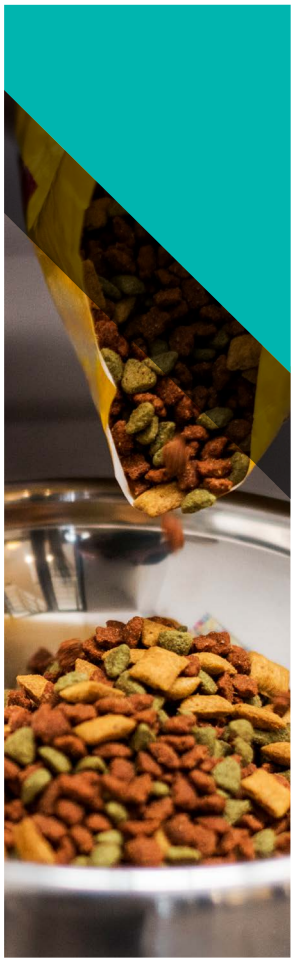
Food & Consumer Packaged Goods Litigation
2023 YEAR IN REVIEW


PERKINSCOIE

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INTRODUCTION

PERKINS COIE RELEASES EIGHTH ANNUAL FOOD & CONSUMER PACKAGED GOODS LITIGATION YEAR IN REVIEW.

In 2023, the drumbeat of class actions filed against the consumer packaged goods (CPG) industry remained constant. Filings maintained a sustained pace and continued aggressiveness in search of new theories of liability. We also saw plaintiffs' lawyers returning to seemingly dormant theories, attacking, for example, "natural" claims on food and personal care products with renewed vigor.

The plaintiffs' bar also demonstrated a broadening interest in cases challenging the presence of purportedly harmful trace substances—including heavy metals, phthalates, and polyfluoroalkyl substances (PFAS). Although the law remains in flux, during the past year, courts have expressed growing skepticism that manufacturers are obligated to affirmatively disclose the potential presence of these substances. As a result, the "omission" theory tends to result in defense-favorable initial decisions for these types of cases.

As in years past, in 2023, the "reasonable consumer" defense remained a key weapon in defendants' arsenal, with encouraging developments in this area of the law. Both the U.S. Courts of Appeals for the Ninth and Second Circuits continued to whittle away at the notion that a "reasonable consumer" can or should ignore a product's statement of ingredients or nutrition facts panel when making purchases. Courts have, instead, continued to coalesce around the view that the label in its entirety must be considered when evaluating a plaintiff's claim of deception. That reasoning includes courts considering the effect of clarifying language or disclaimers on product labels, especially when such language discredits a plaintiff's claimed deception.

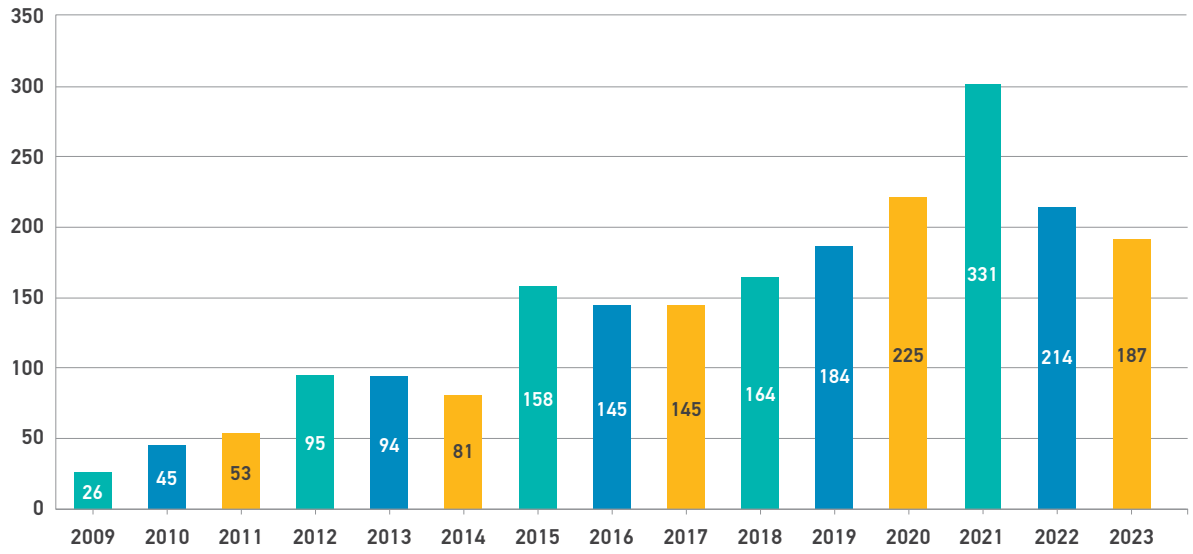
The regulatory arena also remained active in 2023. The U.S. Food and Drug Administration (FDA) issued numerous advisory updates on food traceability, food imports, dietary supplements, food additives, and PFAS. Perkins Coie expanded its regulatory capabilities in 2023 and is actively monitoring these 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.

LEGAL TRENDS IN FOOD AND BEVERAGE

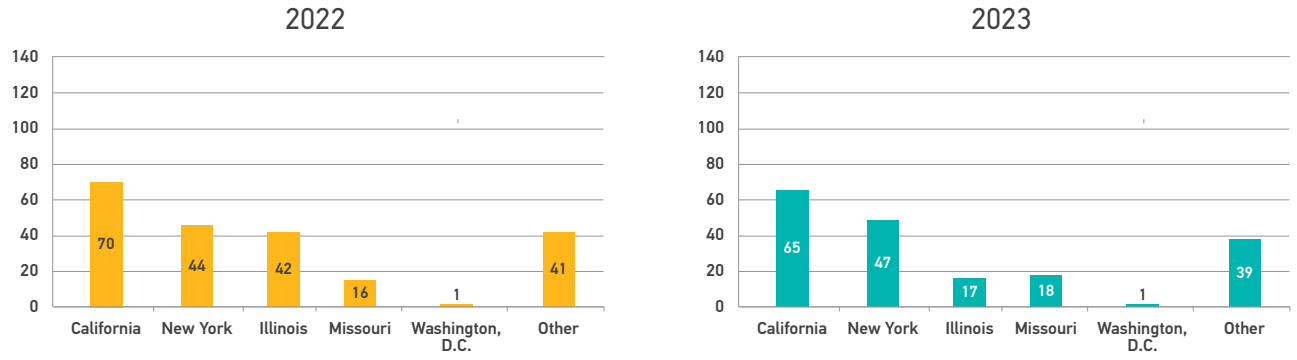
FOOD AND BEVERAGE CLASS ACTIONS

FIGURE 1



FOOD AND BEVERAGE CLASS ACTIONS: FILINGS BY JURISDICTION

FIGURE 2



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

NATURAL CLAIMS

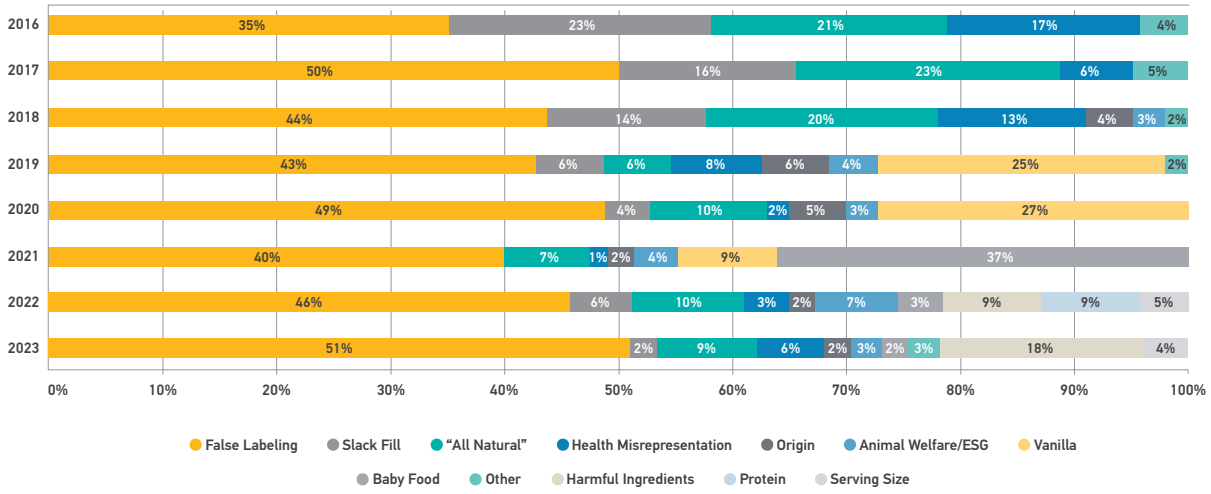
Key Wins in Cases Challenging "Natural" Claims

"Natural" claims continue to be a target for the plaintiffs' bar, with more than 40 filings in 2023. Nearly half of the complaints involved food and beverage products, with a marked rise in cases involving beverages as well as water enhancer products. The plaintiffs' bar has also lodged claims against supplements and pet food manufacturers. But plaintiffs' counsel are not ignoring personal care products. Challenges to natural claims on shampoo, deodorant, face creams, and soap products are on the rise.

As in 2022, plaintiffs continue to allege that malic acid, citric acid, ascorbic acid, and PFAS are nonnatural, synthetic ingredients, rendering any natural claims false and misleading. Challenges to mixed tocopherols, a class of chemical compounds that may

INDUSTRY FILINGS AND TRENDS: CATEGORIES

FIGURE 3



Data compiled by Perkins Coie based on a review of dockets from courts nationwide.
**Data above shown in percentages*

be derived from genetically engineered crops, dropped off this year. In 2023, more than half of the cases were filed in California, including in all federal districts. Only five out of 22 California cases were filed in Los Angeles Superior Court.

On the heels of a 2022 win for defendants, the U.S. Court of Appeals for the Ninth Circuit delivered a key win to defendants where the U.S. District Court for the Southern District of New York held that plaintiffs failed to articulate a definition of "All Natural" as held by reasonable consumers given the FDA provided no such definition. *In re KIND LLC "Healthy & All Natural" Litig.*, 627 F. Supp. 3d 269 (S.D.N.Y. 2022). In *McGinity v. The Procter & Gamble Company*, the Ninth Circuit affirmed dismissal of a putative class action alleging defendant's hair products, labeled as "Nature Fusion" in bold, capitalized text with an image of an avocado on a green leaf. Even though the products allegedly contained nonnatural and synthetic ingredients, the statement "Nature Fusion" was ambiguous, so a reasonable consumer would be expected to turn to the product's ingredient list for clarification. 69 F.4th 1093, 1099 (9th Cir. 2023).

Defendants garnered other wins in federal court as well as before the National Advertising Division (NAD). For example, in *Richburg v. Conagra Brands, Inc.*, the court held that reasonable consumers would not consider PFAS to be a traditional "ingredient" and therefore would not be deceived by its presence in products labeled as "natural." 2023 WL 1818561, at *7 (N.D. Ill. Feb. 8, 2023); *see also Lacour, v. Colgate-Palmolive*, 2024 WL 36820, at *6 (S.D.N.Y. Jan. 3, 2024) (granting summary judgment for defendants where the FDA had not provided guidance on use of natural claims in personal care products, citing *In Re Kind LLC*). Moreover, the NAD determined that natural claims on defendant's soap products were supported; even though the natural products underwent a chemical process known as saponification, the NAD agreed that saponification is an ancient process and that consumers would understand that the "simple" process doesn't convert something natural into something that is not natural. NAD Case No. 7195.

However, not all cases this year sided with defendants. For example, in *Gonzalez v. Chattem, Inc.*, the court held that the term "naturally" on a melatonin product's label was susceptible to two meanings: "naturally" meant "without the aid of drugs" (as defendants argued), and/or it meant the product was free of artificial and synthetic ingredients (as plaintiffs alleged). Whether the ingredient panel could clarify the term was a factual question properly resolved on the merits. 2023 WL 8101923, at *1 (N.D. Cal. Nov. 21, 2023); *see also Iglesias v. Arizona Beverages USA, LLC*, 2023 WL 4053803 (N.D. Cal. June 16, 2023) (concluding a reasonable consumer could plausibly assume a beverage labeled as "All Natural" does not include color additives, ascorbic acid, high-fructose corn syrup, malic acid, erythritol, or natural flavors); *Brunts v. Hornell Brewing Co.*, 2023 WL 3568650

(E.D. Mo. May 19, 2023) (allowing lawsuit to proceed where "natural flavors" claim was allegedly false because the natural flavors had artificial or synthetic components). As a result, complaints involving natural claims flow on, and we expect they'll continue to do so in 2024.

PLACE OF ORIGIN CLAIMS

Courts Remain Divided, but Filings Are Cooling Down

In 2023, courts continue to split over geographic origin claims, also called country-of-origin labeling (COOL). Defendants prevailed in two cases and lost in two others. For example, in *Eshelby v. L'Oreal USA*, plaintiff alleged that including the word "Paris" in L'Oreal Paris' brand name suggested the company's beauty products were made in France. However, the Southern District of New York disagreed, noting that the brand name simply reflected the company's heritage, and no reasonable consumer would conclude on that basis a particular product is manufactured in Paris, especially where the back label contains a disclaimer with manufacturing location. Moreover, the use of French phrases on certain products' labeling also did not turn the tide, especially considering plaintiff did not buy these products and even had she, the products contained English translations in larger or bolded font. 2023 WL 2647958 (S.D.N.Y. Mar. 27, 2023). Similarly, in a two-paragraph opinion, the Ninth Circuit affirmed that an origin statement as part of a brand name ("Icelandic Provisions") was not enough to suggest the defendant's dairy product was made in Iceland. Importantly, the disclaimer on the back label as to the product's origin ("Distributed by Icelandic Provisions, New York, NY," "Developed in partnership with MS Iceland Dairies, Reykjavik, ISL," and "Proudly made in Batavia, NY with domestic and imported ingredients") cured any ambiguity on the front label. *Steinberg v. Icelandic Provisions, Inc.*, 2023 WL 3918257 (9th Cir. June 9, 2023).

On the other hand, the court in *Tunick v. Takara Sake USA Inc.* held that defendant's sake product could mislead a reasonable consumer into thinking the product was made in Japan. The product's brand name was in Japanese ("Sho Chiku Bai"). The product used large, bold Japanese lettering throughout the product's front labels and a gold emblem that states "Licensed by TaKaRa Japan, Since 1851." Moreover, the court noted there is a strong cultural association between sake and Japan (e.g., licenses to make sake are mostly limited to Japan), which could also suggest to consumers that the product was made in Japan. 2023 WL 3958363 (N.D. Cal. June 12, 2023). The court similarly held in *La Barbera v. Ole Mexican Foods Inc.* that using Mexican words and phrases in the product's brand name "La Banderita" and on the packaging ("El Sabor de Mexico!" "Sabrosísimas," or "Tortillas de Maiz"), combined with a prominent picture of a Mexican flag, could cause a reasonable consumer to believe the products were made in Mexico. 2023 WL 4162348 (C.D. Cal. May 18, 2023). However, days later, the U.S. Court of Appeals for the Second Circuit affirmed dismissal in a nearly identical case involving the same products, finding the labels not misleading, especially where the back of the labels stated "Made in U.S.A." *Hardy v. Ole Mexican Foods, Inc.*, 2023 WL 3577867 (2d Cir. May 22, 2023).

These cases continue the trend that determinations in origin cases are generally highly fact- and judge-specific. Perhaps because these cases are not slam dunks, filings are slowing down, with only four cases filed this year.

REASONABLE CONSUMER DEFENSE

The Second and Ninth Circuits were busy this year handing down at least eight decisions involving the reasonable consumer defense. The defense is often relied upon by defendants in putative class actions that challenge false or misleading labeling or advertising. The growing body of case law, further developed in 2023, concludes that a "reasonable consumer" would not be deceived by a product's claims (such as "natural," "sustainable," "healthy," "GMO-free," etc.), especially in the context of the whole packaging, which may include the ingredient list or disclaimers.

While the defense is not a silver bullet, the law continues to develop in favor of defendants. This year, in *Vitort v. Kroger Co.*, the Ninth Circuit affirmed dismissal of a putative class action alleging that the "Just Fruit" claim on defendant's spreadable fruit product was false or misleading when the products also contain other ingredients. The court agreed with the district

court's conclusion that the "Just Fruit" label is not objectively false and is not likely to mislead a reasonable consumer because spreadable fruit products, which do not exist in nature, necessarily contain ingredients other than fruit. 2023 WL 3143690 (9th Cir. Apr. 28, 2023).

Further, in *Robles v. GOJO Indus., Inc.*, the Ninth Circuit affirmed dismissal in a case challenging a hand sanitizer's representations that the product either "Kills More than 99.99% of Germs" or "Kills More than 99.99% of Most Illness Causing Germs" as misleading, even though the representations included an asterisk directing consumers to a back-label disclaimer that the product "Kills 99.99% of most common germs that may cause illness." The court reasoned the claims were not literally false, as the front label does not claim the product has been tested on each individual type of germ or that it kills the specific germs identified by plaintiff. And because the front label was ambiguous "as to the population of germs at issue in the product's 99.99% effectiveness claim," "the back label explains to the consumer what population of germs the 99.99% claim applies to: 'most common germs that may cause illness.'" Relying on consumers' "[g]eneral knowledge and common sense," the court concluded a reasonable consumer "would not expect this product to kill germs unknown to science or germs that are not found on the hand." 2023 WL 4946601 (9th Cir. Aug. 3, 2023).

Surprisingly, though, a few days later, the same Ninth Circuit panel apparently reversed course in a similar case involving hand sanitizer with effectiveness claims. In *Souter v. Edgewell Pers. Care Co.*, the court reversed dismissal where the product's claims that it was "hypoallergenic" and "kill[s] 99.99% of germs" were ambiguous. The court noted that the active ingredient is a known allergen and "cannot eliminate many pathogens that are commonly found on hands." 2023 WL 5011747 (9th Cir. Aug. 7, 2023). Although the Ninth Circuit was not explicit, the key distinction between the two cases is likely that the product at issue in *Souter* did not include the disclaimer found in *Robles* as to the "most common germs that may cause illness."

As evidenced in *Souter*, not all reasonable consumer decisions this year were favorable. The Ninth Circuit in *Horti v. Nestle Healthcare Nutrition, Inc.* also reversed dismissal of claims challenging the labeling and marketing of defendant's "Glucose Control" beverage products. The panel concluded that plaintiff stated a claim because a reasonable consumer could be misled into believing the beverages could be used as a diabetes treatment based on the representations that the beverages provided "glucose control," were "designed for people with diabetes," and "help[ed] manage blood sugar." The panel also noted that the placement of the products among legitimate diabetes treatments could contribute to that interpretation. 2023 WL 8613601 (9th Cir. Dec. 13, 2023); *see also Richardson v. Edgewell Pers. Care, LLC*, 2023 WL 7130940 (2d Cir. Oct. 30, 2023) (reversing dismissal because "Reef Friendly*" could plausibly mislead a reasonable consumer into thinking the sunscreen products contain no reef-harming ingredient and the back-label disclaimer "*No Oxybenzone or Octinoxate" did not mention four other reef-harming ingredients in the products).

The sections herein on origin and natural claims further discuss other key circuit court opinions from this year. *See, e.g.*, *Hardy v. Ole Mexican Foods, Inc.*, 2023 WL 3577867 (2d Cir. May 22, 2023) (affirming dismissal of putative class action alleging tortilla products misleadingly suggested they were made in Mexico, where the back label disclosed "Made in U.S.A."); *McGinity v. Procter & Gamble Co.*, 69 F.4th 1093 (9th Cir. 2023) (affirming dismissal where shampoo product's "Nature Fusion" was ambiguous claim clarified by the ingredient list).

This is the bottom line: Opinions from the nation's appellate and district courts this year drive home some critical components of the reasonable consumer defense: that consumers have "general knowledge and common sense," and ambiguity can be dispelled by fulsome and accurate disclaimers, whether indicated by an asterisk or in the ingredient list. District courts continue to agree. *See, e.g.*, *Vazquez v. Walmart, Inc.*, 2023 WL 8257999 (S.D.N.Y. Nov. 29, 2023) (consumer would use "common sense" to associate the term "honey" to refer to flavor); *Moreno v. Vi-Jon, LLC*, 2023 WL 4611823 (S.D. Cal. July 18, 2023) (a reasonable consumer need not be "an expert in pathogenic diseases" to know that hand sanitizer is not a substitute for handwashing); *Fuller v. Stop & Shop Supermarket Co. LLC*, 2023 WL 8005319 (S.D.N.Y. Nov. 17, 2023) (reasonable consumers with common sense would understand that a "Maximum Strength" lidocaine pain relief patch would not mean "the highest dose that money can buy"); *Abbott v. Golden Grain Co.*, 2023 WL 3975107 (E.D. Mo. June 13, 2023) (plaintiff either "failed to read or blithely ignored . . . the plain language of the package that disclosed its weight and fill line," defying common sense).

MICROCONTAMINANTS

Following a December 2022 *Consumer Reports* article highlighting lead and cadmium in dark chocolate, the new target for plaintiffs upset about heavy metals in 2023 was the chocolate bar. Throughout 2023, plaintiffs filed lawsuits against chocolate companies alleging that their chocolate products contained heavy metals, particularly lead and cadmium, which should have been disclosed on the product label. In addition, plaintiffs relied on affirmative representations about the quality, safety, and health of the ingredients generally. In these cases, plaintiffs alleged that they suffered an economic injury, spending money to purchase chocolate that they otherwise would not have had they known of the presence of the heavy metals.

Toward the end of 2023, courts began to rule on motions to dismiss these heavy metals in chocolate cases, which were filed at the beginning of the year, mostly allowing the cases to proceed on a narrowed basis. *See Rodriguez v. Mondelez Global, LLC*, No. 23-cv-0057 (S.D. Cal. Nov. 22, 2023) (granting in part and denying in part defendant's motion to dismiss); *Grausz v. Hershey Co.*, No. 23-cv-00028 (S.D. Cal. Sept. 9, 2023) (granting in part and denying in part defendant's motion to dismiss). Most notably, the courts, so far, have trimmed the pure omission claims, holding there is no duty to disclose in these circumstances.

Heavy metals in baby food, still making headlines after the 2021 congressional report about the issue, continued to be a hot topic in 2023. In 2023, there were several notable decisions related to heavy metals in baby food. Many of these cases have been dismissed on either primary jurisdiction grounds or for lack of injury, much like in 2022. *See, e.g., In re Beech-Nut Nutrition Co. Baby Food Litig.*, No. 1:21-CV-133 (N.D.N.Y. Jan. 19, 2023) (dismissed on primary jurisdiction grounds); *Barnett v. Kroger Co.*, 1:22-cv-544 (S.D. Oh. Sept. 11, 2023) (dismissed for lack of injury to property under WCPA).

In addition to heavy metals, another favorite microcontaminant of plaintiffs in 2023 was PFAS, a group of synthetic chemicals that 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 2023 related to PFAS in food and beverage products. *See Tate, et al. v. Wm. Bolthouse Farms, Inc.*, No. 1:23-cv-01038 (E.D. Cal. filed July 12, 2023); *Hernandez v. The Wonderful Company, LLC et al.*, No. 1:23-cv-01242 (S.D.N.Y. filed February 14, 2023). Like the heavy metal cases, plaintiffs rely on both unrelated label claims regarding the products—particularly claims regarding "natural"—and omissions to assert an economic injury. However, unlike heavy metals, there is great variation among state regulations related to PFAS, with some states, such as California and New York, outright banning the intentional use of them. In addition, there is also variation in states as to what meets the definition of PFAS, with states defining the microcontaminant differently. Moreover, there are no tested safe harbors yet for defendants. With so much unsettled, we expect to see PFAS continue to be a topic of interest for plaintiffs in 2024.

SERVING SIZE LITIGATION

In short, in 2023, we saw two types of cases brought by plaintiffs related to serving size. The first—and most popular—is based on a claim that a container serves a certain amount of the product when, in reality, it yields much less. The biggest target for this type of serving size suit is coffee companies, but in 2023, we saw plaintiffs expand to include other food and beverage products, such as oatmeal canisters that claimed to make a certain number of servings per container. *See Durant v. Big Lots, Inc.*, No. 5:23-cv-00561 (M.D. Fla. filed Sept. 11, 2023) (coffee), *Nupp v. J.M Smucker Co. et al.*, No. 4:23-cv-00443 (coffee), and *Hassard v. Aldi, Inc.*, 2023-LA-0087 (St. Clair Cty. Cir. Ct. filed Jan. 26, 2023) (oats). Basically, any product that claims to make a certain number of servings is at risk of this type of lawsuit. Most, if not all, of the serving size representations targeted by plaintiffs in 2023 were in some way qualified with phrases such as "makes *up to* X servings" or "makes X servings *when used as directed*." These qualifications, however, were not enough to prevent plaintiffs from bringing these lawsuits, but they did aid many defendants in successfully defeating the claims.

For example, on July 18, 2023, a lawsuit against Starbucks alleging that it provided one-third less coffee than promised in its cold brew concentrate was dismissed in the Southern District of New York. In arguing for dismissal, Starbucks pointed to the instructions on the packaging, which explained that consumers should combine 4 oz. of the concentrate and 4 oz. of water to

prepare a cup of coffee. *Telesco v. Starbucks Co.*, No. 22-cv-2687 (S.D.N.Y. July 18, 2023) at 3. The court agreed with defendant and, in dismissing the lawsuit, explained that no reasonable consumer would "have a valid argument for failing to read and follow instructions as clear as those[.]" *Id.* at 9. Moreover, the court clarified that a reasonable consumer is able to "perform simple math." *Id.* at 10.

The second type of serving size case is based on calories per serving. Specifically, in these cases, plaintiffs allege that they were misled by the caloric intake of the product because the serving size is artificially small. For example, in July, a cookie company was sued for misleading consumers as to the calories of a cookie because it provided calorie information "per serving" when each individual cookie can have as many as four servings. *See Cytryn, et al., v. Crumbl LLC, et al.*, No. 8:23-cv-01218 (C.D.Cal filed July 7, 2023). Plaintiffs alleged defendant provided the caloric information in this manner to deliberately conceal the calories of a single cookie.

On April 18, 2023, the Ninth Circuit affirmed the district court's dismissal of a case premised on a similar theory that defendant misrepresented the calorie and fat content based on artificially low serving sizes of butter-flavored vegetable oil in a spray bottle. *See Pardini v. Unilever United States Inc.*, No. 21-16806 (9th Cir. Apr. 18, 2023). The court, in a split decision, held that the food labeling requirements were expressly preempted by the federal Food Drug and Cosmetic Act (FDCA) for spray fats and oils. Under FDA regulations, the serving size labeling at issue is permitted for sprays. In affirming the district court's dismissal, the court explained the product is correctly classified as a spray, not butter.

PROTEIN LITIGATION

Early on in 2023, like in previous years, plaintiffs continued to bring lawsuits alleging that food companies overstated the amount of protein in their products by using a total protein figure (the nitrogen method) for a front-of-pack (FOP) protein content claim rather than a protein figure adjusted for digestibility. *See, e.g., Luna v. Brad's Raw Chips*, LLC, No. 3:23-cv-00926 (N.D. Cal. filed March 1, 2023).

As discussed over the last several years, the plaintiffs' theory in these protein cases is primarily based on the protein labeling regulation 21 C.F.R. § 101.9(c)(7). This federal 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"). This is called the "total protein" figure. A statement of the "corrected amount of protein per serving," calculated using a different test called the protein digestibility-corrected amino acid score (PDCAAS), 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, where the products display an FOP protein claim (e.g., "10 g protein"), they 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 speak to how companies should calculate protein content for purposes of an FOP protein content claim. The plaintiffs have nevertheless argued that the FOP claim must reflect the amount of "corrected protein" (calculated using a PDCAAS), rather than "total protein" (calculated using the nitrogen method).

However, in August 2023, the Ninth Circuit weighed in on the issue, largely taking much of the shine off of this litigation theory. In the Ninth Circuit decision, the court affirmed the lower courts' rulings in two related consumer class actions, holding that federal law preempted plaintiffs' state law claims that defendants deceived consumers about the protein content of their products. *Nacarino et al. v. Kashi Co.*, No. 22-15377 (9th Cir. Aug. 14, 2023); *Brown et al. v. Kellogg Co.*, No. 22-15658 (9th Cir. Aug. 14, 2023). The court explained 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.

FLAVORING/INGREDIENT CLAIMS

In 2023, plaintiffs targeted products that contained phrases such as "No Artificial Preservatives" or "No Preservatives" at a higher rate than in 2022. *See, e.g., Bruno v. Conagra Brands, Inc.*, E428765461 (L.A. Super. Ct. filed April 7, 2023); *Chauca v. Rowdy Beverage Inc.*, 3:23-cv-00730-BEN-BGS (S.D.Cal. filed April 20, 2023). In fact, these preservative claims were among the most

popular claims of alleged deception in 2023. 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 citric acid, dipotassium phosphate, sodium benzoate, malic acid, and/or ascorbic acid, purported preservatives. As seen so far, these cases will turn on whether the ingredient is functioning as a preservative and/or whether the ingredient is artificial, issues hard to prove on a motion to dismiss.

Indeed, at the motion to dismiss stage, many courts have found that the allegations are sufficient to state a claim. For example, on March 28, 2023, a court denied defendant's motion to dismiss, finding the phrase "no preservatives" on the product label misleading due to the presence of citric acid. *Simeone v. T. Marzetti Co.*, No. 7:21-cv-09111 (S.D.N.Y. March 28, 2023). The court explained that "Plaintiffs' allegations are sufficient at this stage to state a claim that citric acid works as a preservative in the Products." *Id.* at 12. Given the success plaintiffs have been having, it is likely that these claims will continue to be a favorite of plaintiffs in 2024.

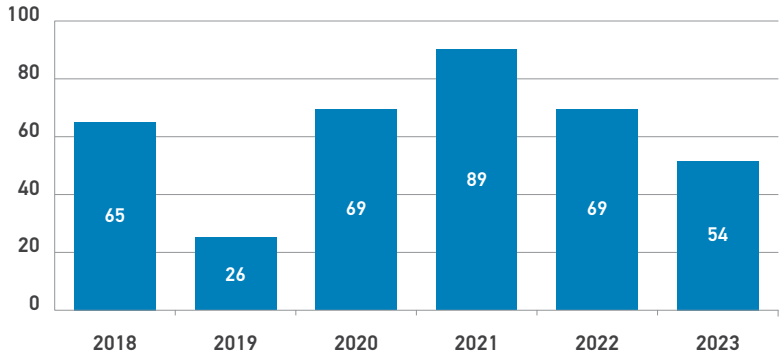
Throughout 2023, we also saw a continued rise in predominant ingredient claims. The predominant ingredient can be indicated by either a claim that the product is "made with" a certain ingredient, such as "made with real butter" or "made with whole grain," or by the name of the product. Either way, plaintiffs were not satisfied with the quantity of the highlighted ingredient. Namely, plaintiffs felt the highlighted ingredient must be the most predominant ingredient; otherwise, the label is deceptive. This was especially true if the claim highlighting the ingredient is also coupled with an image of that ingredient.

Recent case law in this area suggests that plaintiffs may have a harder time succeeding on this claim. This is largely because, as courts have noted, (1) the highlighted ingredient is generally truly an ingredient of the product, and (2) the back of the label clarifies the amount of the highlighted ingredient. For example, in *Venticinque v. Back to Nature Foods Co., LLC*, No. 22-cv-7497 (S.D.N.Y. Aug. 8, 2023), the court found the claim "organic whole wheat flour" on the label of a box of crackers along with the product name "Stoneground Wheat Crackers" would not trick consumers into falsely believing that whole wheat flour was the predominant flour in the crackers. *Id.* at 8. In dismissing the complaint, the court explained that the ingredient list resolved any ambiguity as to the amount of whole wheat flour: "A simple tilt of the package would reveal the full list of ingredients and dispel any confusion." *Id.*

LEGAL TRENDS IN ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG)

ESG-RELATED CLASS ACTIONS: FILINGS BY YEAR

FIGURE 4



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

As 2023 waned, environmental, social, and governance (ESG) issues remained turbulent. Adding to the pressure, the plaintiffs' bar continued to challenge unsubstantiated claims across the industry, demanding greater transparency and accuracy in green marketing.

ESG-RELATED LEGISLATION

ESG legislation in 2023 was complex and often contentious, marked by both significant developments and continued uncertainties. There was increased legislative activity in 2023, including legislation both for and against ESG. Evolving environmental regulations and standards also pose a continuing challenge for CPG companies; staying ahead of changes and ensuring compliance with various regulations across different jurisdictions require almost constant vigilance.

The U.S. Securities and Exchange Commission's (SEC's) proposed climate-disclosure rule requiring public companies to report on their greenhouse gas emissions and climate risk management strategies is still under consideration and facing significant pushback from certain industries. Meanwhile, the Biden administration established an interagency working group on sustainable finance, signifying a strong federal focus on ESG issues.

Several states in the United States introduced and passed legislation related to ESG with a focus on subjects including the following:

- **Supply chain transparency.** Several bills addressed environmental due diligence and ethical sourcing.
- **Extended producer responsibility and sustainable packaging**. In the absence of comprehensive federal legislation, states and local jurisdictions have considered laws and regulations affecting the production, use, and disposal of packaging.
- **Fiduciary duties.** Legislation aimed at aligning corporation decisions with long-term sustainability goals faced strong opposition.
- **Divestment of fossil fuels.** Some states explored proposals targeting divestment from fossil fuel companies.

ESG-RELATED LITIGATION

The spotlight shone brightly on misleading sustainability claims in 2023. Sunscreens touted as "reef-friendly" continued to face legal heat, as they were accused of harboring ingredients harmful to coral reefs. A lawsuit alleging that a major retailer's "reef-conscious" label deceived consumers expecting reef protection exemplifies this trend. However, some courts have offered hope

for CPG companies battling these claims. The U.S. District Court for the Southern District granted dismissal of a putative class action alleging the "Reef Friendly*" statement on the defendant's sunscreen product is false and misleading due to the presence of certain ingredients that can harm coral reefs and surrounding marine life. The court held that a reasonable consumer would not be misled by the challenged labeling statements because consumers could follow the asterisk on the product label and see the withheld ingredients for themselves. The court dismissed plaintiff's state law claims because, considering the sunscreen's label as a whole, the court found that the "Reef Friendly*" representation may be ambiguous, but it was not materially misleading. See *Sherise Richardson v. Edgewell Personal Care, LLC*, No. 21-cv- 08275-PMH (S.D.N.Y. - January 30, 2023).

The seafood industry also continued to face challenges. For example, in a case filed in the U.S. District Court for the Central District of California, the plaintiff alleged that the marketing and labeling of the defendant's tuna products are deceptive and misleading. The plaintiff claimed that because of the representation that the products are "DOLPHIN SAFE," reasonable consumers would be led to believe that the products are manufactured using fishing methods that neither kill nor harm dolphins when, in fact, the tuna in the products is sourced using fishing methods that are known to kill and harm dolphins and other marine life. The court in this case denied dismissal of the putative class action, finding that a reasonable customer could interpret "dolphin-safe" to imply a heightened promise. The defendant argued that the plaintiff lacked standing because there was no evidence that any dolphins were actually harmed. However, the judge reasoned that plaintiff's claimed injury was not harm to the dolphins but that consumers paid for a product that misrepresented itself. See*, Elizabeth Henriquez v. ALDI Inc., No. 2:22*-cv-06060-JLS-JEM (C.D. Cal. - February 7, 2023).

The "all natural" label continued to faced scrutiny. CPG giants were targeted for products allegedly containing PFAS, harmful synthetic chemicals, despite their natural branding. These lawsuits highlight the growing awareness of hidden ingredients and the public's demand for authentically natural products. For example, in a case pending in the U.S. District Court for the Eastern District of Missouri, the plaintiff alleged that the marketing and labeling of the ECOS brand line of cleaners, soaps, detergents, and stain and odor removers are deceptive and misleading because of representations such as "nontoxic," "safer," "made without known carcinogens, reproductive toxins, or endocrine disruptors," "climate positive," "Earth Friendly," and/or "sustainable." The plaintiffs claim the products allegedly contain the chemical phenoxyethanol, a category 2 carcinogen. The court allowed allegations of "ascertainable loss," in which the plaintiffs claimed they paid more for the purportedly nontoxic and environmentally friendly products, to survive a motion to dismiss. Similarly, the court allowed deception claims to proceed, reasoning a reasonable consumer could plausibly be misled by the products' affirmative statements. See, *Delia De Santiago Lizama et al. v. Venus Laboratories,* No. 4:22-cv-00841-RLW (E.D. Mo. – June 27, 2023).

Recyclability claims also took a hit. Tom's of Maine found itself embroiled in a lawsuit over its "Recyclable Tube" labels. The plaintiffs argued that the tubes, indistinguishable from traditional nonrecyclables, contaminate recycling streams and jeopardize legitimate recycling efforts. The case underscores the complexity of mixed-material packaging and its impact on recycling infrastructure.

CPG businesses must remain vigilant in the current environment. Staying informed about emerging claims and potential pitfalls is crucial. Looking ahead, the revised Federal Trade Commission (FTC) Green Guides, expected in 2024, offer clarity. Clearer definitions for terms like "recyclable" and "compostable" should provide much-needed guidance and strengthen legal defenses against future challenges.

However, the Green Guides are not a panacea: they offer no force of law. Ultimately, the onus lies on CPG companies to ensure responsible marketing practices. Transparency, rigorous scientific backing for claims, and a commitment to genuine sustainability should be the guiding principles. By embracing authenticity and ethical product development, the CPG industry can rebuild trust and withstand greenwashing scrutiny.

REGULATORY DEVELOPMENTS AFFECTING THE CPG INDUSTRY

REGULATORY DEVELOPMENTS AFFECTING THE CPG INDUSTRY

FDA AND USDA FOOD REGULATORY DEVELOPMENTS

Throughout 2023 and extending into 2024, several regulatory developments are likely to bear on food and beverage litigation—with the hope that increased regulatory precision will allow defendants to avoid lawsuits through compliance with more clearly articulated standards.

The FDA announced new food traceability resources in November 2023 for stakeholders that manufacture, process, pack, or hold foods listed on the Food Traceability List. These resources aim to facilitate compliance with the FDA's Food Traceability Rule. The rule requires stakeholders to maintain certain records regarding the handling of foods listed on the Food Traceability List. The compliance date for regulated entities is January 20, 2026. The FDA says it will not begin routine inspections under the rule until 2027.

In Fall 2023, the FDA published final guidance and a proposed rule regarding Prior Notice for human food and animal feed. The final guidance (Edition 4) clarifies how to submit prior notice to the FDA and includes a new Q&A on several important issues. For example, the new Q&A makes clear that food imported from a country with which the FDA has a Systems Recognition Arrangement (SRA) or equivalence determination is not exempt from prior notice. On the heels of this guidance, the FDA issued a proposed rule to amend aspects of the Prior Notice rule. Taken together, this activity could indicate an increased focus at the FDA on tracking and inspecting imported human food and animal feed.

The FDA stated its interest in moving forward with FOP nutrition labeling in the short term. At a November 2023 Reagan-Udall Foundation convening, the FDA highlighted FOP labeling as a high priority for the agency and noted its commitment to ongoing stakeholder engagement on this important topic, building on continued industry interest in a simple, highly visible, and attention-grabbing FOP design to help consumers make informed and healthy food choices.

The FDA emphasized added sugar reduction efforts in recent public meeting. In a November 6-8, 2023, stakeholder meeting, the FDA shared its recent efforts to reduce added sugar consumption, and presenters from academia and state and local governments discussed a range of potential added sugar reduction measures, including taxes on sugar-sweetened beverages, voluntary sugar reduction targets, and public education and counter-marketing campaigns. We'll continue to keep a close eye on federal, state, and local efforts to reduce added sugars in the U.S. marketplace.

The FDA released an updated draft guidance to facilitate current good manufacturing practices (CGMPs) and hazard analysis and risk-based preventive controls (HARPC) compliance for human food. On September 26, 2023, the FDA added two new chapters to the agency's *Draft Guidance for Industry: Hazard Analysis and Risk-Based Preventive Controls for Human Food*. These two new chapters, focusing on food allergen programs and acidified foods, aim to facilitate compliance with the FDA's CGMPs and preventive controls for human food.

FDA dietary supplement program updates. In light of the proposed human foods program redesign at the FDA, Commissioner Robert M. Califf explained that (1) a new Office of Food Chemical Safety, Dietary Supplements, and Innovation (OFCSDI) will regulate dietary supplements; (2) this new office aims to implement an effective risk-management framework with a focus on the "greatest risks to the public"; and (3) the agency seeks to develop new surveillance methods and tools to strengthen its oversight.

The FDA released a public inventory of unapproved food additives. In July 2023, the FDA released a public inventory of certain food ingredients that the agency has determined are unsafe because they are unapproved additives that are not generally recognized as safe (GRAS) when used as intended. The FDA developed this inventory as part of its post-market surveillance of food ingredients. Notable ingredients included in the inventory are cannabidiol (CBD), melatonin, Delta-8-tetrahydrocannabinol (delta-8-THC), and caffeinated alcoholic beverages.

USDA issued new directives regarding cell-cultured meat and poultry products in summer 2023. USDA clarified inspection, sampling, and labeling review practices. This activity came on the heels of labeling review approval and grants of inspection to two cell-cultured poultry companies in June 2023.

PFAS. In May 2023, the FDA shared a constituent update on its PFAS activities to better understand PFAS in the general food supply, including recent testing results, seafood-related work, and advances in testing methods. The FDA is taking steps to better understand PFAS in seafood and has expanded its ability to detect specific types of PFAS in foods.

The FDA issued a draft compliance policy guide for major food allergen labeling and cross-contact. Updating the 2005 CPG Sec 555.250 Statement of Policy for Labeling and Preventing Cross-contact of Common Food Allergens, the draft CPG includes the FDA's current policies on major food allergen labeling requirements, allergen cross-contact, and voluntary allergen information, among other issues.

New FDA directory of select ingredients used in dietary supplements. Originally launched in March 2023, and updated (and renamed) in February 2024, this publicly available directory aims to facilitate stakeholder access to information about ingredients used in products marketed as dietary supplements. Importantly, it allows the user to quickly find what the FDA has said about enumerated ingredients and whether the agency has taken any regulatory action with regard to the ingredient. The directory is not exhaustive and covers only ingredients where the FDA has taken enforcement actions or has otherwise expressed concerns.

The FDA released a draft guidance on labeling of plant-based milk alternatives. In February 2023, the FDA set out its views on the naming and labeling of plant-based milk alternatives. The draft guidance specifically recommends the use of voluntary nutrient label statements to identify differences in nutrient content between a plant-based milk product and milk from cows. Notably, the document includes an in-depth consumer understanding write-up focused on plant-based milk alternatives that we think can also serve as a guidepost for understanding how the FDA may approach the naming of plant-based alternative foods more broadly.

The FDA issued action levels for lead in food intended for babies and young children via draft guidance published in January 2023 as part of its Closer to Zero action plan. The FDA establishes the following action levels: 20 parts per billion (ppb) for root vegetables (single ingredient); 20 ppb for dry cereals; and 10 ppb for fruits, vegetables (excluding single-ingredient root vegetables), mixtures, yogurts, custards/puddings, and single-ingredient meats.

The FDA announced the need for a new regulatory pathway for CBD "that balances individuals' desire for access to CBD products with the regulatory oversight needed to manage risks." On January 26, 2023, the FDA explained that existing regulatory frameworks for human and animal food and dietary supplements are not appropriate for CBD. On the very same day, the FDA denied three separate citizen petitions requesting the FDA to issue a regulation allowing CBD products to be marketed as dietary supplements. We expect the FDA to work with Congress to develop a federal strategy for regulating CBD in food and dietary supplements.

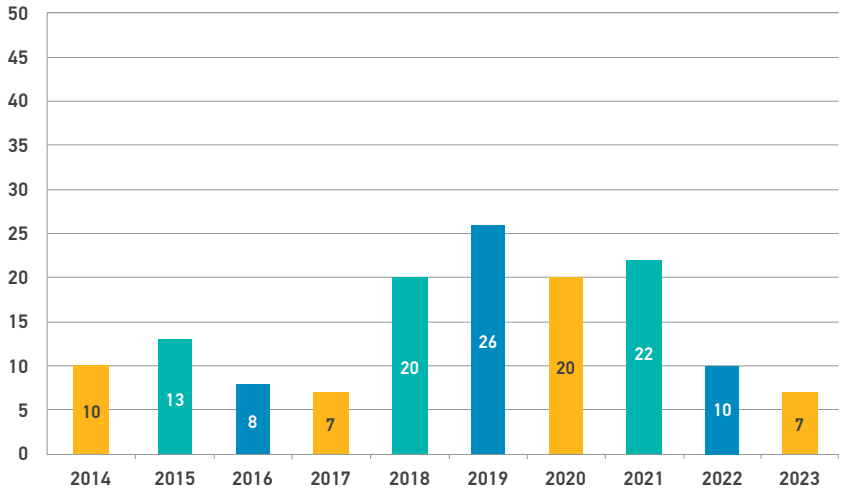
USDA issued a final rule on January 19, 2023, to amend its organic regulations to strengthen oversight and enforcement of the National Organic Program. The final rule mandates compliance by March 19, 2024, and imposes new regulatory obligations on certified entities, including requirements related to traceability, fraud prevention, labeling of nonretail containers, and use of import certificates.

The FDA announced a redesign of its human food programs to unify and elevate the program, remove redundancies, and facilitate more effective and efficient oversight. Announced on January 31, 2023, the FDA intends to unify various functions of the Center for Food Safety and Applied Nutrition (CFSAN), Office of Food Policy and Response (OFPR), and Office of Regulatory Affairs (ORA) under the Human Foods Program, among other key updates. This follows the findings and recommendations of a Reagan-Udall Foundation expert panel that the FDA tasked with evaluating the agency's existing human foods program. Jim Jones joined the FDA in September 2023 as the agency's first Deputy Commissioner for Human Foods.

LEGAL TRENDS IN PET FOOD

PET FOOD CLASS ACTIONS: FILINGS BY YEAR

FIGURE 5



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

The pet food industry has seen a steady stream of putative class action filings in recent years. As shown below, filings in 2019 were nearly 400% above the 2014 number, a growth from 10 to almost 40 cases. The numbers have declined in recent years, with a drop to 10 cases in 2022 and 7 cases in 2023.

Trends in pet food litigation largely mirror those in food litigation. As these cases continue to work their way through the courts, an emerging body of case law is developing. In many instances, decisions have tracked analyses from food and beverage matters—e.g., litigation over the term "natural." But issues unique to pet food are prompting court decisions specific to the segment.

SALMONELLA

Following a recall of dog food products allegedly containing salmonella, several putative class actions have been filed alleging injury to the plaintiffs' pets, including death and serious illness, after they consumed certain Mid-America Pet Food products. Three cases were filed in federal courts in New York and Texas.

CHAMPION PETFOODS

Cases challenging pet food labeling claims like "biologically appropriate" as false or misleading when the products allegedly contained heavy metals continue to work their way through the courts. In 2022, the U.S. Court of Appeals for the Eighth Circuit found that pet food representations such as "biologically appropriate," "made from fresh ingredients," and "never outsourced" would not be misleading to a reasonable consumer. *Song v. Champion Petfoods USA, Inc.,* 27 F.4th 1339 (8th Cir. 2022). The U.S. Court of Appeals for the Tenth Circuit held similarly in a case dismissing representations such as "Trusted Everywhere" and "Fresh and Regional" as nonactionable. *Renfro v. Champion Petfoods USA, Inc,* 25 F.4th 1293 (10th Cir. 2022).

In 2023, the U.S. Court of Appeals for the Second Circuit affirmed the district court's grant of summary judgment in favor of the company. The panel reasoned that a "reasonable consumer could have discovered that Champion's pet foods had a material risk of containing some measurable amount of heavy metals." *Paradowski v. Champion Petfoods, Inc.*, No. 22-962-cv, 2023

WL 3829559, at *3 (2nd Cir. 2023). The panel further acknowledged the importance of consumer labeling "for both humans and pets alike" but noted that "it is not within the province of the courts to decide what information must be disclosed on consumer packaging "but instead "[t]hat issue should be for Congress or a federal agency such as the FDA to determine." *Id.*

Reviewing similar allegations, the U.S. District Court for the District of Massachusetts dismissed a putative class action, concluding that any allegation of deception was "dubious." *Slawsby v. Champion Petfoods USA, Inc.*, 2023 WL 2647065, at *2, n.2 (D. Mass. 2023).

In Iowa, a state court denied a motion for class certification, holding that the plaintiffs had not met their burden to demonstrate that common questions predominated over individual issues. *Blackburn v. Champion Petfoods USA, Inc.*, No. 04651-CVCV026865, 2023 WL 3072746, at *6 (Iowa Dist. Apr. 11, 2023).

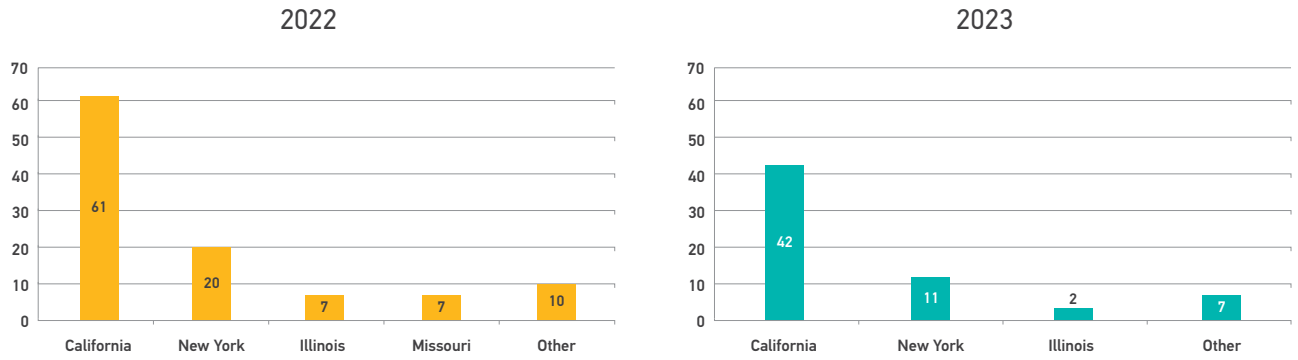
The U.S. District Court for the Northern District of Illinois also denied class certification in a separate case, reasoning that the "plaintiffs' proposed class certification involves too many different products, too many different product labels, too many different purchasers, and too many different package contents to effectively resolve the legal claim together." *Zarinebaf v. Champion Petfoods USA Inc.*, No. 18 C 6951, 2023 WL 2561613, at *5 (N.D. Ill. Mar. 17, 2023).

In the U.S. District Court for the Western District of Washington, the court denied the plaintiffs' request to certify 10 different classes. *Rydman v. Champion Petfoods USA, Inc.*, No. C18-1578 TSZ, 2023 WL 3506133, at *11 (W.D. Wash. May 17, 2023). That court noted that the plaintiffs' request ignored key variations between individual members of the putative class. The court noted "whether a member of any of the ten putative classes purchased a bag containing food that was inconsistent with the packaging and was or could have been deceived by the labels is not a question with a 'common answer,' but rather an issue that would require individualized assessment about which production lot or lots of the specific diet each person bought." *Id.* at *12.

LEGAL TRENDS IN SUPPLEMENTS

DIETARY SUPPLEMENT CLASS ACTIONS: FILINGS BY JURISDICTION

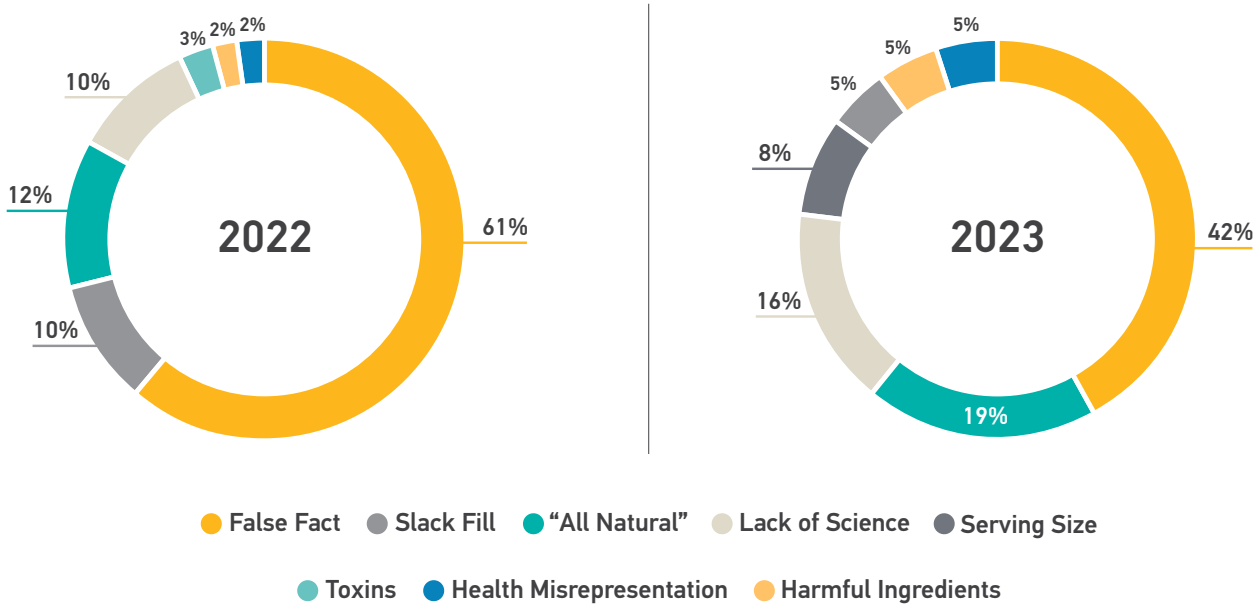
FIGURE 6



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

INDUSTRY FILINGS AND TRENDS: CATEGORIES

FIGURE 7



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

SUPPLEMENTS

Filings made against dietary supplement companies were slightly down in 2023 compared to the record-high number of supplement-related consumer class action filings in 2022. However, supplement companies continued to be targets throughout 2023 at a steady rate. In 2023, California, by far, remained the most popular jurisdiction for supplement cases to be brought, followed by New York.

In 2023, we also saw some notable rulings in the supplement space, particularly related to fish oil supplements. Most recently, in December 2023, the U.S. Court of Appeals for the Second Circuit affirmed dismissal of a case where plaintiffs alleged that defendant misleadingly labeled their product as "fish oil" when it was, in fact, an "ethyl ester," a product distinct from fish oil. *Baines v. Nature's Bounty, Inc*., No. 23-710 (2nd Cir. Dec. 11, 2023). The court disagreed with plaintiffs, explaining that no reasonable consumer would be deceived by the phrase "fish oil" because the complaint conclusorily alleged that consumers "are actually thinking about the molecular form of their fish-oil-derived omega-3s at all," and even if they did care, "that consumer can look to the back label and read that the product's omega-3s are present 'As Ethyl Esters.'" However, in a nearly identical case in California, a federal court denied defendant's motion to dismiss, finding that it could not conclude "that a reasonable consumer would not be deceived by labeling the Product as 'fish oil.'" *Corpuz v. Walmart, Inc.,* No. 322CV00901RBMAHG (S.D. Cal. Aug. 10, 2023).

Consistent with previous years, we saw several types of claims of consumer deception brought by plaintiffs related to supplements, three of which we highlight below.

First, false fact claims, such as claims related to statements like "clinically proven" or claims alleging that the purported benefits of the supplement are false, continued to be popular in 2023. Indeed, as in previous years, filings involving false labeling claims were the most popular theory of alleged deception related to supplements. Specifically, plaintiffs targeted supplement products that claim to have "clinically proven" results when, according to plaintiffs, they did not. *See, e.g, Noriega v. Abbott Laboratories*, 7:23-cv-04014-NSR (S.D.N.Y. filed May 15, 2023). Relatedly, plaintiffs focused on efficacy of certain supplement products that purportedly cannot provide the promised benefit. *See, e.g., Aviles v. TK Supplements, Inc.*, E435938978 (L.A. Super. Ct. filed April 27, 2023). These cases rely primarily on scientific studies to support the theory that the products cannot work as advertised.

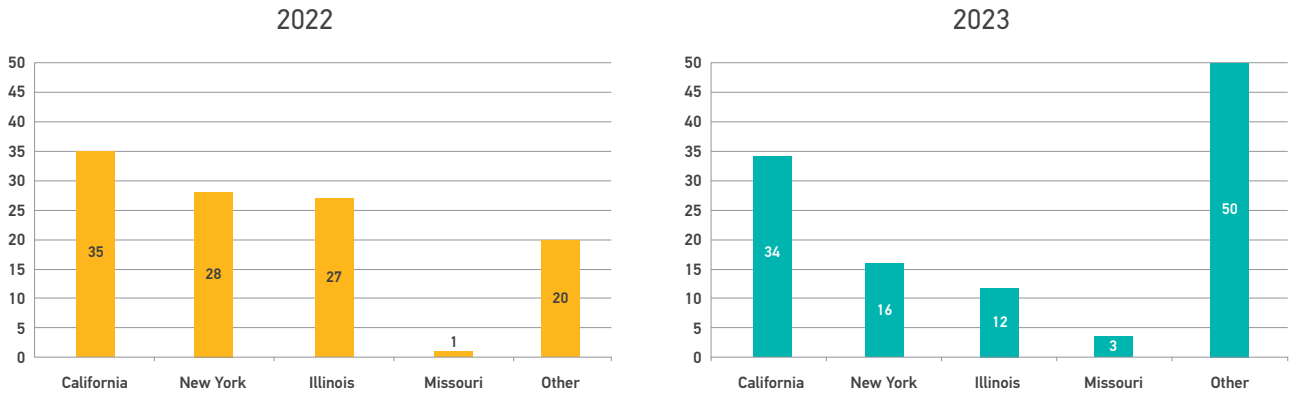
Second, supplement companies have also been targets of microcontaminants cases related to heavy metals and PFAS. In 2023, these microcontaminant claims gained traction in the supplement space following the surge in these cases related to food and beverage products. For example, in *Catherine Barnes, et al. v. Kos Inc*, plaintiffs alleged that defendant misleads consumers as to the healthfulness of its protein powders due to the presence of PFAS. No. 7:23-cv-10104 (S.D.N.Y filed Nov. 16, 2023). Similarly, in 2023, we saw several lawsuits alleging that healthfulness claims were false and misleading due to the presence of heavy metals—lead, in particular. *See, e.g., Pellegrino v. Procter & Gamble Co*., No. 7:23-cv-10631 (S.D.N.Y filed Dec. 6, 2023).

Third, we continued to see slack fill cases brought against supplement companies. *See, e.g*., *Michael Gonzales v. Sway Fitness LLC*, No. E491222209, (L.A. Super. Ct. filed Sept. 12, 2023, alleging dietary supplement products are deceptive and misleading because the product is sold in oversized, opaque packaging, leading reasonable consumers to believe that they are purchasing more product than they receive). These slack fill cases focus on allegedly deceptive product packaging, which, according to plaintiffs, is unlawful, nonfunctional slack fill designed to deceive consumers.

LEGAL TRENDS IN PERSONAL CARE PRODUCTS

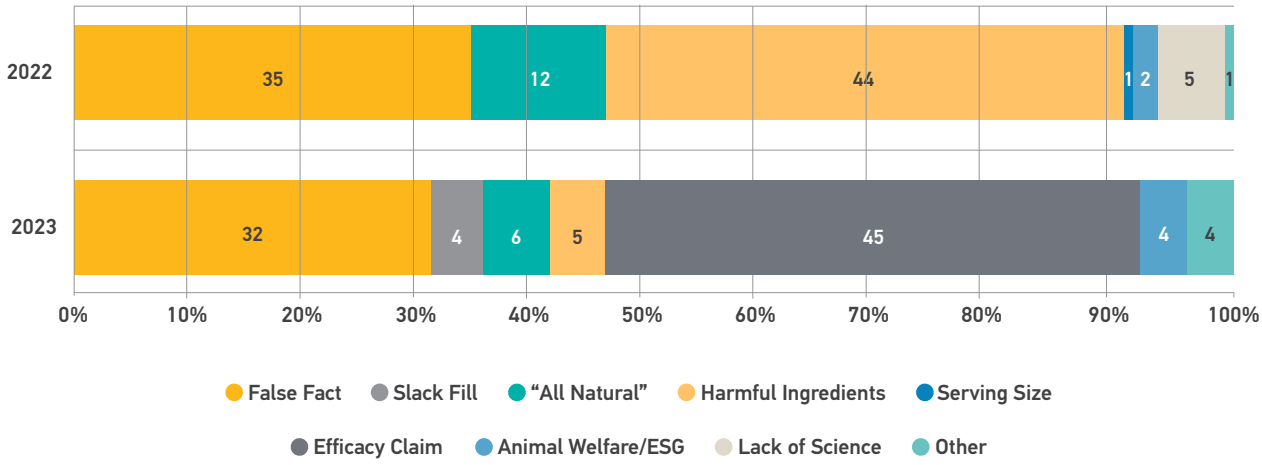
PERSONAL CARE CLASS ACTIONS: FILINGS BY JURISDICTION

FIGURE 8



INDUSTRY FILINGS AND TRENDS: CATEGORIES

FIGURE 9



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

FEDERAL REGULATIONS: THE YEAR OF MOCRA

President Biden signed the Modernization of Cosmetics Regulation Act of 2022 (MoCRA) into law on December 29, 2022. MoCRA is the most significant expansion of FDA authority to regulate cosmetics since the Federal Food, Drug, and Cosmetic (FD&C) Act was passed in 1938, and personal care and cosmetics companies spent much of 2023 preparing to comply with the new regulations.

NEW FDA AUTHORITIES UNDER MOCRA

The purpose of MoCRA is simply to help ensure the safety of cosmetic products that consumers use daily. The FDA has two notable new authorities under MoCRA: records access and mandatory recall authority.

- **Records access**. If the FDA has a reasonable belief that a cosmetic product is likely to be adulterated such that the use of or exposure to such product presents a threat of serious adverse health consequences or death to humans, each manufacturer responsible for the cosmetic must, at the request of the FDA, as part of a facility inspection, permit access to and copy all records relating to such cosmetics. The FDA's access to records will not include recipes or formulas for cosmetics, financial data, pricing data, personnel data (other than data regarding qualification of technical and professional personnel performing functions subject to this Act), research data (other than safety substantiation data for cosmetic products and their ingredients), or sales data (other than shipment data regarding sales).
- **Mandatory recall authority.** If the FDA determines that there is a reasonable probability that a cosmetic is adulterated or misbranded and "the use of or exposure to such cosmetic will cause serious adverse health consequences or death," the FDA will provide the responsible person with an opportunity to voluntarily cease distribution and recall such cosmetic. If the responsible person refuses to or does not voluntarily cease distribution and/or recall the cosmetic within the time and manner prescribed by the FDA (if so prescribed), the FDA may, by order, require such person to immediately cease distribution of such cosmetic. The law provides a process for holding an "informal hearing" within 10 days after such order on whether adequate evidence exists to justify the order.

NEW INDUSTRY REQUIREMENTS UNDER MOCRA

- **Cosmetic safety substantiation.** As of December 29, 2023, cosmetic companies shall ensure, for each cosmetic, and maintain records supporting, that there is adequate substantiation of safety of such cosmetic.
- **Adverse event recordkeeping and serious adverse event reporting.** For the first time, as of December 29, 2023, cosmetic companies are required to report serious adverse events to the FDA associated with the use of a cosmetic product in the United States.

MoCRA also requires industry compliance with forthcoming FDA regulations, including the following:

- **Mandatory facility registration.** MoCRA requires that every person who, on the date of enactment of MoCRA (December 29, 2022), owns or operates a facility that engages in the manufacturing or processing of a cosmetic product for distribution in the United States shall register each facility with the Secretary no later than July 1, 2024.
- **Product listing.** Cosmetic companies must submit to the FDA a cosmetic product listing for each cosmetic no later than July 1, 2024. Listings will include, among other things, the facility registration number, information on the responsible person, cosmetic category, and list of ingredients. There will be flexibility to allow a single listing for products available in multiple fragrances, flavors, or quantities.
- **Good Manufacturing Practice (GMP) requirements for facilities that manufacture cosmetic products.** The FDA will promulgate GMP regulations for facilities that are consistent, "to the extent practicable, and appropriate," with national and international standards to avoid the adulteration of cosmetics.
- **Fragrance allergen labeling requirements.** Every cosmetic label will be required to include a domestic address, domestic phone number, or electronic contact information, which may include a website through which the company can receive adverse event reports. This is in addition to the existing requirement to include address information on the label. This provision becomes effective two years after the passage of MoCRA (December 2024). The FDA will commence notice and comment rulemaking within 18 months (June 2024) of the passage of MoCRA to identify allergens in fragrance ingredients that will be required to be identified on product labels.
- **Standardized testing methods for detecting and identifying asbestos in talc-containing cosmetic products.** First, the FDA is required to promulgate proposed regulations to establish and require standardized testing methods for detecting and identifying asbestos in talc-containing cosmetic products. Secondly, the FDA shall assess the use of PFAS in cosmetic

products and the scientific evidence regarding the safety of such use in cosmetic products. A report summarizing the results of the assessment must be published by December 29, 2025.

In December 2023, the FDA announced that its portal for the electronic submission of facility registrations and product listings under MoCRA is now available online and can be accessed by the industry. The FDA also issued its final *Guidance for Industry: Registration and Listing of Cosmetic Product Facilities and Products.* Finally, the FDA provided guidance on submitting serious adverse event reports for cosmetics, though the agency is still developing a process for submitting electronic mandatory adverse events reports.

STATE REGULATIONS

2023 was the year of MoCRA, but the states did not sleep on their own regulations of cosmetics and personal care products. MoCRA does not prevent a state from regulating cosmetics, although state regulations are subject to potential FDA preemption. Several states have enacted regulations related to cosmetic ingredients.

Most notably, in 2023, Washington State followed California's lead and enacted its own Toxic-Free Cosmetic Act on May 15, 2023. Washington's act sets 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 act, beginning January 1, 2025, no person may manufacture, knowingly sell, offer for sale, distribute for sale, or distribute for use in this state any cosmetic product that contains any of the following intentionally added chemicals or chemical classes:

- Ortho-phthalates.
- 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).
- o-Phenylenediamine and its salts (CAS 95-54-5).

Additionally, 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 Ecology through rulemaking. Washington's law follows at least six other states, including California, New York, Maryland, Minnesota, Maine, and Colorado, which have also enacted laws regulating the use of substances used in cosmetics and personal care products.

Shortly thereafter, Oregon signed into law its own Toxic-Free Cosmetics Act in August 2023. Under Oregon's new law, beginning January 1, 2027, manufacturers may not manufacture, sell, or distribute cosmetics that contain any of the following intentionally added chemicals: ortho-phthalates, PFAS, formaldehyde and formaldehyde releasing agents, methylene glycol, mercury and mercury compounds, triclosan, m-Phenylenediamine and its salts, o-Phenylenediamine and its salts, and lead or lead compounds at 10 ppm or above.

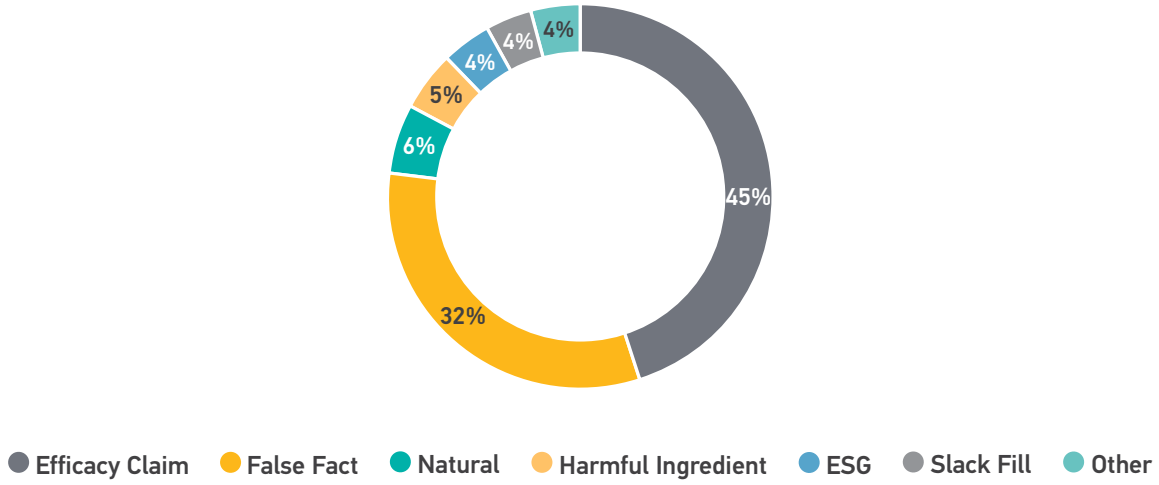
In October 2023, the California state legislature passed Assembly Bill 496, which will ban the manufacture and sale of any cosmetic products that contain any of several specified intentionally added ingredients, except under specified circumstances, as of January 1, 2025. Notably, California had already banned 24 chemicals from personal care products under its Toxic-Free Cosmetic Act taking effect on January 1, 2025. This new bill will supplement the list with an additional 26 prohibited chemicals found in fragrances, nail polish, and hair dye.

COSMETIC LITIGATION IN 2023

In 2023, we continued to see 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 clean beauty claims, and pure false advertising cases. There were 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 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 Sun Protection Factor (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.

PERSONAL CARE CLASS ACTIONS: FILINGS BY TYPE

FIGURE 10



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

Some notable cases coming out of 2023 include the following:

ANIMAL TESTING HAS BEEN CHALLENGED

The use of animals in testing the safety of cosmetic products is not banned under MoCRA, but Congress notes that it discourages such activities and recommends that they be phased out. While animal testing is still permitted in the United States, cosmetic and personal care companies should be cautious of touting cruelty-free claims. For example, John Paul Mitchell Systems faced a putative class action in which the plaintiffs challenged the company's "cruelty-free" claims, including "never animal tested," "a pioneer in cruelty-free hair care," and "no animal testing," when the company allegedly allows animal testing on numerous products in order to sell products in China, where testing on animals is mandatory for companies.

In *Heagney et al. v. John Paul Mitchell Systems*, N.D. Cal. Case No. 3:23-cv-00687, the court denied (in part) John Paul Mitchell System's motion to dismiss on August 2, 2023, finding that the company must face the plaintiffs' false advertising claim because it has long marketed its business and products as "cruelty-free," even though it once imported its products into China and registered them with the Chinese government—at a time when Chinese law required that companies test cosmetic imports on animals as a condition of registration. The court found that "[b]y definition, a product that has been animal-tested once—and a company that has animal-tested once—can never be 'cruelty-free' again."

Several other cosmetic companies have faced similar claims. These cases serve as a reminder about the potential for litigation when making broad-based claims that can be difficult to substantiate.

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 to contain more detailed information about the product that would confirm representations made on the packaging. See *McGinity v. Procter & Gamble Co.*, 69 F.4th 1093 (9th Cir. 2023).

- **Class certified in a case challenging "Collagen" label for products that allegedly do not contain collagen.** In April 2023, 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. The court noted, "There are triable issues of fact as to deception, reliance, materiality, and damages." 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.'" *Mocha Gunaratna, et al., v. Dr. Dennis Gross Skincare, LLC*, C.D. Cal. Case No. 2:20-cv 02311-MWF-GJS.

SEVERAL CASES HAVE HIGHLIGHTED THE IMPORTANCE OF CLEAR AND CONSPICUOUS DISCLAIMERS ON COSMETIC PRODUCT LABELS AND PACKAGING

In 2023, the U.S. District Court for the Northern District of California issued a handful of rulings highlighting the importance of clear and conspicuous labeling of cosmetic products. These include the following:

- First, the court shot down a putative class action addressing efficacy claims related to the defendant's over-the-counter cold sore treatment. In *Tawneya Houser v. GlaxoSmithKline Consumer Healthcare Holdings (US), LLC*, N.D. Cal. Case No. 4:21-cv-09390-JST, the plaintiff alleged that the labeling of the defendant's over-the-counter cold sore treatment was false or misleading because of representations that would lead reasonable consumers to believe that the treatment would typically heal cold sores in two and a half days. The court concluded that the representation "You Can Get Rid Of Your Cold Sore In 2 ½ Days*" was not likely to mislead a reasonable consumer because the term "can" denotes possibility, not probability, and even if the representation was misleading, the corresponding disclaimer eliminates any doubt as to its meaning. This case highlights the importance of clear and conspicuous disclaimers if a claim requires qualification or explanation.

- The court similarly dismissed certain claims challenging the labeling and marketing of cosmetic sunscreen products that represent that they are "24H," which the plaintiffs allege misled consumers to believe that the products provide 24 hours of sunscreen protection. For example, in *Alexis Slaten v. Christian Dior Perfumes, LLC,* N.D. Cal. Case No. 3:23-cv-00409-JSC (October 19, 2023), the court dismissed a putative class action challenging the labeling and marketing of Christian Dior's

Forever Foundation, which provides sunscreen. Specifically, the plaintiff alleged that the representation of "24H" applied to the products' sunscreen benefits. The court held that the plaintiff failed to plausibly plead that the defendant's products' labels are false or misleading to reasonable consumers because, after referencing the products' back labels, no reasonable consumer could interpret the front labels' "24H" representation as applying to the products' sunscreen because the products' packaging provided directions to "reapply at least every 2 hours."

- However, in *Lynn Zimmerman, et al. v. L'Oreal USA Inc.,* N.D. Cal. Case No. 22-cv-07609-HSG (December 8, 2023), the Northern District of California only trimmed a putative class action challenging purported sunscreen benefit representations on some of the defendant's cosmetic sunscreen products. Here, the plaintiffs alleged that the representations such as "Up to 24HR Breathable Texture," "Up to 24H Fresh Wear," and "Sunscreen Broad Spectrum SPF 25" would lead a reasonable consumer to believe that the product provides 24 hours of sunscreen protection when the product's SPF lasts only two hours. The court noted that the back label instructions directed to "reapply at least every 2 hours for sunscreen use," but the instructions on at least one of the challenged products are printed underneath a peel-back sticker. The court could not conclude as a matter of law that a reasonable consumer would peel back the sticker on the label in the store prior to purchase, and the court allowed the claim to proceed as to those products. By contrast, where the back label instructions to "reapply at least every 2 hours for sunscreen use" were located directly on the back of the product, visible to the consumer prior to purchase, the court concluded the challenged representations were not likely to mislead a reasonable consumer. These rulings demonstrate the importance of placing easily readable, qualifying language on the outside packaging of the product.

EXPECTATIONS FOR 2024

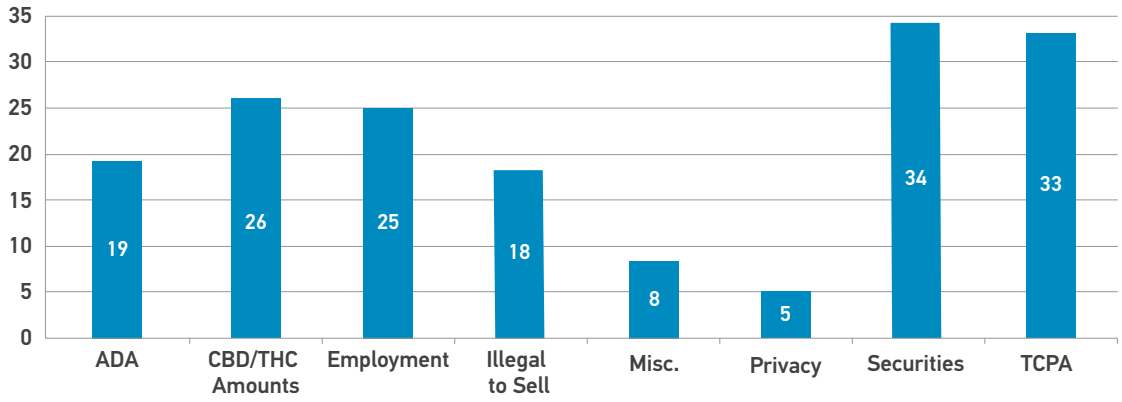
We expect that plaintiffs' lawyers will continue to be focused on clean, natural, and cruelty-free beauty products in 2024. The industry should also be prepared to defend against claims alleging a purported trace presence of certain chemicals, including benzene and PFAS. Relatedly, we will continue to see litigation following reports made by certain plaintiff-friendly laboratories and consumer advocacy groups. This trend has continued over the last couple of years, with reports allegedly finding harmful chemicals in several products, including dry shampoo, sunscreens, and deodorants.

LEGAL TRENDS IN CANNABIS

CANNABIS CLASS ACTIONS: FILINGS BY CATEGORY

FIGURE 11

2019-2023



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

The cannabis marketplace has expanded dramatically in recent years. As of 2023, 38 states have legalized cannabis for medical use, with 24 states allowing cannabis for recreational use. At the same time, the industry has suffered because of the burden of federal taxation. Critically, in October 2022, the Biden administration asked the Drug Enforcement Administration (DEA) and Department of Health & Human Services (HHS) to reevaluate cannabis's status as a schedule I substance under the Controlled Substances Act (CSA). Under federal tax law, namely Internal Revenue Code § 280E, companies making schedule I or II substances cannot write off ordinary business expenses. In August 2023, the HHS recommended that marijuana be rescheduled to schedule III, and the DEA, the federal agency responsible for administering the CSA, is currently considering the HHS's recommendation.

Federal legislators continued to take significant steps regarding cannabis in 2023, namely regarding cannabis banking. While these proposals failed, they indicate increasing federal consideration at the federal level regarding legalizing and regulating the cannabis market.

HIGH-LEVEL TRENDS

- The federal government took a monumental step toward the potential rescheduling of marijuana at the federal level. Following President Biden's announcement that the federal government will conduct an expedited review of the federal regulation of cannabis, the HHS and DEA have initiated the process to potentially reschedule marijuana from schedule I to schedule III. HHS has conducted its review of the available scientific evidence and recommended that marijuana should be rescheduled to schedule III. The most significant, and potentially seismic, activity regarding cannabis in 2023 was the executive branch's actions regarding cannabis rescheduling. Rescheduling to schedule III, if completed, would likely result in market growth and, correspondingly, more business-related litigation. Critically, it will also reduce the burdensome federal taxes paid by cannabis companies under Internal Revenue Code 280E, which forbids those companies from deducting ordinary and necessary business expenses.
- Federal and state regulators continue to address delta-8 THC, an intoxicating cannabinoid derived from otherwise legal hemp. In July 2023, the FDA and the FTC issued warning letters to six companies regarding products containing delta-8 THC. In announcing these warning letters, the FDA advised that delta-8 THC has not been evaluated or approved by the FDA for

safe use in any context, including when added to food. Some state regulators, namely those in California, Connecticut, and Tennessee, have prohibited or otherwise imposed substantial regulations on delta-8 THC.

- Given the growth in the cannabis market, we expect to see greater numbers of class actions filed against cannabis companies. Our survey of federal class action cases found more than 165 recent filings since 2019 against cannabis companies. Additional class action litigation cases are anticipated, and cannabis companies should proactively mitigate potential litigation risks. For example, cannabis companies are increasingly seeing litigation involving allegations of (1) autodialed, unsolicited messages and (2) allegedly mislabeled amounts of CBD or delta-9 THC, the substance most closely associated with a marijuana "high" in products.
- The FDA continues to work on federal policies regarding hemp-derived CBD and other cannabinoids. In January 2023, the FDA concluded that its existing regulatory frameworks for food and supplement products were not appropriate for CBD and vowed to work with Congress on new regulatory pathways. CBD products face a patchwork of state and even local laws regarding their marketing and sale. The sale of food and beverage products containing CBD remains nominally illegal at the federal level. California, among other states, has now legalized the sale of hemp-derived CBD food and beverage products.
- In November 2019, the FDA noted that the agency continues "to explore potential pathways for various types of CBD products to be lawfully marketed." In March 2020, the agency announced it recognized the "significant public interest in CBD" and that it was moving forward in evaluating a potential risk-based enforcement strategy to "further the goals of protecting the public and providing more clarity to the industry and the public" while also taking "potential steps to establish a clear regulatory pathway." In 2022, the FDA hired its first in-house cannabis advisor—a former state cannabis regulator—to provide guidance on the potential regulation of hemp and cannabis.

LEGISLATION

In 2023, Congress continued to debate a bipartisan cannabis bill, the SAFER Banking Act. Previous versions of the bill, formerly known as the SAFE Banking Act, passed in the House six times but failed to move through the Senate. The SAFER Banking Act would make it easier for banks to serve the cannabis industry by permitting financial institutions to conduct business with state-legal cannabis businesses. As it stands now, cannabis businesses must operate in cash, increasing risk to personnel and property. In addition to addressing a public safety issue, cannabis banking reform could allow retailers to accept credit cards and make it easier for businesses to access mortgages and other financial services.

At the state level, cannabis legislation continues to develop. Among other things, states continue to wrestle with regulating delta-8 THC, as well as other cannabinoids.

REGULATION AND REGULATORY ENFORCEMENT

In 2024, there may be a monumental shift in the federal regulation of cannabis. Following President Biden's October 2022 call to reevaluate federal cannabis regulation under the CSA, the HHS issued an August 29, 2023, recommendation to DEA concluding that marijuana should be regulated as a schedule III substance. Specifically, the HHS review found that marijuana has less potential for abuse than substances controlled under schedules I or II and has a currently accepted medical use in treatment in the United States. The DEA is now evaluating the HHS recommendation.

At the federal level, products containing delta-8 THC continue to face regulatory scrutiny. The FDA has issued public announcements that delta-8 THC may not lawfully be added to foods and dietary supplements, including six warning letters jointly issued with the FTC. Federal agencies have also focused closely on what they claim are unsupported health claims regarding CBD product marketing, especially as a result of the COVID-19 pandemic. In December 2020, the FTC announced Operation CBDeceit, a suite of six settlements of enforcement actions that herald the FTC's ongoing efforts to monitor the marketplace regarding misleading CBD product claims. The FTC noted companies, particularly CBD product manufacturers, "that represent expressly or by implication that what they sell can prevent, treat, or cure serious medical

conditions will be held to the highest substantiation standards and marketers can expect careful scrutiny of those promises." In May 2021, the FTC announced that "marketers making health-related representations for CBD products are subject to long-standing consumer protection standards" and "[s]erious health claims require the highest level of scientific substantiation."

Additionally, federal and state officials are taking action on cannabis products that are inappropriately marketed to children. For example, in 2022 the FDA issued several warning letters targeting CBD and delta-8 products noting the agency's concern regarding marketing toward children. Likewise, more than 20 state attorneys general authored an open letter regarding copycat cannabis products, writing "copycat THC edibles pose a grave risk to the health, safety, and welfare of our children."

State attorneys general have also taken action on unregulated cannabis and hemp products. In the first weeks of 2024, Connecticut's attorney general has launched seven lawsuits against unregulated cannabis products, some of which were sold with 35 times the state-legal amount of THC.

In October 2023, California's state attorney general issued a Proposition 65 challenge against nine companies that allegedly failed to provide required warnings regarding potential exposure to delta-9 THC or beta-Myrcene. The state's lawsuit also alleged violations of California's laws on inhalable hemp products.

LITIGATION

As the cannabis industry continues to grow, so too does the risk of litigation. Our survey of federal cannabis class actions filed between 2019 and 2023 revealed approximately 170 case filings, including 17 in 2023.

The largest portion (approximately 20%) of these cases involved securities in cannabis businesses, such as a New York "stock drop" case alleging that the business should have disclosed more about disappointing financial news regarding an acquisition. Similarly, about 20% of cannabis cases involved the Telephone Consumer Protection Act (TCPA), alleging that consumers received unsolicited, autodialed communications from cannabis companies.

For cannabis product manufacturers, the most significant cases are the approximately 15% of claims concerning inaccurate THC and CBD labeling. These cases made up the plurality of new class actions filed against cannabis companies in 2022. In addition, as in prior years, a significant portion of cases—approximately 11%—alleged that a CBD product was "illegal to sell" pursuant to the FDA's recent public announcements. Cases in the former category allege that companies represented the amounts of THC or CBD in their products as either too far under or too far over the amount represented on the label. The cases in this latter category allege that the manufacturers' cannabis or hemp products violate state law rules protecting consumers because the products are "illegal to sell," per the FDA's recent public statements.

The remaining cases in the survey largely involved employment-related or disability-related claims. These included individuals who alleged that they consumed a product and were subsequently fired from their employment or asserted that a cannabis company's website did not accommodate visually disabled users. Several privacy cases also asserted claims on behalf of putative classes regarding the deletion of court records for cannabis-related arrests of minors.

PROPOSITION 65 TRENDS

PROPOSITION 65 TRENDS

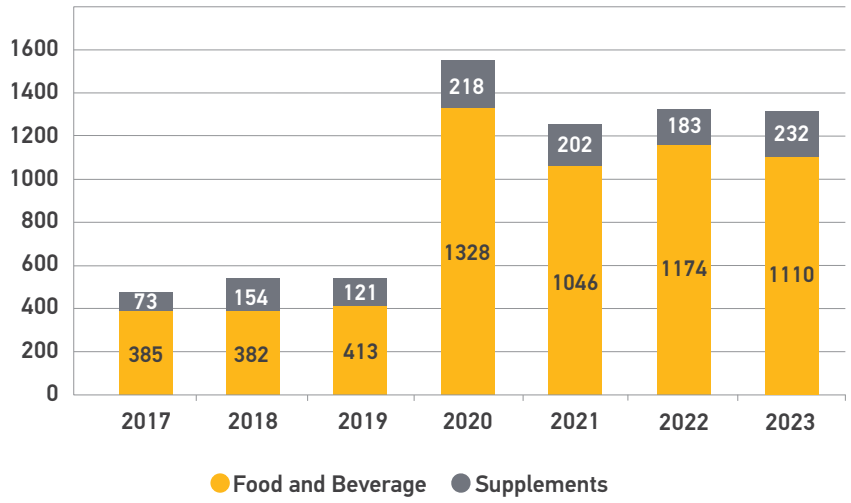
Proposition 65 was a California initiative approved by voters in 1986 and enacted into law as the Safe Drinking Water and Toxic Enforcement Act. Proposition 65 prohibits retailers and manufacturers from knowingly and intentionally exposing California consumers to a chemical known to the state of California 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 (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 across all products—a significant increase over prior years. Food and CPG products remain a significant target for these notices.

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 prelitigation notices for food products have increased steadily over the last five years, with numbers holding steady through 2023.

PRE-SUIT NOTICES OF VIOLATION

FIGURE 12



Data compiled by Perkins Coie based on a review of Proposition 65 Notices filed with the California Office of Attorney General.

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 continued to hold through 2023. The number of notices targeting food, beverage, or dietary supplements stayed relatively stable from 2021 through 2023—from 1,248 notices in 2021 to 1,357 notices in 2022 and 1,342 notices in 2023.

As in prior years, the prelitigation 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 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 prelitigation notices issued to food, beverage, and supplement companies. In 2023, there were no 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

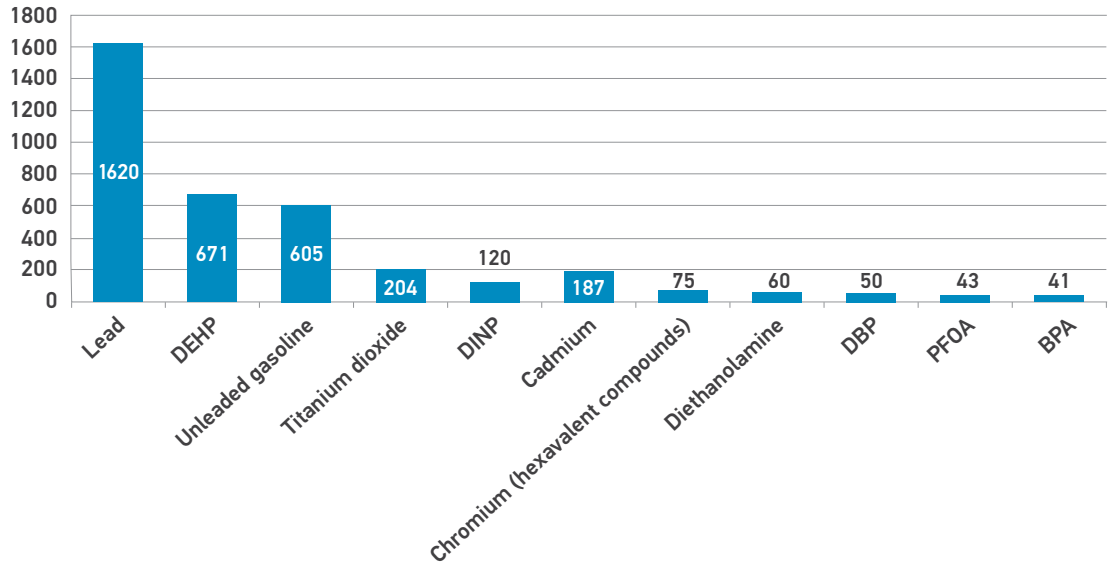
powdered foods, and dietary supplements. Notably, 2023 saw a marked increase in the number of notices targeting dietary supplements—jumping from 183 to 232 notices. Moreover, more than one-third of the dietary supplement notices appear to target products that the plaintiffs purchased from online retailers.

GENERAL CONSUMER PACKAGED GOODS

General CPG companies have also faced a flood of Proposition 65 notices in recent years, receiving approximately 60% of all notices issued. The range of products targeted is extremely broad, but some general trends have emerged. The chemicals most often at issue are lead and phthalates.

NOTICES BY CHEMICAL

FIGURE 13



Phthalates, also known as plasticizers, are a group of chemicals used to make plastics more flexible and durable. They are frequently present in polyvinyl chloride (PVC) and vinyl products. They are used widely in the manufacturing of consumer goods and can be found in items such as plastic packaging, water-proof fabrics, apparel, footwear, automotive interiors, sporting goods, tool grips, and more. Proposition 65 plaintiffs have targeted products containing phthalates for several years and, given the ubiquity of phthalates in consumer goods, continue to be the focus of Proposition 65 claims.

New trends we have observed include notices of violation issued for bisphenol A (BPA) in nylon apparel, n-nitrosodiethylamine in latex-based products such as workout bands, and an increasing number of notices for perfluorooctanoic acid (PFOA) in various water-resistant textiles such as bibs and shower curtains.

PROPOSITION 65 REGULATORY UPDATES

International Agency for Research on Cancer 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 they cause cancer in humans.

Under Health and Safety Code section 25249.8(b) and Title 27, Cal. Code of Regs., section 25306, California's 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 it ultimately did not take such an action. The new IARC classification will likely revive these considerations.

Proposed Amendments to Short-Form Warning Language

In January 2021, California's OEHHA announced proposed regulations that would significantly affect how businesses may use short-form Proposition 65 warnings.

When short-form warnings were first introduced in 2016, many businesses chose to use these truncated warnings on their product labels and websites. Currently, OEHHA provides two versions of model Proposition 65 warning labels: a long-form warning and a short-form warning. The key difference between these two categories is that the long-form warning requires that the business specifically name at least one Proposition 65 chemical that could result in exposure from the product's use; by contrast, the short-form warning requires only a statement of the potential health hazard. The proposed regulations also provide that warnings (both long-form and short-form) may use additional "signal words" such as "CA WARNING" or "CALIFORNIA WARNING."

Previously, a short-form warning could simply read as follows:

WARNING: Cancer—www.P65Warnings.ca.gov.

The proposed regulations would require short-form warnings, to read as follows:

CA WARNING: Can expose you to [name of chemical], a carcinogen. See www.P65Warnings.ca.gov.

OEHHA's efforts to update the short-form warning requirements previously stalled, but now, nearly three years later, OEHHA is back at it. Most recently, on December 20, 2023, OEHHA issued a notice of extension of the public comment period for its proposed amendments to the short-form warning regulations—providing the public until January 3, 2024, to submit comments. A transcript of the public hearing on the proposed rulemaking is available on OEHHA's website.

OEHHA ADDS BISPHENOL S ONTO PROPOSITION 65 LIST OF CHEMICALS

Effective December 29, 2023, OEHHA has added bisphenol S (BPS) to the Proposition 65 list as a female reproductive toxicant.

BPS is similar both chemically and functionally to BPA, which has been on the Proposition 65 list as a reproductive toxicant since 2015. BPS is often found in hard plastic items, synthetic fibers for clothing and textiles, and thermal paper—such as receipt paper and airplane boarding passes.

Businesses will have until December 29, 2024, to provide Proposition 65 warnings for exposures to BPS, including for exposures from products manufactured or distributed prior to that date. OEHHA has not provided a safe harbor level for BPS.

PROPOSITION 65 NOTABLE RULINGS

Defense Victory in Consumer *Advocacy Group v. Gulf Pacific Rice*

On December 5, 2023, Judge Elihu M. Berle of the Los Angeles Superior Court issued a statement of decision finding for rice sellers in a long-running case involving lead in rice. Consumer Advocacy Group (CAG) commenced the lawsuit in 2014 and alleged that certain manufacturers/distributors of rice were in violation of Proposition 65 based on the levels of lead in their rice products.

After a phase 2 trial, the court held that the rice defendants had demonstrated that their products did not cause any exposure to lead above the 0.5 ug/day safe harbor. In making this determination, the court followed the exposure analysis in *Environmental Law Foundation v. Beech-Nut Corporation et al.*, No. A139821, 2015 WL 1212155 (Cal. Ct. App. Mar. 17, 2015), which found that the level of exposure to a Proposition 65 chemical could properly be calculated by averaging exposures over time and over multiple products rather than by using a maximum exposure from a single product on a single day. Judge Berle also noted that the "average user" of a food is determined by the population as a whole, not by "subpopulations," as the plaintiff had argued. It remains to be seen whether CAG will appeal the decision.

Council for Education and Research on Toxics Loses Motions to Dismiss and Vacate in *CalChambers* Litigation

On August 15, Judge Daniel Calabretta denied the Council for Education and Research on Toxics' (CERT's) motion to dismiss and motion to vacate in *California Chamber of Commerce v. Bonta*, the ongoing federal litigation concerning Proposition 65 warnings relating to dietary acrylamide. Defendant-intervenor CERT filed a motion in late 2021 to dismiss the CalChamber case for lack of subject matter jurisdiction. CERT's primary argument was that the plaintiff, California Chamber of Commerce (CalChamber), could not satisfy the case or controversy requirements of Article III because the state attorney general's interests are aligned with CalChamber's interests—essentially claiming that the attorney general had been colluding with CalChamber to undermine Proposition 65. The court definitively rejected this argument, noting that the attorney general has filed several "important, health-protective Prop. 65 lawsuits" and has taken clear steps to defend Prop. 65 in this litigation.

CERT also filed a motion to vacate orders issued previously by Judge Kimberly Mueller: (1) denying CERT's motion for summary judgment and (2) granting CalChamber's motion for preliminary injunction. CERT alleged that Judge Mueller's orders must be vacated because of alleged financial conflicts of interest at the time she issued the orders and her subsequent recusal from the matter.

Judge Calabretta denied CERT's motion to vacate, noting that Judge Mueller's decision to recuse herself was based on CERT's "uncommonly aggressive, scorched earth efforts" and invasion "of [her] personal life and that of [her] husband" that had occurred after Judge Mueller issued the decisions that CERT sought to vacate. Judge Calabretta also noted that the U.S. Court of Appeals for the Ninth Circuit has affirmed the propriety of the preliminary injunction, which has now been in place for almost two and a half years.

CYBERSECURITY

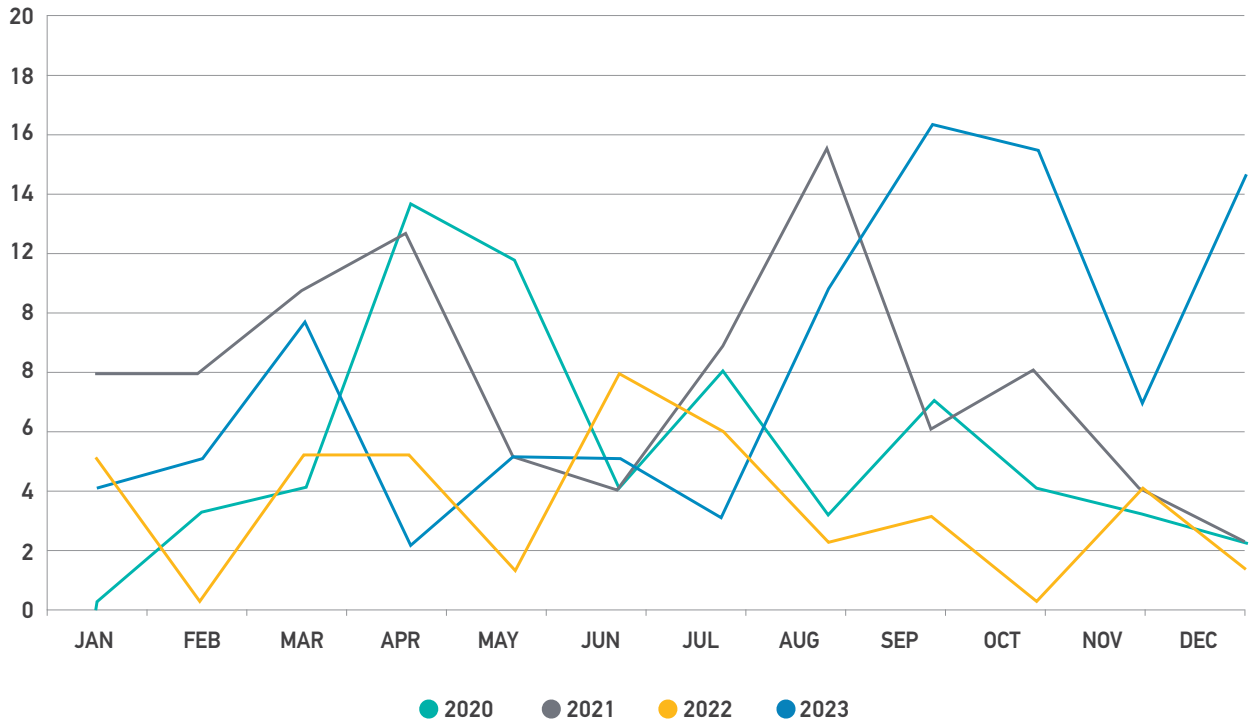
CALIFORNIA CONSUMER PRIVACY ACT LITIGATION CONCERNS CONTINUE IN 2023 FOR THE CPG INDUSTRY

While there is no all-encompassing federal law in place, the CPG industry is facing increasing pressure to be proactive in managing consumer privacy. Thirteen states have passed comprehensive consumer privacy laws. The California Consumer Privacy Act (CCPA), as amended by the California Privacy Rights Act (CPRA), is the most comprehensive privacy law in the United States.

Since the CCPA went into effect at the start of 2020, more than 360 lawsuits asserting CCPA claims have been filed targeting defendants across all industries. This past year saw a significant increase in filings (93%) compared to the previous year. The vast majority of 2023's new filings centered on data security breaches.

STEADY FILINGS SINCE ENACTMENT OF THE CCPA

FIGURE 14



The past year also saw several new settlements in class actions involving CCPA claims. All of these privacy class settlements involved data incidents. In addition to a non-reversionary cash component, the settlements include prospective relief in the form of credit monitoring and changes to defendants' security practices. The prospective relief can be as costly and burdensome as the monetary relief.

RISE IN WIRETAPPING LITIGATION

There has been a surge in privacy litigation under the California Invasion of Privacy Act (CIPA) and other wiretap statutes in Pennsylvania and Maryland. These are novel claims adapted from laws first enacted in the late 1960s, when eavesdropping or wiretapping actually involved the physical tapping of a telephone wire, line, or cable. California class action plaintiffs' lawyers have sought to apply CIPA to certain website tracking technologies such as session replay and chat. These cases allege

companies violate CIPA by recording and sharing users' private chat conversations without their knowledge or consent. The vast majority of the litigation is filed in California; however, it is not just California. We are seeing a rise in other two-party consent states (CA, CT, FL, IL, MD, MA, MI, MT, NV, NH, PA, and WA).

In 2023, there were more than 260 lawsuits asserting CIPA violations. No industry has escaped targeting by the plaintiffs' bar, and there was a significant focus on food, retail, and CPG companies. There have been over 20 rulings issued on pleading challenges just last year, with the overwhelming majority of courts finding that plaintiffs had not sufficiently pleaded wiretapping violations as a matter of law. However, there are a few judges who are denying demurrers and motions to dismiss, allowing these cases to proceed on the merits. Until an appellate court weighs in on the CIPA litigation, we will continue to see an increase in these filings in 2024 due to the availability of substantial, enticing statutory penalties ($5,000 per violation).

We can expect an expansion of consumer privacy laws that follow California's lead and an overall increase in privacy litigation as we head into 2024. We can also expect to see continued enforcement activity at the state level, including in California, where the new California Privacy Protection Agency will ramp up action in connection with the CPRA.

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 in Band 1 for 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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