

# Food & Consumer Packaged Goods Litigation

## 2020 YEAR IN REVIEW





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# INTRODUCTION

**PERKINS COIE IS PLEASED TO ANNOUNCE THAT ITS FIFTH ANNUAL FOOD LITIGATION YEAR IN REVIEW, IN COORDINATION WITH A RELATED EXPANSION OF OUR PRACTICE, HAS BEEN RENAMED THE **FOOD AND CONSUMER PACKAGED GOODS LITIGATION YEAR IN REVIEW.****

In a tumultuous 2020, one thing stayed the same: Plaintiffs' class action lawyers continued to file plenty of lawsuits against manufacturers of consumer packaged goods (CPGs).

For nearly a decade, Perkins Coie has tracked filings against the food and beverage industry specifically, publishing data annually in our previously named Food Litigation Year in Review. As in prior years, the trend remains upward: Despite the interruption in civil litigation prompted by the COVID-19 pandemic, more new class action lawsuits were filed against the food and beverage industry—220 cases—than in any other year of the past decade. And, as plaintiffs' lawyers have set their sights on other products in the CPG space, Perkins Coie has begun to systematically track these cases as well. Supplements, pet foods, household cleaning products, cosmetics, personal care products, and cannabis-based goods are all industries now under attack from the plaintiffs' bar.

So, starting with this 2020 report, the Food Litigation Year in Review will be retitled the Food and Consumer Packaged Goods Year in Review. This renaming is also meant to reflect Perkins Coie's experience and expansion into these related areas. Lawyers in Perkins Coie's Food Litigation practice have defended false labeling cases across a broad range of products and industries. And as our practice area has broadened, we have continued to pay close attention to the litigation environment for emerging trends, important developments in case law, and related regulatory guidance. We use this real-time tracking to help advise clients on risk and develop effective defense strategies for companies facing class litigation.

One area that we monitored closely in 2020, and will continue to track in 2021, is litigation related to "sustainability," i.e., lawsuits that challenge a company's animal welfare or environmental practices. Plaintiffs' counsel made modest inroads into this type of litigation, but if the past is any guide, initial efforts like those we saw in 2020 tend to be followed by a more substantial wave of cases.

Yet, as was true in years past, judicial scrutiny of labeling cases generally remained prevalent. In 2020, courts in the Ninth and Eleventh Circuits clarified that class litigation challenging product labels remains subject to meaningful Article III standing requirements, and the bare fact that a consumer purchases a product she later does not want is insufficient to meet these requirements. Similarly, courts continued to apply the "reasonable consumer" standard to reach early dismissals in cases positing implausible theories as to how consumers actually read and understand the labels of consumer packaged goods.

Beyond this yearly overview, we also monitor filings on a daily basis and provide real-time info to clients and key contacts via our Food and Consumer Packaged Goods Litigation Update. To receive this daily email report about cases filed, Proposition 65 notices, and important industry decisions, please email Rebecca Grube at [rgrube@perkinscoie.com](mailto:rgrube@perkinscoie.com).



# LEGAL TRENDS

## In Food & Beverage

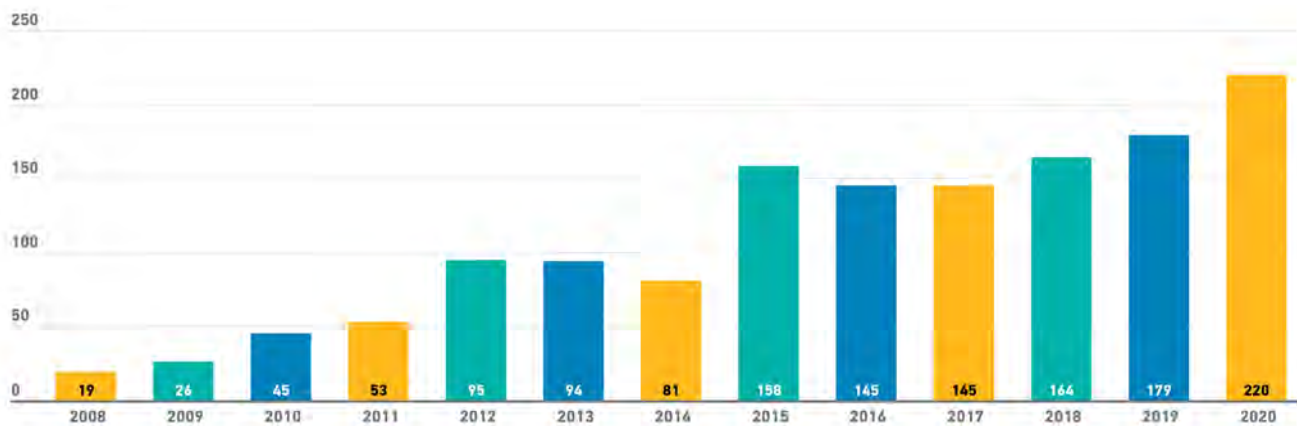
# LEGAL TRENDS IN FOOD & BEVERAGE

As in 2019, we continued to see an uptick in the number of filings against the food and beverage industry, with a record-setting 220 lawsuits filed last year. As we explain elsewhere, much of that filing volume came from a number of cases challenging products flavored with vanilla—presenting an idiosyncratic theory adopted by one plaintiffs’ lawyer whose “vanilla” cases were consistently tossed out by federal courts in 2020. These cases are also largely responsible for the growth in filings in New York, as that state has been the predominant jurisdiction for these latest vanilla-flavoring lawsuits. Additional notable trends are covered in Figure 3.

## FOOD AND BEVERAGE CLASS ACTIONS

FILINGS BY YEAR

FIGURE 1



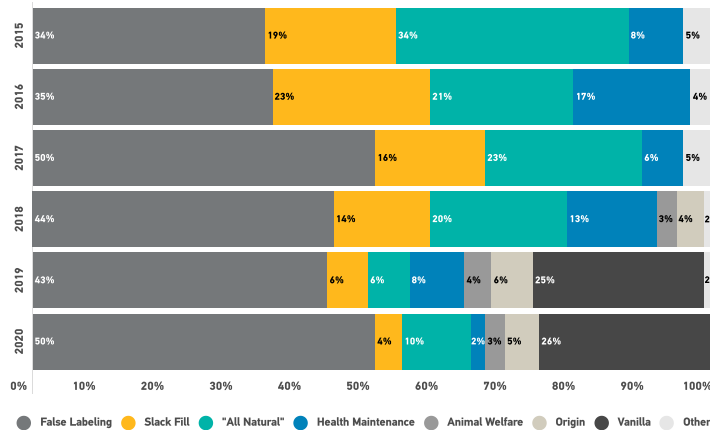
FILINGS BY JURISDICTION

FIGURE 2



FILINGS BY CATEGORY

FIGURE 3



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

## FALSE LABELING

The largest category of filings we track—False Labeling—showed growth with 110 new lawsuits filed in 2020. This category encompassed a broad range of theories: under- or over-reporting of the amount of a nutrient or ingredient in a product (e.g., level of sugar or protein); allegations that the food was not made in the manner suggested by the label (e.g., foods labeled “smoked” deriving their smoke flavor from chemicals versus smoke); referring to ingredients as “real” when they are allegedly processed (e.g., “real cocoa”); and misstating the number of servings in a container (e.g., instant coffee yielding fewer servings than the label indicated, when used as instructed). The breadth and variation of these cases demonstrate how plaintiffs’ counsel continue to scrutinize all label claims for new angles on liability.

Yet, in 2020, the Ninth Circuit Court of Appeals clarified important limits on false labeling cases in *McGee v. S-L Snacks National*, 982 F.3d 700 (9th Cir. 2020), by holding that a consumer is not economically injured when she purchases a food or beverage she simply “believes” was worth less than she paid for it. In *McGee*, the plaintiff purchased microwave popcorn that contained partially hydrogenated oils (PHOs), which the plaintiff alleged was an unhealthy ingredient that diminished the value of the food. However, the label—which fully disclosed PHOs on the ingredient list—made no representations about that ingredient or its healthfulness. The *McGee* court held, affirming the lower court’s dismissal on Article III standing grounds, that “absent some allegation that [the defendant] made false representations,” the plaintiff suffered no injury as a result of her purchase. Likewise, because the plaintiff had not plausibly alleged that the product was worth less than the price she paid for it, she could not claim an injury on an “overpayment” theory either. *McGee* thus helps reinforce the notion that, unless some actionable misrepresentation by the defendant is shown, a generalized assertion that the consumer paid too much for the product is not sufficient to support Article III standing.

In a related favorable ruling concerning standing for false labeling cases, the Eleventh Circuit Court of Appeals held in *Doss v. General Mills, Inc.*, 816 F. App’x 312 (11th Cir. 2020), that even where the plaintiff points to some allegedly misleading aspect of a product’s label or marketing, this is not enough to prop up a complaint otherwise lacking plausible allegations of injury. In *Doss* the plaintiff alleged that certain aspects of marketing for General Mills’ Cheerios cereal—pointing to the product’s undisputed health benefits—were misleading given the alleged presence of trace pesticides in the food. The district court dismissed on standing grounds and the Eleventh Circuit affirmed. The panel focused on the complaint’s lack of any plausible allegation that trace pesticides are, in fact, harmful. Thus, any economic injury tied to the purchase of Cheerios was deemed “conjectural or hypothetical,” because the consumer gained with her purchase exactly what she bargained for: a safe and healthful cereal.

## SLACK FILL

Defendants continued to secure slack fill wins at the federal level in 2020, as courts continued to closely scrutinize putative class actions at the motion to dismiss phase based on plaintiffs’ failures to meet critical pleading standards.

For example, in *Critcher v. L’Oréal*, 959 F.3d 31 (2d Cir. 2020), the Second Circuit affirmed the dismissal of a putative class action alleging that the net weight disclosures on packaging for certain L’Oréal moisturizers and cosmetics were false and misleading because the products did not dispense the full amount of product listed on the containers. The Southern District of New York dismissed plaintiffs’ claims, holding that (1) the claims were preempted by the federal Food Drug and Cosmetic Act (FDCA), which requires product packaging to disclose the net weight of products regardless of the amount that is accessible through the dispensing mechanism; and (2) a “reasonable consumer would know that a container that dispenses a viscous cosmetic through a pump will not dispense all of the cosmetic.” 2019 WL 3066394 (S.D.N.Y. July 11, 2019). On appeal, the Second Circuit affirmed the district court’s holding on preemption grounds, stating that if plaintiffs were permitted to move forward with their claims, they would be using state law to impose labeling requirements on top of those already mandated by federal law, “which is exactly what the FDCA does not permit.” 959 F.3d at 36.

In the Southern District of California, slack fill defendants also obtained significant wins based on (1) the failure to adequately plead nonfunctionality; and (2) the “reasonable consumer” standard. In *Jackson v. General Mills, Inc.*, 2020 WL 5106652 (S.D. Cal. Aug. 28, 2020), the court granted General Mills’ motion to dismiss plaintiff’s second amended complaint, with prejudice, finding that plaintiff had repeatedly failed to “plead facts plausibly supporting her conclusion that the slack fill in the box of cereal she bought was non-functional slack fill as defined by statute.” *Id.* at \*5. Likewise, in *Buso v. ACH Food Cos., Inc.*, 445 F.Supp.3d 1033 (S.D. Cal. 2020), the court dismissed, with prejudice, a putative class action claiming consumers were misled by nonfunctional slack fill contained in boxes of cornbread mix. In *Buso*, the court rejected the theory that defendant’s non-transparent packaging was inherently deceptive and held that a reasonable consumer would not be deceived by packaging that discloses the product’s net weight, number of servings, and the “rough estimate” of cornbread that could be made from the box. *Id.* at 1038.

Last, the Central District of California has issued noteworthy decisions addressing whether slack fill plaintiffs alleging violations under the “unlawful” prong of California’s Unfair Competition Law (UCL) must allege reliance and but-for causation to successfully state a claim. First, in *Clevenger v. Riviana Foods, Inc.*, the court denied defendant’s motion to dismiss, holding that the reliance and causation pleading requirements under the “fraudulent” practices prong of the UCL do not apply to actions based solely on the “unlawful” prong of the statute. 2020 WL 1137906 (C.D. Cal. Feb. 7, 2020) (Selna, J.). Then, after further briefing on the issue, the district court granted defendant’s request for interlocutory appeal, but the case settled and the defendant withdrew the appeal. In a subsequent slack fill ruling in *Clevenger v. Welch Foods, Inc.*, the court distinguished *Riviana Foods*, and held that but-for causation and reliance *are* required elements under the “unlawful” prong of the UCL. Case No. 8:20-cv-01859 (Order, Dec. 29, 2020) (Carney, J.). The contours explored in the *Clevenger* cases will likely continue to be litigated in future slack fill cases addressing the pleading requirements under the UCL.


### “ALL NATURAL”

While the number of filings has dwindled over the years, the persistence of “natural” as a category of false labeling cases suggests the claim continues to remain a target of the plaintiffs’ bar. Cases filed in 2020 generally tracked the traditional theory of relief in these cases, i.e., an allegation that a product labeled “natural” contains some ingredient that is artificial or synthetic or, alternatively, that the ingredients were bred with the assistance of biotechnology. Examples of ingredients challenged in these cases include gelatin, citric acid, ascorbic acid, dextrose, potassium sorbate, xanthan gum, and soy lecithin. And, despite setbacks in that area, the plaintiffs’ bar likewise persisted in the filing of lawsuits challenging products labeled “natural” that contain residual amounts of trace pesticides, including glyphosate, acetamiprid, and captan.

Decisions in 2020 suggest that challenges to bioengineered or other allegedly unnatural ingredients remain viable, while “natural” cases attacking the presence of trace pesticides are consistently met with disfavor by the federal courts.

So, for example, in *Lee v. Conagra Brands, Inc.*, 958 F.3d 70 (1st Cir. 2020), the First Circuit Court of Appeals reversed a dismissal by the district court below and held that it was plausible that consumers might be misled by the claim “100% Natural” on a product containing ingredients made from corn bred with bioengineering. The *Lee* court considered the complaint’s citations to surveys purporting to show that some consumers believe bioengineered foods are not “natural,” along with the plaintiff’s allegation that she believed the product was free of bioengineered ingredients, sufficient to pass the “low threshold” of plausibility for her claim to proceed.

**Despite the interruption in civil litigation prompted by the COVID-19 pandemic, there were more new class action lawsuits filed against the food and beverage industry—220 cases—than in any prior year over the past decade.**



*Lee*, however, stands in contrast with appellate and district court decisions in 2020 rejecting the notion that the existence of trace pesticides in foods renders a “natural” claim misleading. The Second Circuit Court of Appeals affirmed a dismissal based on this theory in 2020 in *Axon v. Florida’s Natural Growers, Inc.*, 813 F. App’x 701 (2d Cir. 2020). In *Axon*, the Second Circuit agreed with the district court that no “reasonable consumer” believes that the use of “natural” in a product’s brand name is plausibly interpreted as communicating that the food is completely free of trace pesticides. Likewise, in *Yu v. Dr Pepper Snapple Group*, 2020 WL 5910071 (N.D. Cal. Oct. 6, 2020), the Northern District of California dismissed with prejudice a complaint alleging that trace amounts of the federally approved pesticide acetamiprid rendered a “natural” claim misleading. The district court likewise deemed this allegation wholly implausible under the “reasonable consumer” standard: “The Court finds that Plaintiff has failed to plausibly allege that a reasonable consumer would believe that the Products labeled natural are free of any trace pesticides whatsoever.” And, notably, the court in *Yu* rejected the same sort of survey evidence considered relevant to plausibility in *Lee*. The *Yu* court explained that “generic surveys” concerning the meaning of “natural” are insufficient to “bolster [the] plaintiff’s claim into the realm of plausibility.”

## HEALTH MAINTENANCE

In 2020, the plaintiffs’ bar continued to hone in on the issue of sugar in food products. Beverages in particular were targeted last year, with several lawsuits filed challenging the labeling of juices, teas, and fruit drinks as allegedly misleading because of the amount of sugar in these products. These cases challenge labeling that—according to the plaintiffs—misleadingly characterizes the amount of sugar in the product in some way by using descriptors like “a tad,” “sorta,” or “kinda.” In the past, courts have considered similar language to be non-actionable puffery. We’ll be monitoring this litigation trend in 2021 to see if this new spate of cases are dispensed with in the same way.

## ANIMAL WELFARE / ENVIRONMENTAL PRACTICES

We continue to monitor closely an emerging area of litigation—complaints that challenge some aspect of a company’s animal welfare or environmental practices. Seven such cases were filed in 2020, involving treatment of animals and use of terms like “humane” or “free range” that relate to how animals are cared for. And, outside the food and beverage space, plaintiffs’ counsel have shown interest in lawsuits that allege environmental claims fail to comply with the suggestions in the U.S. Federal Trade Commission (FTC) Green Guides as to best practices for environmental marketing. See *Bush v. Rust-Oleum Corp.*, 2021 WL 24842 (N.D. Cal. Jan. 4, 2021) (denying motion to dismiss in lawsuit regarding use of “non-toxic” and “earth friendly” claims for stain and degreasing sprays, based on alleged noncompliance with FTC Green Guides for such claims).

Despite the relatively modest level of activity in this area in 2020, it is an area we are watching closely in 2021 as consumer packaged goods continue to focus on claims that communicate a product’s or brand’s environmental benefits.

Other legal developments in this area were more favorable for defendants in 2020. In the related context of marketing concerning a company’s corporate social responsibility practices, the First Circuit Court of Appeals—in a decision very similar to one issued by the Ninth Circuit in 2018—held that food manufacturers do not have any freestanding obligation under state consumer protection laws to advise consumers of the possibility of forced labor occurring abroad in a company’s supply chain. See *Tomasella v. Nestlé USA, Inc.*, 962 F.3d 60 (1st Cir. 2020). In *Tomasella*, the plaintiffs alleged that the labels of the defendants’ chocolate products misleadingly “omitted” the possibility of forced labor having been used in cocoa farms in Côte d’Ivoire. The plaintiffs’ complaint admitted, however, that the defendants had not made any misleading statements on the labels on this subject. Following FTC guidance on matters that companies should be required to disclose, the First Circuit explained that plaintiffs’ allegations did not go to the fitness of the product for use, and so there was no legal requirement to compel defendants to disclose this information. And, the First Circuit noted with approval that the defendants already disclosed, via their website, information on the prevalence of forced labor, thus further undermining any claim of misleading conduct.

## PLACE OF ORIGIN

Place of origin claims remained constant in 2020, with 10 cases filed—the same number as in 2019. The majority of the cases alleged that the words and imagery on the product labels misled consumers into believing that the product was made in a certain location or contained ingredients sourced from a particular location. A subset of those cases claimed that the product name itself was misleading to consumers. For example, coffee products branded as “Kona Classic,” “Kona Sunrise,” and “Kona Hazelnut” were alleged to have misled consumers into believing that the coffee was grown in the Kona District of the Big Island of Hawaii.

The “reasonable consumer” defense continued to be the primary defense in place of origin cases. As in previous years, whether a complaint survived a motion to dismiss hinged on the particular facts of each case. In 2020, the cases were evenly split: two cases were dismissed, and two cases proceeded past the pleading stage. Courts continued to find that geographic brand names and associated imagery alone (particularly when there is a place of origin disclaimer) will not likely mislead a reasonable consumer, whereas geographic brand names coupled with references to geo-specific ingredients, imagery, and express origin statements could mislead a reasonable consumer.

In *Culver v. Unilever*, CV 19-9263-GW-RAO (C.D. Cal. May 11, 2020 (tentative ruling) and Jan. 21, 2021 (final ruling)), the court granted the defendant’s motion to dismiss, ruling that defendant’s marketing and labeling of its Maille brand mustard products were not misleading. Plaintiff claimed that consumers were misled into believing that the mustard was made in France because the labels referenced “Paris,” included a Paris emblem, and contained French words (“Depuis 1747” and “Que Maille”). The court found significant that the French words did not refer to a place of origin, that French is spoken in many countries other than France, and that there was not an express statement of origin: “none of those elements...indicate where the mustard is made. For example, none say ‘Made in France,’ a ‘Product of France,’ or even ‘Imported.’” The court ruled that a “mere reference to a geographic location does not imply a location of manufacture.” Moreover, to the extent there is any ambiguity, the court found that the disclosure “Product of Canada” on the back of the label was sufficient to dispel any confusion.

The express statement of origin on the label in *Boshnack v. Widow Jane Distilleries LLC*, No. 19CV8812 (DLC), 2020 WL 3000358 (S.D.N.Y. June 4, 2020), likewise led the court to grant defendant’s motion to dismiss. The court found that the label describing the product as “Kentucky Bourbon Whisky” precluded a reasonable consumer from believing that the bourbon was distilled in New York.

A contrary conclusion was reached in *Hesse v. Godiva Chocolatier, Inc.*, 463 F. Supp. 3d 453 (S.D.N.Y. 2020). In *Hesse*, the court denied defendant’s motion to dismiss in a lawsuit alleging that the defendant’s chocolates were made in Belgium. The court considered the words “Belgium 1926” on the front of the label and in other marketing materials, combined with the statements “Assorted Belgium Chocolate Caramels” and “Delicious Belgium chocolates brought to you,” and deemed these statements sufficient to satisfy the reasonable consumer standard at the pleading stage. In reaching its decision, the court went beyond the label itself, and considered also representations made on defendant’s social media and in other marketing materials, noting that “context is crucial.” *Id.* at 468 (citation omitted).

The final case, *Peacock v. Pabst Brewing Co., LLC*, No. 218CV00568TLNCKD, 2020 WL 5847244 (E.D. Cal. Oct. 1, 2020), found that the brand name “Olympia Beer,” combined with the slogan “It’s the Water” and an image of a waterfall similar to those found in the Olympia area, could mislead consumers into believing that the beer was brewed with the water from Olympia, Washington. Accordingly, the court denied the motion to dismiss.

## VANILLA

Another steady trend in 2020—although one that could be nearing its endpoint in 2021—is the unabated filing of lawsuits challenging foods flavored with vanilla. Adding to 2019’s already prodigious total, 58 such cases were filed in 2020. While details vary, in general these cases proceed on the theory that a “reasonable consumer” expects that a product labeled as having been flavored with vanilla cannot derive *any* of its flavor from other sources beyond pure vanilla or vanilla extract. These cases have been filed overwhelmingly by a single plaintiffs’ counsel, Spencer Sheehan. Mr. Sheehan’s filings are concentrated in the federal courts in New York, and his undeterred filing of these cases largely explains the 2020 uptick in food and beverage consumer class actions in that jurisdiction generally.

**Much of 2020’s filing volume came from a number of cases challenging products flavored with vanilla.**

But 2020 also indicated an increasing impatience by the federal courts toward this onslaught of vanilla litigation, as courts in New York dismissed complaints challenging vanilla-flavoring claims four separate times over a 12-month period. *See Steele v. Wegmans Food Mkts., Inc.*, 472 F. Supp. 3d 47, 50 (S.D.N.Y. 2020); *Pichardo v. Only What You Need, Inc.*, 2020 WL 6323775, at \*5 (S.D.N.Y. Oct. 27, 2020); *Cosgrove v. Blue Diamond Growers*, 2020 WL 7211218, at \*4 (S.D.N.Y. Dec. 7, 2020); *Barreto v. Westbrae Nat., Inc.*, 2021 WL 76331, at \*4 (S.D.N.Y. Jan. 7, 2021). In every instance, these courts have reasonably concluded that no “reasonable consumer” is misled by a claim indicating that a product is flavored with vanilla when that product, in fact, tastes like vanilla. The district court’s trenchant analysis in *Pichardo* reflects the commonsense analysis courts now apply to these cases: “When consumers read vanilla on a product label, they understand it to mean the product has a certain taste. It is difficult to comprehend what is misleading when the Defendant’s ‘Smooth Vanilla’ tastes like vanilla.”

And as Mr. Sheehan has tested the waters for these cases in California, courts there have reached similar results. So, in *Clark v. Westbrae Natural, Inc.*, 2020 WL 7043879 (N.D. Cal. Dec. 1, 2020), the court reached a similar conclusion in dismissing a complaint challenging the vanilla-flavoring claim on a soymilk product: “As Plaintiff has not plausibly alleged that a reasonable consumer would expect that vanilla soymilk would derive its vanilla flavor exclusively from vanilla bean all of his deception claims must be dismissed.”



# LEGAL TRENDS In Pet Food

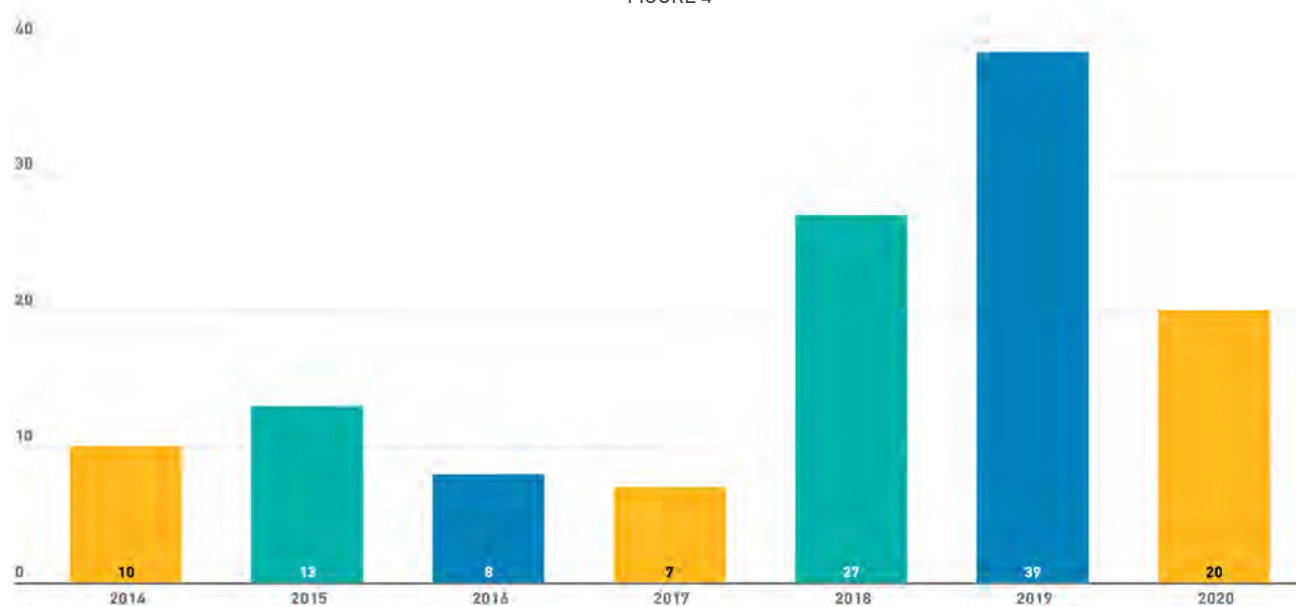
## LEGAL TRENDS IN PET FOOD

The pet food industry has seen a steady increase over the past several years in the volume of class action filings. As shown above, filings in 2019 were nearly 400% above the 2014 number, a growth from 10 to almost 40 cases. The number declined somewhat in 2020, dropping to 20 cases, likely due to the uncertainty surrounding court operations caused by the COVID-19 pandemic.

Trends in pet food litigation largely mirror those in food litigation generally. As these cases start 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—prescription-based diets, for example—are giving rise to decisions unique to the segment.

### PET FOOD CLASS ACTIONS: FILINGS BY YEAR

FIGURE 4



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

### “INGREDIENT”-FREE PET FOODS

In 2020, plaintiffs filed a slew of putative class actions against pet food companies, alleging that certain “limited ingredient” claims on pet food products were false or misleading. Most of these cases focused on “grain-free” or “gluten-free” labeling claims. In virtually every case, plaintiffs relied on laboratory analyses to demonstrate that the products contained the very ingredient they were marketed as being free of. *See, e.g., Miller v. Big Heart Pet Brands, Inc.*, Case No. 19-cv-3613 (N.D. Cal.) (Nature’s Recipe product marketed as “grain-free” allegedly contained corn and soy); *Fishon v. Mars Petcare US, Inc.*, Case No. 3:19-CV-00816 (M.D. Tenn.) (IAMS Proactive product marketed as “grain-free” allegedly contains corn and soy); *Michael v. Mars Petcare US, Inc.*, Case No. 20-cv-4845 (C.D. Cal.) (Nutro Limited product marketed as wheat-, soy-, and chicken-free allegedly contains all three ingredients); *Kirchenberg v. Ainsworth Pet Nutrition, Inc. and J.M. Smucker Co.*, Case No. 20-cv-337 (E.D. Cal.) (Rachael Ray Nutrish product marketed as corn-, wheat-, soy-, gluten, and beef-free contained all five ingredients). District courts in California and Tennessee have permitted plaintiffs’ claims to survive motions to dismiss, even though the laboratory analyses relied upon by plaintiffs are not performed on the specific products purchased by the plaintiffs.

## “WILD” VS. FARMED FISH

Plaintiffs recently filed a putative class action against Champion Petfoods, alleging that the “wild-caught” phrase on the labeling of their Acana cat food is misleading because laboratory testing of the products reveals the presence of ethoxyquin, a chemical used as a feed additive in fish farming operations. *Sultanis v. Champion Petfoods USA, Inc.*, Case No 3:21-cv-167 (N.D. Cal.). This is a novel type of claim, so we will be monitoring the action carefully to see if the claims survive a motion to dismiss.

## PRESCRIPTION PET FOODS

The Seventh Circuit revived a class action matter against Hill’s Pet Nutrition over allegations that its prescription pet food product was mislabeled because it was not “medically necessary” for the health of pets. *Vanzant v. Hill’s Pet Nutrition, Inc.*, 934 F.3d 730 (7th Cir. 2019). A similar lawsuit, *Moore v. Mars Petcare US, Inc.*, was initially dismissed by the Northern District of California but was recently reversed and remanded by the Ninth Circuit, finding that it was reasonable for a consumer to rely on the prescription labeling in making purchasing decisions for an ailing pet. *Moore*, 966 F.3d 1007 (9th Cir. 2020).

## PRESENCE OF HEAVY METALS AND OTHER CONTAMINANTS

The Central District of California rejected class certification where consumers alleged that commercial dog food contained heavy metals and other contaminants harmful to their pets. *Reitman v. Champion Petfoods USA, Inc.*, No. CV 18-1736-D0C (JPRX), 2019 WL 7169792 (C.D. Cal. Oct. 30, 2019). The class certification denial was subsequently affirmed by the Ninth Circuit. *Reitman v. Champion Petfoods USA, Inc.*, 830 F. App’x 880 (9th Cir. 2020).

## “NATURAL” LABELING

The Eastern District of New York dismissed a suit alleging that Rachael Ray Nutrish dog food had misleadingly labeled its products “natural” because they contained trace amounts of glyphosate, finding that “a reasonable consumer would not interpret the label ‘natural’ as warranting that the Products contain no amount of glyphosate.” *Parks v. Ainsworth Pet Nutrition, LLC*, 377 F. Supp. 3d 241, 248 (S.D.N.Y. 2019). Nonetheless, two putative class actions were filed against Purina PetCare in 2020, alleging that Purina had falsely marketed its products as “natural,” or free of “artificial preservatives” because they contained trace amounts of glyphosate. *Jacquin v. Nestlé Purina PetCare Company*, Case No. 4:20-cv-00467-SNLJ (E.D. Mo.); *GMO Free USA v. Nestlé Purina PetCare Company*, Case No. 2020-CA-002775B (D.C. Super. Ct.).

## AFLATOXIN

Following a recall of dog food products allegedly containing aflatoxin, several putative class actions have been filed in the Southern District of Indiana alleging injury to plaintiffs’ pets, including death and serious illness, after they consumed Sportmix pet food products. See *Carlson v. Midwestern Pet Foods, Inc.*, Case No 3:21-cv-0007 (S.D. Ind.); *Romero v. Midwestern Pet Foods, Inc.*, Case No. 3:21-cv-0014 (S.D. Ind.); *Johnson v. Midwestern Pet Foods, Inc.*, Case No. 3:21-cv-0009 (S.D. Ind.).

**In 2020, plaintiffs filed a slew of putative class actions against pet food companies, alleging that certain “limited ingredient” claims on pet food products were false and misleading.**



# LEGAL TRENDS

## In Supplements

## LEGAL TRENDS IN SUPPLEMENTS

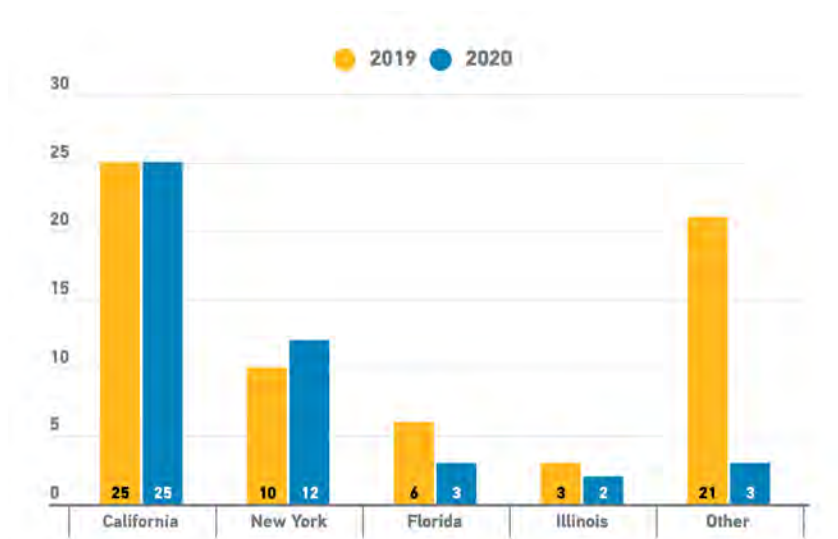
Last year we reported that 2019 set a record high for filings against dietary supplement makers—and 2020 was not far behind. Courts nationwide saw 45 filings in 2020, 20 fewer than in 2019 but almost double the filings in 2018. California and New York jurisdictions continue to be plaintiffs’ favorites; filings in “other” jurisdictions dropped significantly in 2020. California, in particular, saw more than half of the filings.

Cannabis cases fell dramatically in 2020, replaced by complaints alleging a “false fact” (e.g., the product claims to have gelatin but plaintiff alleges it does not; the product claims it “supports healthy skin” but plaintiff alleges it does not). Such false fact complaints account for 62% of filings. Other filings are a mixed bag. All “natural” cases take second place at 13%. Cannabis is still on the scene at 11%, followed by health misrepresentation and slack fill cases at 9% and 4%, respectively.

### DIETARY SUPPLEMENT CLASS ACTIONS

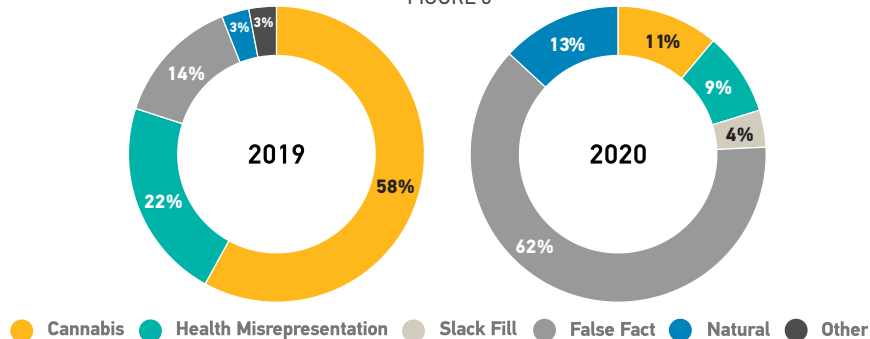
FILINGS BY JURISDICTION

FIGURE 5



FILINGS BY CATEGORY

FIGURE 6



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

## PREEMPTION PROGENY POST-DACHAUER

After the Ninth Circuit issued *Dachauer v. NBTY, Inc.*, 913 F.3d 844 (9th Cir. 2019), a complex decision affecting the preemption defense for structure/function claims, district courts in 2020 continued to grapple with its holding. *See, e.g., Seegert v. Rexall Sundown, Inc.*, 445 F. Supp. 3d 1149 (S.D. Cal. 2020); *Capaci v. Sports Research Corp.*, 445 F. Supp. 3d 607 (C.D. Cal. 2020).

In October 2020, the Ninth Circuit stepped in with *Kroessler v. CVS Health Corp.*, 977 F.3d 803 (9th Cir. 2020). There, the plaintiff purchased from CVS a glucosamine supplement marketed to “support” and “nourish” joint health, flexibility, and comfort. *Id.* at 806. Plaintiff alleged these representations were false and misleading because, according to four clinical trials, such supplements are “ineffective” at benefiting joint health. *Id.* at 807. On a motion to dismiss, CVS argued the representations are permissible structure/function claims and therefore plaintiff’s statutory and common law claims were preempted. The district court agreed, granting dismissal and relying on *Dachauer*. The Ninth Circuit, on the other hand, held plaintiff’s claims were not preempted. Although the Court of Appeals reversed dismissal and distinguished *Dachauer*, in doing so the Ninth Circuit reaffirmed several core principles of the preemption defense in the supplement space:

First, supplement makers are permitted by the U.S. Food and Drug Administration (FDA) to make structure/function claims so long as they are substantiated. *Id.* at 810.

Second, California law “prohibits private plaintiffs from demanding that advertisers substantiate their claims” (the so-called substantiation bar). *Id.*

Third, although plaintiffs can challenge a defendant’s substantiation, “the onus is on plaintiffs to prove that advertisers’ claims are false.” *Id.* Plaintiffs can do as the *Kroessler* plaintiff did, for example, by citing “multiple scientific studies” to allege falsity. *Id.* at 813.

Fourth, plaintiffs’ studies (or other evidence) must “match” the challenged structure/function claims. *Dachauer* illustrated a “mismatch.” *Id.* at 810-11 (describing how the *Dachauer* plaintiff presented studies to refute a *disease* claim yet the supplement was making a *structure/function* claim). *Kroessler*, on the other hand, illustrates a match. *Id.* (noting “*Kroessler* ‘matched’ his evidence with CVS’s structure/function claims” because his allegation regarding scientific studies, if true, would “directly refute CVS’s [structure/function] claims”).

Fifth, procedural posture matters. The *Kroessler* court distinguished *Dachauer* in part because *Dachauer* involved appeal of a summary judgment motion whereas *Kroessler* involved an appeal of a motion to dismiss. Thus, attacking a plaintiffs’ evidence, as defendants did in *Dachauer*, is premature at the pleading stage.

With a 2021 spoiler alert, the Ninth Circuit issued another ruling on the preemption defense for structure/function claims in early January 2021: *Greenberg v. Target Corp.*, No. 19-16699, 2021 WL 116537 (9th Cir. Jan. 13, 2021).

*Greenberg* involved an appeal of a grant of summary judgment for retailers and sellers of biotin supplements. Given the analogous procedure posture, the *Greenberg* court relied on *Dachauer* instead of *Kroessler* (again, a pleadings case) and found that each regulatory element of a structure/function claim was met. *Id.* at \*4. Since each element was met, and since plaintiff “essentially seeks to impose an additional requirement that dietary supplement labels can make structure/function claims only if consumers are likely to benefit from the product,” plaintiff’s claims were preempted. *Id.* at \*5. This ruling supports the conclusion that “manufacturers may make structure/function claims about a nutrient’s general role on the human body without disclosing whether the product will provide a health benefit to each consumer.” *Id.*

**California and New York jurisdictions continue to be plaintiffs’ favorites; California, in particular, saw more than half of the filings in 2020.**

## EQUITABLE RELIEF AND SONNER

In 2020, the Ninth Circuit delivered an important decision regarding the availability of injunctive relief under California's consumer protection statutes. In *Sonner v. Premier Nutrition Corp.*, the Ninth Circuit held that a plaintiff asserting claims under California's consumer protection laws "must establish that she lacks an adequate remedy at law *before* securing equitable restitution for past harm." 971 F.3d 834, 844 (9th Cir. 2020) (emphasis added). In other words, the court limited the ability for plaintiff to seek equitable relief to those who can establish that they lack an adequate remedy at law. In consumer class suits, the refund of purchase price or a price premium might serve as an adequate legal remedy. *See Sonner*, 971 F.3d at 844 (noting that the plaintiff was seeking full refund of her purchase price to compensate her for the alleged harm).

Given that many putative class action plaintiffs seek equitable and injunctive relief, *Sonner* has already had ramifications. Courts have relied on *Sonner* to dismiss a complaint's allegations in whole or in part. *See, e.g., Zaback v. Kellogg Sales Co.*, No. 320CV00268, 2020 WL 6381987, at \*4 (S.D. Cal. Oct. 29, 2020) ("*Sonner* is controlling [and the] Motion to Dismiss is granted."); *Roper v. Big Heart Pet Brands, Inc.*, No. 119CV00406, 2020 WL 7769819, at \*9 (E.D. Cal. Dec. 30, 2020) ("The controlling case in this circuit on this point is *Sonner v. Premier Nutrition Corp.* [...]") (citation information omitted); *Sagastume v. Psychmedics Corp.*, No. CV206624, 2020 WL 8175597, at \*7 (C.D. Cal. Nov. 30, 2020) ("[I]n order to adequately assert a claim for equitable restitution under [California's Unfair Competition Law] in federal court, the complaint must allege that [plaintiff] lacks an adequate legal remedy [and plaintiff's complaint] does not."); *Gibson v. Jaguar Land Rover N. Am., LLC*, No. CV2000769, 2020 WL 5492990, at \*3 (C.D. Cal. Sept. 9, 2020) (dismissing claim for equitable relief with prejudice). The months ahead will likely see further application of *Sonner* to food and CPG litigation matters.



# LEGAL TRENDS

## In Personal Care Products



## LEGAL TRENDS IN PERSONAL CARE PRODUCTS

The litigation environment surrounding personal care products is heating up. Federal agencies have issued warning letters, focusing on unapproved health and drug claims. Personal care products are being targeted by the plaintiffs' bar for an expanding number of class action cases. Even as COVID-19 constrained the ability of the nation's courts to handle burgeoning dockets in 2020, personal care products saw a significant number of class action filings, especially against brands in the hair care and hand sanitizer industries. In the year ahead, the number of class action litigation matters is expected to increase, and we expect claims to be similar to those lodged against other CPG categories.

### LEGISLATION

As 2021 unfolds, we might see new legislative initiatives regarding personal care products. In 2019, Senator Dianne Feinstein (D-Cal.) introduced the Personal Care Products Safety Act, S. 726, which would have, among other things, provided the FDA with mandatory recall authority over cosmetic products and instituted a system of adverse event reporting for such products. While the bill died in committee, it is worth noting that Senator Susan Collins (R-Me.) and then-Senator Kamala Harris were among the bill's co-sponsors. With the change in the Senate's composition in the months ahead, further action on the federal legislative front is possible.

At the state level, California enacted its Toxic-Free Cosmetics Act, signed by Governor Gavin Newsom on September 30, 2020, which bans certain ingredients from cosmetics and personal care products. Proponents of the bill argued that the newly-prohibited ingredients, such as mercury and formaldehyde, are associated with cancer and reproductive harm among other health issues. The statute goes into effect in 2025.

### REGULATION & ENFORCEMENT

The FDA generally takes a light-touch approach regarding the regulation of cosmetic products, and often, that regulatory approach focuses on the claims the product makes. Certain claims, such as those establishing that the product is intended to treat or prevent disease, may prompt the agency to regulate the article as a drug, which imposes higher regulatory burdens. The FDA has issued numerous warning letters addressing unapproved drug claims in products advertised as cosmetics.

Notably, the FDA issued a warning letter to a hand sanitizer manufacturer in January 2020 for claims that the product: "Kills more than 99% of most common germs that may cause illness in a health care setting, including methicillin-resistant *Staphylococcus aureus*, or MRSA, and vancomycin-resistant enterococcus, or VRE" and "Can reduce MRSA and VRE by 100%."

While the warning letter did not address the virus that causes COVID-19, the agency took issue with the product's statements that it was effective against various enveloped viruses, such as influenza, norovirus, and Ebola, which are "easily killed or inactivated by alcohol." The virus that causes COVID-19, SARS-CoV-2, is an enveloped virus. The agency noted that it was "not currently aware of any adequate and well-controlled studies demonstrating that killing or decreasing the number of bacteria or viruses on the skin by a certain magnitude produces a corresponding clinical reduction in infection or disease caused by any such bacteria or virus."

### TAKEAWAYS

- Despite fairly light federal regulation of cosmetic products, federal agencies have issued warning letters when the agencies perceive that the products make unapproved drug claims.
- Class action cases targeting the personal care industry are growing and are expected to increase, mirroring trends in food litigation.
- Hair care products and hand sanitizers saw dozens of class action filings in 2020.

The FTC has been especially vigilant regarding claims related to the treatment or prevention of COVID-19. The FTC and FDA jointly issued warning letters and announced that more than 35 products had already been removed from major retailers and online marketplaces for inappropriate claims. The FTC also issued separate warning letters to skin care companies, among others, who advertised that their products could treat or prevent COVID-19.

The FDA and FTC are actively monitoring advertising related to COVID-19, and marketers should ensure that they have competent and reliable scientific evidence to support any COVID-19-related advertising and labeling claims about their products before such claims are made.

## LITIGATION

The year 2020 saw dozens of class action filings targeting the personal care industry. Two products stood out for the number of cases filed: hand sanitizer and shampoo.

Following the FDA's warning letter in January 2020, and prompted by increased use of hand sanitizers in the wake of the COVID-19 pandemic, hand sanitizer companies saw at least seven new filings alleging that claims that the product could kill "99.99% of germs," which rendered the product's labeling false or misleading.

Regarding shampoos, at least 23 putative class action cases were filed against Deva Concepts LLC, the company behind the curly-hair-focused hair care brand DevaCurl. Plaintiffs alleged that the products caused scalp irritation, hair loss, and/or balding during normal use. At least two class action cases were filed against a manufacturer of a keratin shampoo product, also alleging that the product contained ingredients that led to hair loss and scalp irritation.

Other personal care products have been at the center of class action filings as well. More than half a dozen companies saw class action filings targeting an "oil-free" claim. These cases alleged that the products actually contained oils or derivatives of oils despite such "oil-free" claims. Several other filings targeted products containing vitamin E, claiming that the vitamin E oil products did not contain adequate amounts of the vitamin. In another case, Judge Alsup of the Northern District of California denied summary judgment in a case alleging that the hyaluronic acid contained in a skin care product could attract and retain up to one thousand times its weight in water. The court found that fantastic—even untrue—statements are not deceptive where the reasonable consumer would not take them literally as a statement of fact. Subsequently, the case was voluntarily dismissed.

At the appellate level, the Second Circuit ruled on *Critcher v. L'Oreal USA Inc.*, 959 F.3d 31 (2d Cir. 2020), a putative class action arguing that a cosmetic product's labeling was accurate as to the amount of product in the container, but that the pump dispenser left product at the bottom of the bottle. The panel found that plaintiffs' claims were preempted and "avoid the sweeping preemptive force" of federal law as applied to the labeling of these cosmetics.

## LOOKING AHEAD

The volume of class action litigation matters is expected to increase over the coming year, including those aimed at personal care brands, and we anticipate claims to be similar to those percolating in the food litigation space over the past several years. These include claims over sustainability, health benefits, animal rights, and the presence of heavy metals or other contaminants. Several new matters have also targeted toothpaste companies for teeth whitening or enamel repair claims, and more may be forthcoming.

**Hand sanitizer companies saw at least seven new filings alleging the product could kill 99.99% of germs, which rendered the product's labeling false or misleading.**



# LEGAL TRENDS

## In Cannabis



## LEGAL TRENDS IN CANNABIS

Recent years have seen dramatic development in the cannabis marketplace. A total of 36 states and the District of Columbia have legalized marijuana for medical use, and 15 of those jurisdictions also allow recreational use as of November 2020. Regarding hemp, the passage of the 2018 Farm Bill prompted the introduction of new hemp and hemp-derived products, namely those containing cannabidiol (CBD), into the market.

### TAKEAWAYS AND TRENDS

- Given the growth in the cannabis market, we expect to see greater numbers of class actions filed. Our survey of federal class action cases found over 100 recent filings since 2019 against cannabis companies. Additional class action litigation cases are expected, and cannabis companies should proactively mitigate potential litigation risks. For example, cannabis companies are increasingly seeing litigation involving allegations of (i) autodialed, unsolicited messages and (ii) allegedly mislabeled CBD or THC (THC is the substance in cannabis products most associated with a marijuana “high”).
- Federal cannabis law lags behind that of the states, including regarding CBD products. CBD products face a patchwork of state and even local laws regarding their marketing and sale.
- The FDA continues to work on federal policies regarding CBD. In November 2019, the FDA noted that the agency continues “to explore potential pathways for various types of CBD products to be lawfully marketed” and expects to “provide an update on its progress regarding the agency’s approach to these products in the coming weeks.” In March 2020, the agency announced that 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 industry and the public” while also taking “potential steps to establish a clear regulatory pathway.” The FDA provided draft CBD enforcement policy to the White House in summer 2020. It is possible that 2021 sees this document released.
- While the courts and the industry await FDA guidance on CBD products, courts have increasingly stayed cases involving CBD on primary jurisdiction grounds. In several high-profile actions, federal courts have deferred action in class action cases alleging that CBD products were mislabeled in favor of the FDA issuing enforcement policies regarding CBD product labeling. Congress has prompted the agency to issue periodic reports on its efforts to regulate the burgeoning CBD industry.

**Our survey of federal class action cases found over 100 recent filings since 2019 against cannabis companies. The largest portion (approximately 30%) involved securities in cannabis businesses. About 20% involved the Telephone Communications Protections Act (TCPA).**

## LEGISLATION

In the November 2020 election, voters in Arizona, New Jersey, Montana, and South Dakota legalized recreational marijuana, and voters in Mississippi voted to legalize the use of medical marijuana in that jurisdiction. In addition, 2020 was the first time a chamber of Congress voted to legalize marijuana. The U.S. House of Representatives approved H.R. 3884, the Marijuana Opportunity Reinvestment and Expungement (“MORE”) Act. If passed by the Senate, the MORE Act would remove marijuana from the list of scheduled substances under the Controlled Substances Act and eliminate criminal penalties for the manufacture, distribution, and possession of marijuana.

Pursuant to a directive in an appropriations bill at the end of 2019, Congress directed \$2 million to the FDA for “research, policy evaluation, market surveillance, and issuance of an enforcement discretion policy and appropriate regulatory activity” for hemp-derived CBD. This appropriation further required the FDA to produce a report on its progress toward obtaining and analyzing data to help determine (1) a policy of enforcement discretion and (2) a process in which hemp-derived CBD will be evaluated for use in products. The agency issued reports to Congress in March and July 2020 concerning its efforts to monitor the CBD marketplace. According to the FDA’s July report, knowing “the characteristics of marketed CBD products is critical to making informed decisions about how best to protect public health in the current marketplace.”

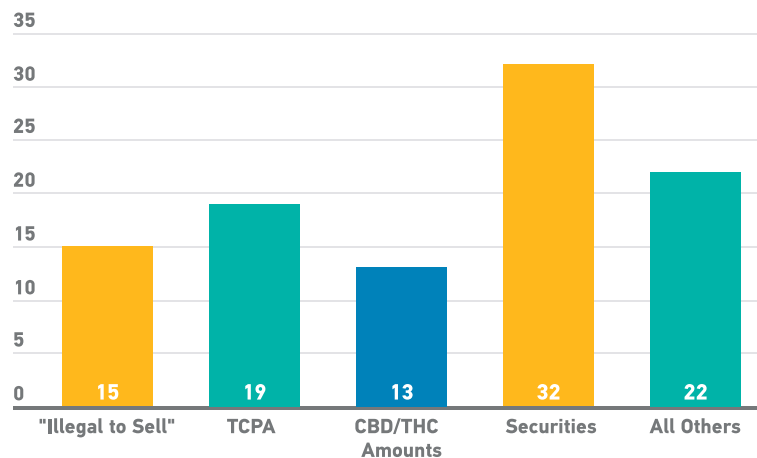
## REGULATION AND REGULATORY ENFORCEMENT

At the federal level, products containing CBD continue to face regulatory scrutiny. The FDA has issued public announcements that CBD may not lawfully be added to foods and dietary supplements. The agency has also issued several public statements questioning both the accuracy of CBD content on product labeling and, more generally, the overall safety of CBD, especially for certain populations such as children or pregnant women.


Federal agencies have also particularly focused on what they say are unsupported health claims in CBD product marketing, especially in light of the COVID-19 pandemic. In December 2020, the FTC announced Operation CBDDeceit, a suite of six settlements of enforcement actions that herald the FTC’s ongoing efforts to monitor the marketplace regarding misleading cannabidiol (CBD) product claims. The FTC noted that 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.” These new settlements demonstrate

### CANNABIS CLASS ACTIONS: 2019-2020 FILINGS BY CATEGORY

FIGURE 7



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



that federal agencies are becoming increasingly vigilant regarding what they view as unsupported health claims, and the FTC is willing and able to launch these enforcement actions without coordinating with the FDA. Earlier in the year, the FDA and FTC announced a settlement with a CBD supplement that claimed it could treat, prevent, or reduce risks from COVID-19. The FTC's new efforts come amid a stream of warning letters issued by both the FTC and the FDA regarding cannabis products, including those claiming that the products could treat or prevent the effects of COVID-19. All told, the FDA issued over 20 warning letters in 2020 for cannabidiol-related products.

Regarding securities, the U.S. Securities and Exchange Commission (SEC) has also taken action against cannabis companies and individuals for suspected securities fraud. This included administrative actions to suspend trading of a CBD company's shares and enforcement action targeting false statements regarding a company's operations. Other securities-related enforcement actions have included federal lawsuits in California and Illinois, where the SEC claimed individuals or companies were inflating stock prices, selling illusory securities, or taking money raised from the sale of unregistered securities for themselves.

## LITIGATION

As the cannabis industry continues to grow, so too do the litigation risks facing the industry. Our survey of federal cannabis class actions filed during 2019 and 2020 revealed approximately 100 new case filings—55 in 2019, and 46 in 2020. The largest portion (approximately 30%) of these cases involved securities in cannabis businesses, such as a New York “stock drop” case alleging that the business should have done more to prevent the losses associated with an FDA warning letter. 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 30% of claims alleging: (i) the labeled amount of THC or CBD was inaccurate or (ii) the CBD product was “illegal to sell” pursuant to the FDA's recent public announcements. The cases in this latter category allege that the manufacturers' CBD products violate *state law* rules protecting consumers because the products are “illegal to sell” per the FDA's recent public statements. As federal authorities continue to develop uniform national standards regarding CBD product labeling, courts are increasingly staying these cases on primary jurisdiction grounds. See *Snyder v. Green Roads of Florida LLC* (S.D. Fla. 2020); *Colette v. CV Sciences Inc.* (N.D. Cal. 2020); *Glass v. Global Widget LLC* (E.D. Cal. June 15, 2020).

The remaining 22 cases in the survey largely involved employment-related or disability-related claims. These include individuals who allege that they consumed a product and were subsequently fired from their employment or assert that a cannabis company's website does not accommodate visually disabled users.



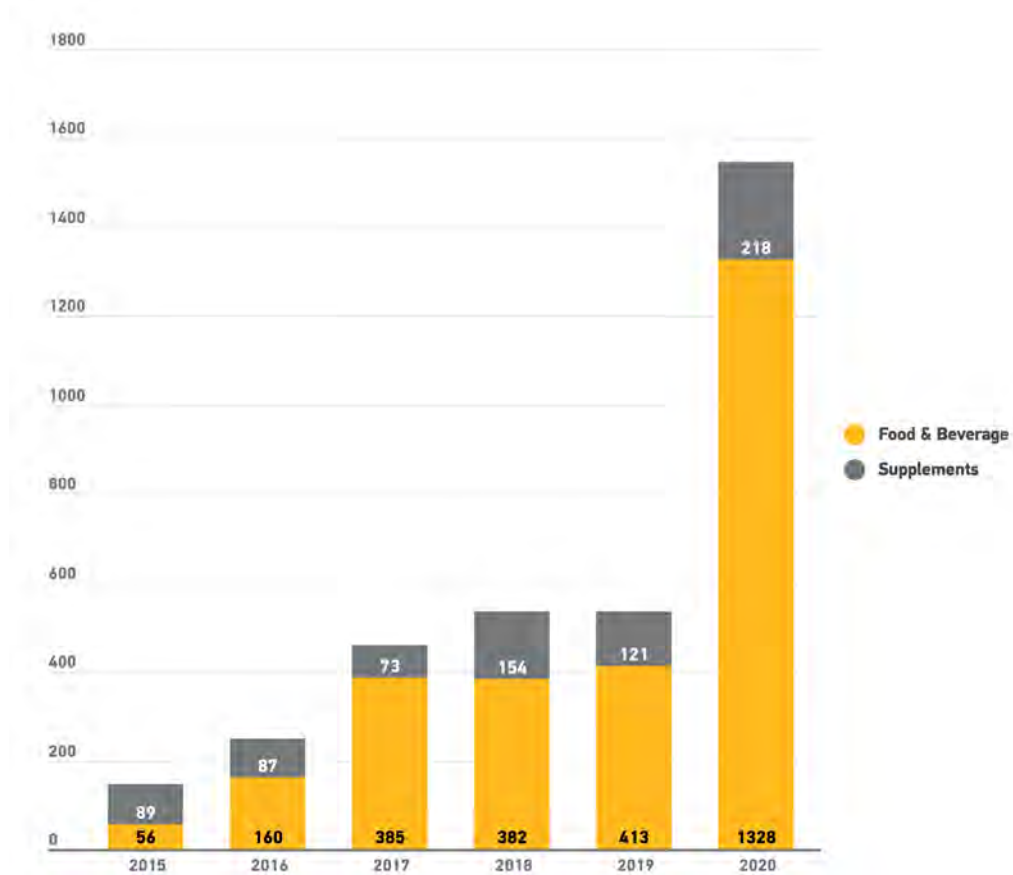
## Proposition 65 **TRENDS**

## 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 state’s Office of Environmental Health Hazard Assessment, commonly referred to as OEHHA. As shown in the figure below, Proposition 65 pre-litigation notices affecting the food and beverage industry, including dietary supplements, have increased steadily over the last five years. In 2020, there was a shocking threefold increase in the number of notices served by plaintiffs on food, beverage, and supplement manufacturers—jumping from 534 notices in 2019 to a record-breaking 1,546 notices in 2020.

### PROPOSITION 65 PRE-LITIGATION NOTICES

FIGURE 8



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

The spike in the number of pre-litigation notices has been driven primarily by a handful of new and aggressive “bounty hunter” plaintiffs. Notably, however, the number of Proposition 65 settlements slumped in 2020, perhaps indicating that the new plaintiffs took a shotgun approach when issuing pre-litigation notices and may not have had the resources to pursue litigation.

As before, the pre-litigation notices primarily target food products containing acrylamide, lead, and cadmium. These three chemicals alone account for over 85% of all pre-litigation notices issued to food, beverage, and supplement companies. The key product categories also remain the same: for acrylamide—baked and fried snack foods such as chips, crackers, and cookies; for lead and cadmium—seafood products, powdered spices, and protein supplements.

### OEHHA CLARIFIES RETAILER WARNING RESPONSIBILITIES

OEHHA’s amendments regarding retailer warning responsibilities became effective April 1, 2020. Per OEHHA, the amendments “clarify how intermediate parties in the chain of distribution can satisfy their obligation to provide a warning” under Proposition 65. OEHHA also revised the level of knowledge required to trigger warning obligations for retail sellers.

The amendments allow manufacturers, producers, packagers, importers, suppliers, or distributors of products to discharge their warning requirements under Proposition 65 either by: (a) providing adequate warnings on the product’s labeling that satisfy the Proposition 65 requirements; or (b) providing written notice to the authorized agent for the retail seller or the immediate business to which they are selling the product. That notice must be renewed annually during the product’s retail sale in California. (27 Cal. Code Reg. Section 25600.2(b)).

In addition, the amendments change certain aspects of when a retail seller is responsible for adding warnings to product labeling. Specifically, a retail seller is required to provide Proposition 65 warnings only in certain circumstances, such as when the seller has “actual knowledge” of potential exposure and no intermediary party meets requirements for California’s jurisdiction. OEHHA further clarified that “actual knowledge” means “the retail seller receives information from any reliable source that allows it to identify the specific product or products that cause the consumer product exposure.” And, the knowledge must “be received by the retail seller, its authorized agent or a person whose knowledge can be imputed to the retail seller from any reliable source.”

### PROPOSED AMENDMENTS TO SHORT-FORM WARNING LANGUAGE

On January 8, 2021, 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 is that the long-form warning requires the business to 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.

**Proposition 65 pre-litigation notices impacting the food and beverage industry, including dietary supplements, have increased steadily over the last five years. In 2020, there was a shocking threefold increase in the number of notices plaintiffs served on food, beverage, and supplement manufacturers.**

For example, a long-form warning for a product containing a chemical listed as a carcinogen would read:

.....

WARNING: This product can expose you to chemicals including [name of one or more chemicals], which is [are] known to the State of California to cause cancer. For more information go to [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

.....

At present, a short-form warning, on the other hand, can read simply:

.....

WARNING: Cancer - [www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

.....

However, OEHHA's proposed changes seek to place dramatic restrictions on the use of short-form warnings, including:

- Allowing use of the short-form warning only on products with five square inches or less of label space; and
- Allowing use of the short-form warning only on products where the package shape or size cannot accommodate the full-length warning; and
- Requiring the entire warning to be printed in a type size no smaller than the largest type size used for other consumer information on the product, but in no case smaller than six-point type.

The content of the short-form warning would also be expanded to include: (1) the name of at least one chemical, and (2) the terms "risk" and "exposure." For example:

.....

WARNING: Cancer Risk From Diisononyl Phthalate (DINP) Exposure—[www.P65Warnings.ca.gov](http://www.P65Warnings.ca.gov).

.....

OEHHA also seeks to eliminate use of short-form warnings for internet and catalog purposes.

OEHHA has included a "sell-through" provision with the amendments, whereby the new rules would not apply to products manufactured prior to the effective date of the regulations.

Written comments responding to the proposed amendments are due by March 8, 2021. After the close of the comment period, regulators will issue final regulations. Based on the timeline in the proposed regulations, the limitations on short-form labeling would go into effect one year after these final regulations are promulgated.



## ABOUT PERKINS COIE

As shown in this report, the food and consumer packaged goods industry is one of the top targets for class actions and individual lawsuits following increased attention to product labeling, advertising, genetically modified organisms, and consumer fraud. Perkins Coie attorneys have had considerable success in countering this rising litigation trend. We protect food and CPG clients by deploying decisive measures that reduce their liability and, when feasible, shut down litigation early and cost-effectively.

Perkins Coie has worked with major food and beverage manufacturers and distributors, as well as their respective supply chains, since the beginning of the food activist movement and the increase in FDA regulations. Additionally, we have advised clients on product recalls and product liability exposure and have served as national coordinating defense counsel in complex nationwide class actions. Perkins Coie attorneys often lead the industry conversation in this evolving area of law. For example, our winning defense in the class action *Turek v. General Mills*, which involved nutrient content claims, led to the first published federal appellate decision on the scope of Nutrition Labeling and Education Act preemption.

Our resident knowledge base includes attorneys from our nationally recognized Retail & Consumer Products industry group and, within that group, attorneys focused on Food & Beverage and Consumer Packaged Goods. Many of our attorneys appear as seminar speakers, provide commentary to the media, and publish articles on topics that our clients need to understand before litigation arises. Our Food Litigation Blog provides real-time information on significant arguments and emerging trends in food and beverage litigation.

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*.

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