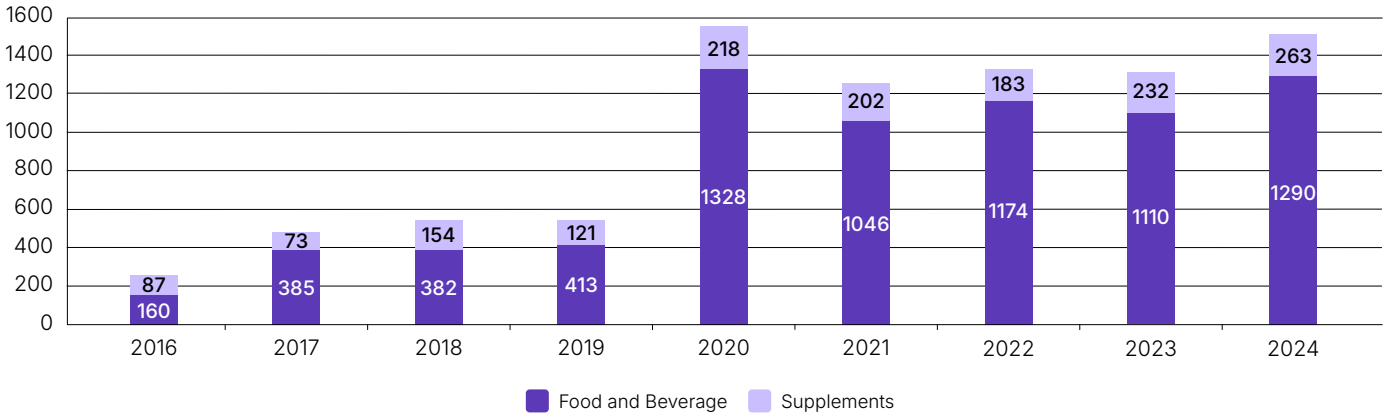
Proposition 65 was a California initiative approved by voters in 1986 and enacted into law as the Safe Drinking Water and Toxic Enforcement Act. Proposition 65 prohibits retailers and manufacturers from knowingly and intentionally exposing California consumers to a chemical known to the State of California to cause cancer, birth defects, or reproductive harm without first providing a "clear and reasonable warning." It is administered and regulated by the Office of Environmental Health Hazard Assessment, commonly referred to as OEHHA. Every CPG company that does business in California should be aware of, and comply with, Proposition 65. Virtually all Proposition 65 claims and enforcement actions are brought by private plaintiffs. In 2023, private Proposition 65 plaintiffs issued nearly 4,000 notices of violation—a significant increase over prior years.

Food, Beverage, and Dietary Supplements

Food, beverage, and dietary supplement companies remain major targets for Proposition 65 plaintiffs. As shown in the figure below, Proposition 65 pre-litigation notices for food products have increased steadily over the last five years, with numbers jumping up again in 2024.

Figure 10

PERSONAL CARE CLASS ACTIONS: FILINGS BY JURISDICTION



Data compiled by Perkins Coie based on a review of dockets from courts nationwide.

In 2020, there was a shocking threefold increase in the number of notices plaintiffs served on food, beverage, and supplement manufacturers—driven primarily by a handful of new and aggressive "bounty hunter" plaintiffs. This increased focus on the food and beverage industry remained relatively stable from 2021 through 2023—from 1,248 notices in 2021, to 1,357 notices in 2022, and finally to 1,342 notices in 2023. In 2024, however, notices targeting food, beverages, and dietary supplements jumped to an *all-time high of 1,553 notices*.

As in prior years, the pre-litigation notices primarily target foods containing heavy metals like lead, cadmium, and arsenic. Since the California Chamber of Commerce filed a lawsuit challenging the requirement to provide Proposition 65 warnings for dietary acrylamide, the number of acrylamide notices has fallen virtually to zero. In 2020, acrylamide accounted for nearly 40% of all Proposition 65 notices relating to foods; in 2021, that number dropped to 22%. In 2022, acrylamide notices accounted for less than 10% of all Proposition 65 notices relating to foods, while heavy metals alone accounted for over 90% of all pre-litigation notices issued to food, beverage, and supplement companies. In 2023, there have been zero notices issued for acrylamide in food. The key product categories targeted by these heavy metal notices remain the same as in previous years:

seafood products, spices, dried and powdered foods, and dietary supplements. Notably, this year saw a marked increase in the number of notices targeting dietary supplements—jumping from 183 notices to 232 notices. Moreover, more than one-third of the dietary supplement notices appear to target products that the plaintiffs purchased from online retailers.

General Consumer Packaged Goods

General consumer packaged goods companies have also faced a flood of Proposition 65 notices in recent years, receiving approximately two-thirds of all notices of violation issued by enforcers. The range of products targeted is extremely broad, but some general trends have emerged. While, as in past years, the chemicals most often at issue for general consumer packaged goods are lead and phthalates, diethanolamine has emerged as a major chemical of concern.

Diethanolamine, often abbreviated as DEA, is a chemical compound used in many personal care products, including detergents, soaps, hair conditioners, and cosmetics. DEA functions as an emulsifier or foaming agent, or it may be used to adjust a product's acidity. DEA was added to the Proposition 65 list in 2012 as a chemical known to cause cancer. Even though DEA has been on the Proposition 65 list for over a decade, and some plaintiffs had previously issued notices for DEA, it was not until recently that enforcers truly focused on this chemical. Indeed, since DEA was added to the Proposition 65 list in 2012, enforcers have issued 1,294 notices for this chemical, but more than 80% of those notices were issued in 2024. This phenomenon highlights one of the key problems with Proposition 65—businesses can never be sure when one of the hundreds of commonly used chemicals on the Proposition 65 list will suddenly become a "popular" target for enforcers.

Notices targeting Perfluorooctanoic Acid (PFOA) have also increased significantly in 2024. PFOA was listed as causing reproductive toxicity in 2017 and as causing cancer in 2022. While there were only a few dozen notices purporting to detect PFOA in 2023, enforcers filed 156 notices in 2024. A significant number of those notices target waterproof apparel—such as ski wear and raincoats—but several enforcers have issued notices relating to PFOA in food products. Because OEHHA has not established a safe harbor for PFOA, and because several labs are now able to detect PFOA at the part-per-*trillion* level, we expect to see an increasing number of notices relating to this chemical.

Proposition 65 Regulatory and Litigation Updates

On October 15, 2024, OEHHA amended California Code of Regulations Title 27, Section 25607.2(b) to provide an additional safe harbor warning option for businesses that cause significant exposures to acrylamide from food products. The Office of Administrative Law previously approved the rulemaking on October 4, 2024. The effective date for the regulation was January 1, 2025.

The new acrylamide warning options are as follows:

1. The words "**WARNING:**" or "**CA WARNING:**" or "**CALIFORNIA WARNING:**" in all capital letters and bold print, followed by the words, "Consuming this product can expose you to acrylamide, a probable human carcinogen formed in some foods during cooking or processing at high temperatures. Many factors affect your cancer risk, including the frequency and amount of the chemical consumed. For more information including ways to reduce your exposure, see www.P65Warnings.ca.gov/acrylamide."
2. The words "**WARNING:**" or "**CA WARNING:**" or "**CALIFORNIA WARNING:**" in all capital letters and bold print, followed by the language in subsections (A) and (B). Option language in subsection (C) may be added.

   A. "Consuming this product can expose you to acrylamide," or the words "Consuming this product can expose you to acrylamide, a chemical formed in some foods during cooking or processing at high temperatures."

   B. At least one of the following sentences:
      i. "The International Agency for Research on Cancer has found that acrylamide is probably carcinogenic to humans."
      ii. "The United States Environmental Protection Agency has found that acrylamide is likely to be carcinogenic to humans."
      iii. "The United States National Toxicology Program has found that acrylamide is reasonably anticipated to cause cancer in humans."

   C. The content in (A) and (B) may be followed by one or more of the following sentences:
      i. "Acrylamide has been found to cause cancer in laboratory animals."
      ii. "Many factors affect your cancer risk, including the frequency and amount of the chemical consumed."
      iii. "For more information including ways to reduce your exposure, see www.P65Warnings.ca.gov/acrylamide."

In the meantime, the injunction against dietary acrylamide warnings issued by the U.S. District Court for the Eastern District of California in *California Chamber of Commerce v. Rob Bonta* remains effective. The California Chamber of Commerce filed a motion for summary judgment against the enforcement of Proposition 65's cancer warning requirement for acrylamide in October 2024, and a hearing date is currently set for February 12, 2025.

Oehha Adds Vinyl Acetate to Proposition 65 List of Chemicals

Effective January 3, 2025, OEHHA has added vinyl acetate to the Proposition 65 list as a carcinogen. Vinyl acetate is rarely used in its pure form but, rather, is primarily used as an essential building block chemical in the production of other polymers. It is often used in the production of paints and glues.

The warning requirement for significant exposures to vinyl acetate will take effect on January 3, 2026.

BPS Warning Requirement Kicks In

OEHHA added bisphenol S (BPS) to the Proposition 65 list as a female reproductive toxicant on December 29, 2023. The warning requirement for BPS took effect on December 29, 2024. Only two weeks later, enforcer Center for Environmental Health issued a notice of violation for BPS in thermal receipt paper to a group of nine retailers. Center for Environmental Health often issues rolling notices for a specific chemical, with each notice targeting a new batch of alleged violators. As such, we expect that the list of retailers receiving notices for BPS in receipt paper will expand significantly in 2025.

About Perkins Coie

For over a decade, our team at Perkins Coie has defended the CPG industry in challenges to companies' labeling, marketing, and advertising. Over that time, we have developed a deep understanding of the legal and regulatory environment, strategies of the plaintiffs' bar, and—most importantly—the business objectives of our clients in these essential industries. That experience informs our risk mitigation counsel to clients and helps us implement effective litigation strategies if claims are filed.

Our team has helped secure important legal precedents in CPG class-action litigation, working with clients to favorably develop the law. Through creative and aggressive lawyering, we have obtained dismissals and favorable decisions on many of the key defenses relied on by companies whose labeling is threatened: the "reasonable consumer" defense, Article III standing, federal preemption, primary jurisdiction, and failure to show damages. And Perkins Coie's experience extends beyond litigation: We frequently offer advice to clients on supply chain issues, labeling risk review, product recalls, and compliance with developing regulatory standards.

The Perkins Coie CPG team is active outside the courtroom as well. Members of our team are frequent speakers and commentators and publish in legal journals nationwide on emerging issues in this dynamic area of the law. Our work in the industry has led to numerous recognitions, including Perkins Coie being named a Food & Beverage Practice Group of the Year by *Law360*. We are also consistently ranked for Food & Beverage and Retail by *Chambers USA*.

This work as thought leaders is informed by our proprietary database cataloging and classifying hundreds of industry filings and key rulings. We regularly perform analytics on this data to spot emerging trends and advise clients on risk. This data is kept current with daily monitoring of case filings, which is information we provide to clients in real time via our *Food & Consumer Packaged Goods Litigation Update*, a daily email update available via subscription by contacting KHale@perkinscoie.com.

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