Midyear 2023 | Food and CPG Legal Trends

PERKINSCOIE

PERKINS COIE IS PLEASED TO PUBLISH ITS FIRST MIDYEAR FOOD AND CPG LEGAL TRENDS REPORT.

This report is a bite-sized version of our annual year in review, providing timely insights on trends so far this year. In the first half of 2023, the Consumer Packaged Goods (CPG) industry continued to face a meaningful threat of class-action activity, with continued filings against companies in the food, beverage, and personal care space. Recent months have also seen significant regulatory developments relevant to food, beverage, and CPG companies on both the federal and state level.

Beyond our Food & Consumer Packaged Goods Litigation Blog and annual Year in Review, we also monitor filings on a daily basis and provide real-time information to clients and key contacts via our Food and Consumer Packaged Goods Litigation Update. To receive this daily email report about cases filed, Proposition 65 notices, and industry decisions, please email Kellie Hale at KHale@perkinscoie.com to inquire about this.

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REGULATORY

Recent months have seen significant developments regarding food and CPG regulation at the federal and state levels. We review several of these regulatory developments below.

FEDERAL DEVELOPMENTS

- **Congress enacts new cosmetic law.** With the passage of the Modernization of Cosmetics Regulation Act of 2022 (MoCRA), Congress provided the Food and Drug Administation (FDA) with greatly expanded regulatory authority over cosmetic products. For example, the agency now has the authority to implement mandatory recalls of cosmetics and require good manufacturing practices for facilities producing cosmetics. The FDA is developing rules to implement certain provisions of MoCRA.
- **FDA kicks cannabidiol regulation to Congress.** The FDA has issued its long-awaited decision regarding the regulation of products containing cannabidiol (CBD), concluding that the agency lacked the authority to regulate the substance. Instead, the FDA called on Congress to issue new legislation regarding CBD, writing that "a new regulatory pathway for CBD is needed that balances individuals' desire for access to CBD products with the regulatory oversight needed to manage risks."
- **USDA strengthens organic labeling enforcement.** The U.S. Department of Agriculture (USDA) promulgated a final rule titled "Strengthening Organic Enforcement." The new regulation became effective on March 20, 2023, and its provisions will be enforced one year later, on March 19, 2024. Among other things, this new regulation will mean that entities in the organic food supply chain will see new certification requirements and new compliance procedures.
- **USDA issues new directives on cell-cultured meat.** The USDA issued new directives regarding cell-cultured meat and poultry products. Among other things, the agency clarified inspection, sampling, and labeling review practices. This administrative activity came on the heels of labeling review approval and grants of inspection to two cell-cultured poultry companies in June 2023.

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- **USDA announces substantiation requirements for animal-raising claims.** The USDA announced in June 2023 that it was strengthening substantiation requirements for animal-raising claims, such as "raised without antibiotics," "grass fed," and "free range." The agency plans to issue further guidance to industry regarding documentation and certifications to verify claims.

STATE DEVELOPMENTS

- **States enact PFAS restrictions.** At least 11 states have some form of restriction on per- and polyfluoroalkyl (PFAS) substances. Significantly, PFAS restrictions in New York and California are already in effect regarding food packaging.
- **Washington enacts Toxic-Free Cosmetic Act**. In May 2023, Washington state enacted new stringent standards regarding the use of certain chemicals, such as PFAS, in cosmetics and personal care products.
- **California considers a ban on certain food additives.** The California legislature is currently debating AB 418, which would prohibit the use of certain food additives in that state. As currently written, the bill would ban brominated vegetable oil, potassium bromate, propylparaben, Red Dye No. 3, and titanium dioxide, effective January 1, 2027. To date, the bill has passed the California State Assembly and is under consideration in the state senate.

FOOD AND SUPPLEMENTS

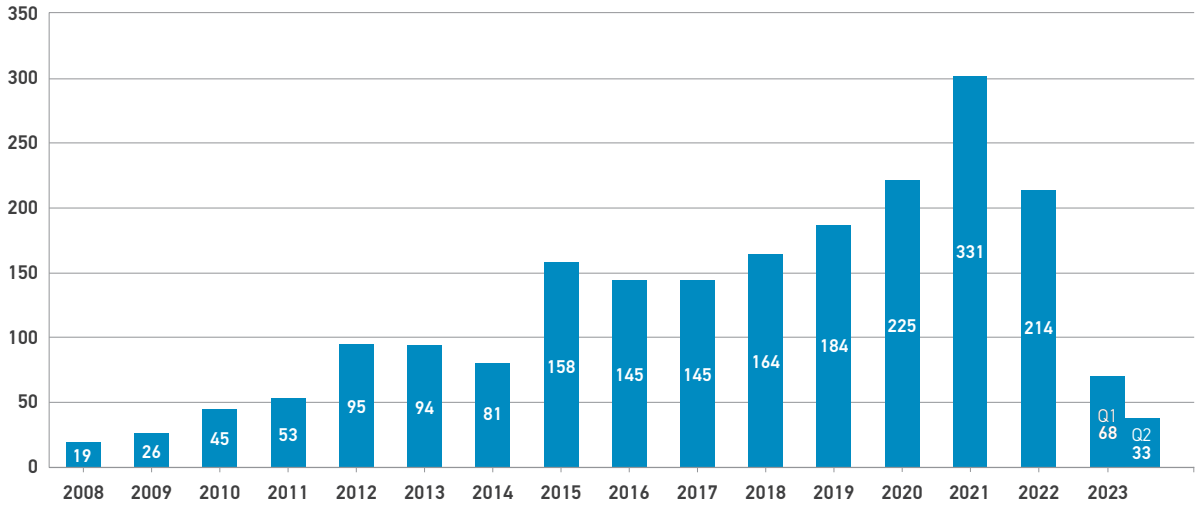
In the second quarter of 2023, we saw four main litigation theories advanced by plaintiffs in the food and beverage space and two main litigation theories advanced in the supplement space, explored in detail below. For both the food and beverage and supplement categories, California remains the most popular state for plaintiffs to file, followed by New York.

FOOD AND BEVERAGE TRENDS

- **Preservatives**
  First, a common litigation theory advanced by plaintiffs related to food and beverages in Q2 pertains to representations about preservatives. Throughout Q2, plaintiffs targeted products that contained phrases such as "No Artificial Preservatives" or "No Preservatives." In these cases, plaintiffs alleged that these statements regarding the absence of preservatives are false and misleading because of the presence of certain purported preservatives. Namely, plaintiffs have focused on the presence of dipotassium phosphate, which they allege is a synthetic preservative, and the presence of citric acid, sodium benzoate and/or ascorbic acid, additional purported preservatives.
- **"100%"**
  The second most popular litigation theory in Q2 relates to the use of "100%" in a label statement (e.g.,100% fruit juice, 100% agave). In these cases, plaintiffs alleged that the 100% statements are false because the products contain other ingredients. Having been successful for plaintiffs in the past, this continued focus on the use of "100%" does not come as a surprise. Most notably, in December 2020, the U.S. Court of Appeals for the Seventh Circuit reversed a dismissal of a case regarding the phrase "100% Grated Parmesan Cheese," holding that consumers were likely to be misled by the phrase where the product contained other ingredients besides just parmesan cheese.
- **Health Claims**
  Another popular theory advanced in Q2 was related to the use of health claims for products that, according to plaintiffs, are unhealthy. In these lawsuits, plaintiffs focused on a wide variety of statements, some more explicit than others, which

FOOD AND BEVERAGE CLASS ACTIONS

FIGURE 1



supposedly gave consumers the false impression that the product is healthy. For example, in Q2, plaintiffs targeted statements such as "wholesome" and "overall wellness" as well as claims such as "digestive health" and "path to a healthier lifestyle." The plaintiffs' main basis for their repeated claims that the products in these lawsuits are unhealthy is the presence of sugar, which increases the risk of various diseases. In Q2, plaintiffs continued to target products with both naturally occurring sugars and/or added sugars.

- **Flavoring Claims**
  The last major litigation theory we saw advanced in Q2 was what we refer to as "flavoring claims." This theory is not new, and any flavored product that is flavored with anything other than the characterizing food ingredient is at risk. Although largely (but not always) unsuccessful in the past, plaintiffs continued to focus on specifically fruit-flavored products not containing actual fruit. For example, in Q2, we saw flavoring claims against pear-flavored beverages and lemon-flavored cookies not containing pear or lemon ingredients.

SUPPLEMENTS TRENDS

In Q2 2023, we saw two main types of claims of consumer deception brought by plaintiffs related to supplements. Namely, we saw claims related to the statement "clinically proven" and claims alleging that the purported benefits of the supplement are false. The first litigation theory targeted supplement products that claim to have "clinically proven" results when, according to the plaintiffs, they did not. Relatedly, the second theory focused on the efficacy of supplement products that purportedly cannot provide the promised benefit. These cases rely on scientific studies to support their allegations that the products cannot work as advertised.

BEAUTY, COSMETICS AND PERSONAL CARE

As cosmetic and personal care companies prepare to comply with MoCRA and various state laws banning certain ingredients in their products, they have also been on the defense against an ever-increasing number of lawsuits filed against the industry. These lawsuits include allegations regarding the presence of a harmful ingredient (PFAS, benzene, and titanium dioxide, among others) and allegations challenging the lack of science to support certain claims, in addition to challenging "natural" claims when products allegedly contain synthetic ingredients. Now more than ever, the industry is under the scrutiny of regulators and plaintiffs' lawyers alike.

LEGAL AND REGULATORY UPDATES

- **Preparing for MoCRA**

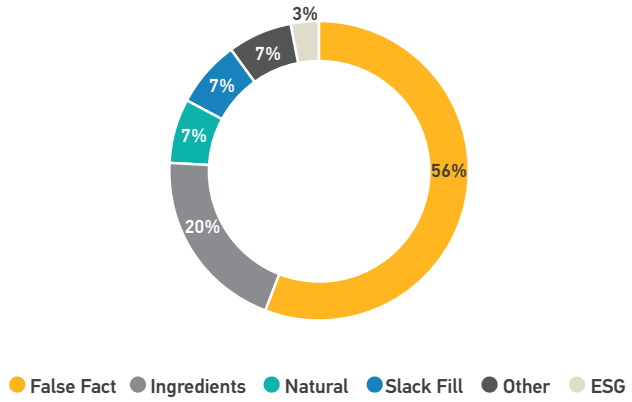
  Midway through 2023, cosmetics and personal care product companies are preparing to implement new regulations under MoCRA. MoCRA is the most significant expansion of the FDA's authority to regulate cosmetics since the Federal Food, Drug, and Cosmetic (FD&C) Act was passed in 1938 and will help ensure the safety of cosmetic products that American consumers use on a daily basis.

  To prepare for MoCRA, companies are implementing standard operating procedures (SOPs) for facility registrations, product labeling and packaging, product ingredients, product listings, safety substantiation, good manufacturing practices, and adverse event reporting. As part of the SOPs, companies are digitizing, centralizing, and standardizing recordkeeping. Companies should prepare to have information regarding product label and package disclosures, product ingredients, fragrance allergens, safety substantiation, and facility registrations readily available for reporting to the FDA. Generally, records must be kept for six years.

  Recently, the Senate Appropriations Committee approved $7,000,000 in funding for the FDA to support the implementation of MoCRA.

PERSONAL CARE CLASS ACTIONS: FILINGS BY TYPE

FIGURE 2



2023 LITIGATION TRENDS

In the first half of 2023, we have continued to see an uptick in lawsuits filed against cosmetic and personal care products companies alleging the presence of a harmful ingredient, challenging the lack of science of certain claims, challenging "natural" claims, and making pure false advertising cases.

This year, we've seen lawsuits filed against manufacturers and sellers of dry shampoo products that allegedly contain benzene, mouthwashes labeled as "natural" that allegedly contain PFAS, and chemical hair straightening/hair relaxer products that allegedly contain endocrine-disrupting chemicals. Consumers have challenged claims that deodorant is "clinically proven to block body odor all day, and continues to control odor for 72 hours" and claims that cosmetic foundation products with SPF protection labeled as "24H WEAR" actually provide 24 hours of SPF protection. We've also continued to see "natural" claims challenged. For example, soap products labeled as "natural" are alleged to be misleading when the product contains synthetic ingredients.

There have also been notable rulings issued by courts across the country, including the following rulings regarding the "reasonable consumer":

- **"Natural" Claims: "Nature Fusion" Does Not Mean 100% All-Natural Ingredients**
  The U.S. Court of Appeals for the Ninth Circuit confirmed that a reasonable consumer would not assume that a product labeled "Nature Fusion" contains only natural ingredients. On June 9, 2023, the Ninth Circuit affirmed the district court's dismissal of a putative class action filed against The Procter & Gamble Company alleging that the company violated California consumer protection laws by labeling some of its hair care products with the words "Nature Fusion" in bold, capitalized text, with an image of an avocado on a green leaf. Specifically, the plaintiff alleged that the company misled consumers into believing that the products are natural when in fact, they contain nonnatural and synthetic ingredients and harsh and potentially harmful ingredients and are substantially unnatural. Here, the court held that the plaintiff's claim failed, reasoning that the statement "Nature Fusion" is not misleading but rather is ambiguous and that a reasonable consumer would expect the ingredient list will contain more detailed information about the product that would confirm representations made on the packaging. *(See Sean McGinity v. The Procter & Gamble Company*, No. 22-15080 (9th Cir. – June 9, 2023).)

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- **Class Certified in Case Challenging "Collagen" Label for Products that Allegedly Do Not Contain Collagen**

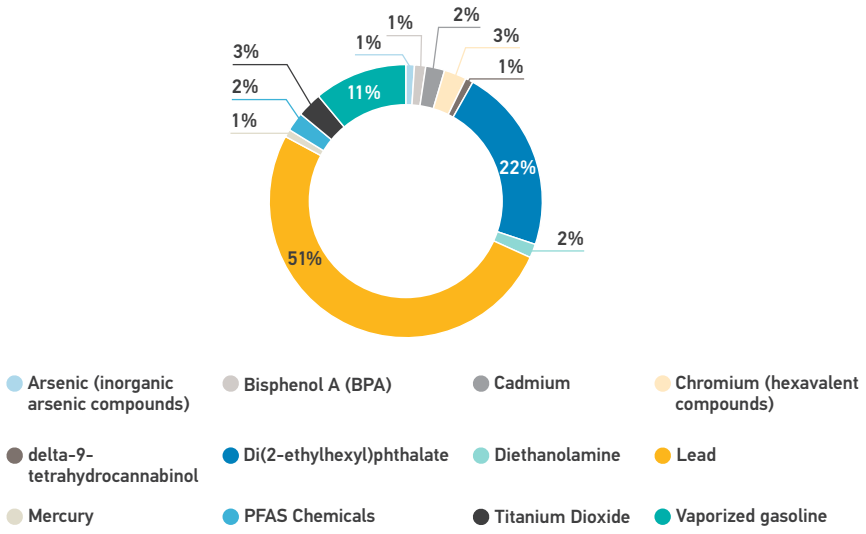
In April, the U.S. District Court for the Central District of California certified the plaintiffs' proposed class of Californians who purchased Dr. Dennis Gross Skincare, LLC C + Collagen products, including C + Collagen Deep Cream, Serum, Mist, and Eye Cream variants, which allegedly do not contain any collagen whatsoever. This case, which was initially filed in March 2020, is headed to trial after the court denied the defendant's motion to dismiss and motion for summary judgment, finding that a reasonable consumer may be misled by the labeling. Notably, in this case, the court reasoned that "even accepting the defendant's argument that no reasonable consumer viewing the package as a whole would conclude that the Products contain collagen, the Ninth Circuit has warned that 'reasonable consumers should [not] be expected to look beyond misleading representations on the front of the box to discover the truth from the ingredient list in small print on the side of the box.'" This case is now headed towards a trial date because, as the court noted, "there are triable issues of fact as to deception, reliance, materiality, and damages." (*Mocha Gunaratna, et al., v. Dr. Dennis Gross Skincare, LLC*, C.D. Cal. Case No. 2:20-cv 02311-MWF-GJS.)

PROPOSITION 65

California Proposition 65, formally known as the Safe Drinking Water and Toxic Enforcement Act of 1986, prohibits manufacturers and retailers 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." The regulations and litigation surrounding Proposition 65 have a substantial impact on the consumer products industry—especially those in the food, beverages, and dietary supplements sectors. Every company that does business in California should monitor Proposition 65 developments closely.

PROPOSITION 65 – Q2 BY THE NUMBERS

A whopping 1,010 Proposition 65 pre-suit notices of violation were filed by plaintiffs in Q2 of 2023. As usual, nearly 50% of the notices relate to alleged exposures to lead. Surprisingly, about 10% of the notices target gas stations for allegedly exposing consumers to vaporized unleaded gasoline without a warning. Prior to this recent wave of notices, it had been more than 20 years since a plaintiff had issued a notice relating to vaporized gasoline. See the chart for a detailed breakdown of the top chemicals at issue this quarter.



Ethylene oxide has historically been used as a pesticide and fumigant, including as a sterilizer for food contact materials.

REGULATORY UPDATES

- **IARC Classifies Aspartame as "Possibly Carcinogenic"**

  In July 2023 the International Agency for Research on Cancer (IARC) classified aspartame as "possibly carcinogenic" to humans. Under IARC's hazard classification system, aspartame falls into Group 2B—substances for which there is "limited evidence" that exposure causes cancer in humans.

  Under Health and Safety Code section 25249.8(b) and Title 27, Cal. Code of Regs., section 25306, California's Office of Environmental Health Hazard Assessment (OEHHA) may add chemicals to the Proposition 65 list if an agency designated as an "authoritative body" identifies a chemical as a potential carcinogen or reproductive toxicant. Because IARC has been designated as an "authoritative body," aspartame is now potentially subject to a Proposition 65 listing. OEHHA's Carcinogen Identification Committee previously considered listing aspartame in 2016, though the committee ultimately did not take such an action. The new IARC classification will likely revive these considerations.

- **OEHHA Proposes Significantly Lower NSRL for Ethylene Oxide**

  Ethylene oxide has been on the Proposition 65 list since 1987 as both a carcinogen and a reproductive toxicant. In April 2023 OEHHA proposed significantly lowering the Proposition 65 No Significant Risk Level (NSRL) for ethylene oxide, from 2 micrograms per day to 0.058 micrograms per day. Several groups submitted public comments raising concerns about the proposed NSRL, including the International Pharmaceutical Excipients Council of the Americas and the International Food Additives Council.

  Ethylene oxide has historically been used as a pesticide and fumigant, including as a sterilizer for food contact materials. In recent years, the European Union has tightened its rules regarding ethylene oxide's use in applications relating to food, banning its use as a pesticide and setting strict maximum residue levels for ethylene oxide in a wide range of food products. OEHHA has thus far not taken any further action with regard to the proposed NSRL.

Contact Us

To learn more about issues facing the food and consumer packaged goods industry, please contact:

FOOD LITIGATION CO-CHAIRS

DAVID T. BIDERMAN | PARTNER
+1.310.788.3220
DBiderman@perkinscoie.com

CHARLES C. SIPOS | PARTNER
+1.206.359.3983
CSipos@perkinscoie.com

CONTRIBUTORS

ADAM MANDELSBERG | PARTNER
+1.212.261.6867
AMandelsberg@perkinscoie.com

BRIAN P. SYLVESTER | PARTNER
+1.202.434.1669
BSylvester@perkinscoie.com

KRISTINE KRUGER | SENIOR COUNSEL
+1.206.359.3111
KKruger@perkinscoie.com

JASMINE WETHERELL | COUNSEL
+1.310.788.3294
JWetherell@perkinscoie.com

CARRIE AKINAKA | ASSOCIATE
+1.206.359.6534
CAkinaka@perkinscoie.com

NATALIE SANDERS | ASSOCIATE
+1.650.838.4840
NSanders@perkinscoie.com

THOMAS TOBIN | ASSOCIATE
+1.206.359.3157
TTobin@perkinscoie.com