Food & Consumer Packaged Goods Litigation
2021 YEAR IN REVIEW





PERKINS COIE

TABLE OF CONTENTS

INTRODUCTION

PERKINS COIE IS PLEASED TO PUBLISH ITS SIXTH ANNUAL FOOD & CONSUMER PACKAGED GOODS (CPG) LITIGATION YEAR IN REVIEW. In 2021, one signifier of a return to "normalcy" was less welcome than others: The food, beverage, and CPG industry remained a consistent target of putative class action litigation. As in years past, plaintiffs' counsel continued to stalk and scrutinize the labels of CPG products for potential lawsuits, with 2021 once again setting record numbers for industry filings.

Last year, our team at Perkins Coie announced an expansion of our food and beverage litigation practice to the CPG space generally. So, our real-time monitoring of food and beverage industry filings and case law—data we have collected for over a decade and catalog in a proprietary database—now encompasses supplements, pet foods, household cleaning products, and cosmetics. Perkins Coie's proprietary database tracking CPG filings is regularly cited by major media outlets, and analysis of this data along with our daily updates are often relied on by in-house practitioners looking to stay current on developments in the law. Our 2021 Year in Review provides a holistic look at this data, and also summarizes important regulatory updates impacting the CPG industry.

One area we are continuing to monitor closely, and that cuts across the entire CPG industry, is litigation related to Environmental, Social & Governance ("ESG") claims, i.e., lawsuits that challenge a company's sustainability or environmental practices. As recently as 2017, this area would have been fairly characterized as a "test case" area, with only three relevant filings that year. In the period between 2020 and 2021, however, that number has skyrocketed with 60+ filings over that two-year period. As ESG litigation expands, we are placing careful attention to theories advanced by plaintiffs' counsel and evaluating the best strategies companies can adopt to avoid litigation—or beat it when it comes.

The year 2021 also saw important developments under the "reasonable consumer" standard, a defense used frequently in CPG litigation, with the U.S. Court of Appeals for the Ninth Circuit issuing an important published opinion emphasizing the importance of commonsense reasoning and marketplace realities in such cases. And the United States Supreme Court likewise issued an important ruling in the class action context, further clarifying that named plaintiffs must have a real, non-speculative injury—often lacking in CPG putative class actions—to open the doors to federal courts. These and other important trends are covered in detail below.

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 PerkinsCoieFood&CPGLitigationUpdate@perkinscoie.com.

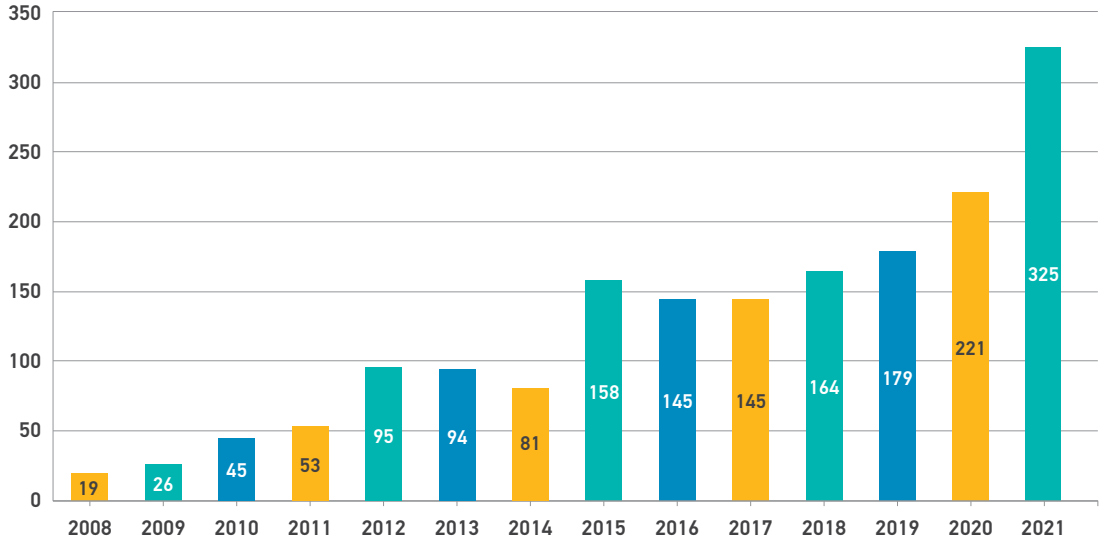
FOOD & BEVERAGE

LEGAL TRENDS IN FOOD & BEVERAGE

As in 2020, we continued to see an uptick in the number of filings against the food and beverage industry in 2021, with a record-setting 325 lawsuits filed last year. As we explain elsewhere, much of that filing volume came from one plaintiff's lawyer, Spencer Sheehan, whose cases continued to be dismissed at a steady pace by federal courts nationwide. The other, more serious, reason for the 2021 filing spike is a large number of cases filed against the baby food industry—120 according to our data—prompted by a Congressional inquiry into trace amounts of heavy metals in those foods. These and other trends are covered below.

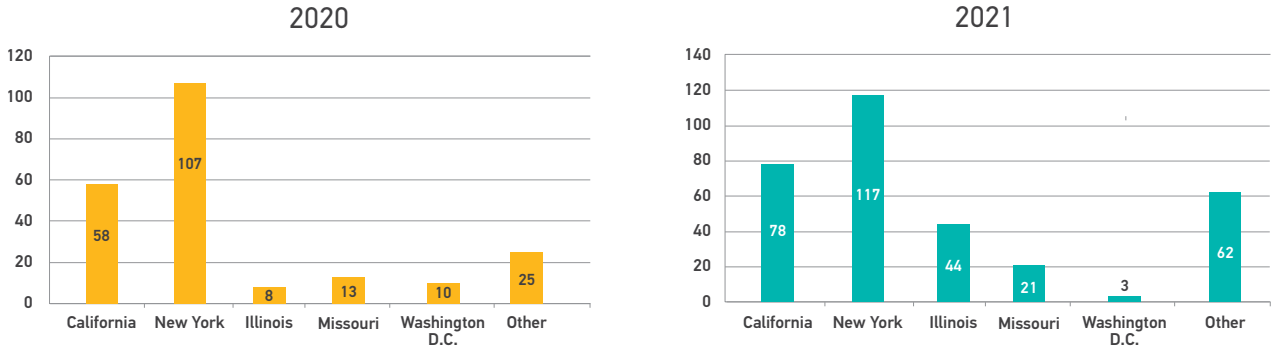
FOOD AND BEVERAGE CLASS ACTIONS

FIGURE 1



FOOD AND BEVERAGE CLASS ACTIONS: FILINGS BY JURISDICTION

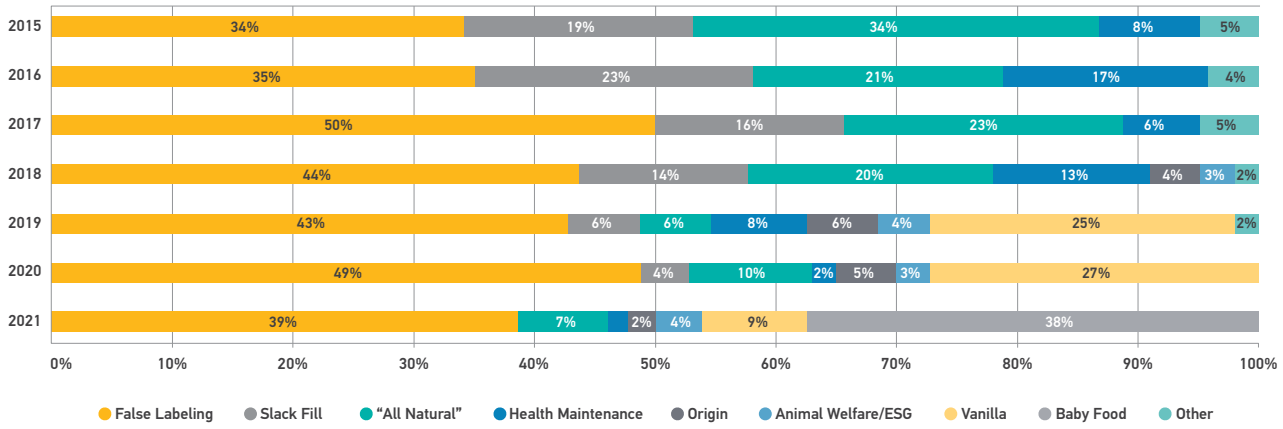
FIGURE 2



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

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*

FALSE LABELING

The largest category of cases we track—false labeling—saw a jump in filings in 2021, with 129 new cases compared to about 100 in 2020. This category encompassed a broad range of theories, including: allegations that "made with real fruit," "salt and vinegar potato chips," and "all butter pound cake" misleadingly suggested premium ingredients (fruit / vinegar / butter); "slightly sweet" suggests to consumers that a product contains minimal sugar; "made with real fudge" claims are false / misleading because the products lack the ingredients essential to fudge; and allegations that the food was not made in the manner suggested by the label (e.g., "smoked" label misleading because product contains smoke flavor). The breadth and creativity of these filings show how plaintiffs continue to scrutinize food and beverage labels for potential lawsuits.

But 2021 saw several favorable appellate-level rulings on the reasonable consumer standard, a key defense in false labeling cases. In *Moore v. Trader Joe's Co.*, 4 F.4th 874 (9th Cir. 2021), the Ninth Circuit held that the labels of Trader Joe's Manuka Honey were not misleading as a matter of law, affirming the district court's dismissal. Plaintiffs alleged that the claim "100% New Zealand manuka honey" represented to consumers that the product was derived entirely from bees that collected nectar from the manuka flower (native to New Zealand). Affirming dismissal, the Ninth Circuit explained a "reasonable consumer" would not share plaintiffs' "unreasonable or fanciful" interpretation of "100% New Zealand Manuka Honey" based on three contextual inferences from the product: "(1) the impossibility of making a honey that is 100% derived from one floral source [bees are foragers after all], (2) the low price of Trader Joe's Manuka Honey [single-source manuka honey is hundreds of dollars], and (3) the presence of the '10+' on the label [suggesting that the product was low-grade manuka honey], all of which is readily available to anyone browsing the aisles of Trader Joe's."

Moore is important for two reasons: First, it emphasizes that contextual cues beyond the label alone—consumer familiarity with the product, differences in products driven by price, and commonsense generally—all must be factored into the "reasonable consumer" analysis. Second, the Ninth Circuit clarified that while a pure "ingredient list" defense might not always be sufficient at Rule 12 (i.e., a defendant's reliance on clarifying information in the ingredient panel to cure alleged deception elsewhere on the label) it is nonetheless required that a court look at the full label in context. Indeed, the court in Moore interpreted Ninth, Second, and Seventh Circuit caselaw to support this bedrock, "the entire label matters" principle of "reasonable consumer" law.

In addition to *Moore*, several other appellate level decisions affirmed "reasonable consumer" dismissals. *See, e.g., George v. Starbucks Corp.*, 857 F. App'x 705 (2d Cir. 2021) (no reasonable consumer interprets claims such as "no artificial dyes or flavors" mean coffee store is free from anti-pest strips); *Chong v. Nestle Waters N. Am.*, 2021 WL 4938128 (9th Cir. Oct. 22, 2021)

(no reasonable consumer believes that image of mountain on Arrowhead spring water means the water comes exclusively from a single-source arrowhead mountain); *Weiss v. Trader Joe's Inc.*, 838 F. App'x 302 (9th Cir. 2021) (no reasonable consumer believes that water advertised as "ionized to achieve the perfect balance" and "refresh and hydrate" would balance a consumer's internal bodily pH and provide superior hydration).

NATURAL EXPANDING

"Natural" claims remained an important focus for the plaintiffs' bar, with more than 20 filings in 2021. The plaintiffs challenged natural claims on a numerous products—including fruit juice, falafel wraps, and cheese pizza—claiming that ingredients such as xanthan gum, citric acid, ascorbic acid, acetic acid and powdered cellulose rendered the natural claims false or misleading. About half of the natural cases filed in 2021 were filed in St. Louis City Superior Court, alleging a Missouri-only class, as part of a more generalized strategy to target products where sales are sufficiently low to keep the cases out of federal court. The less well-developed precedent at the state versus federal court level in food labeling matters can sometimes make motions to dismiss more challenging in state forums.

Cases also challenged terms similar to "natural," relying on similar theories of deception as those seen in the natural cases. Claims such as "pure," "100%" and even labeling that is merely evocative of a natural product were targeted, a trend we expect to continue in 2022. For example, consumers sued supplement company Best Nutritionals LLC 21-cv-0713211 (S.D. Cal.). on the grounds that the labeling of its pure Antarctic krill was false or misleading because the product contained non-krill ingredients. And plaintiffs in *Willard v. Tropicana Manufacturing Co.*, Inc., alleged that claims such as "100% juice" suggested the product was all natural, even if the label did not say so explicitly. The court ultimately let the case proceed past Tropicana's motion to dismiss, finding that the 100% juice claim was potentially misleading given the presence of synthetic malic acid in the product. 2021 WL 6197079 (N.D. Ill. Dec. 30, 2021).

HEALTH MAINTENANCE

Litigation around the presence of sugar in food remained an area of interest by the plaintiffs' bar. The products targeted in these cases included probiotic drinks, and fruit and vegetable juices—thus evidencing an expansion into food categories traditionally recognized as healthful. Plaintiffs allege that sugar consumption from these foods contributes to a variety of alleged negative health outcomes. As with the initial round of sugar-related lawsuits in 2016, different courts have adopted varying approaches to these cases, with some courts recognizing that a "reasonable consumer" is well-equipped to review a product's label, see its sugar content, and decide for herself whether she would like to buy it. We will be monitoring these more recently-filed cases in 2022 to see if a similar analysis prevails there.

FLAVORING

The tide of vanilla litigation began to (finally) ebb in 2021. These cases generally allege that a "reasonable consumer" expects that a product labeled as flavored with vanilla (e.g., vanilla ice cream or vanilla soy milk) derives its flavor exclusively from pure vanilla or vanilla extract, as opposed to artificial vanilla, such as vanillin. The nation's courts have seen over 130 new suits based on this theory since 2019. But compared to 58 cases filed in 2020, only 30 were filed in 2021. This is likely because federal courts are growing increasingly impatient toward vanilla litigation. Most district courts in New York and around the country have 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. Relying on common sense—and a coalescing body of consistent precedent—these courts have repeatedly held that when consumers read vanilla on a product label, they understand it to mean the product has a certain taste, not that it is derived exclusively from vanilla beans. S*ee, e.g., Tropp v. Prairie Farms Dairy, Inc.*, 2021 WL 5416639, at *4 (W.D. Wis. Nov. 19, 2021); *Zahora v. Orgain LLC*, 2021 WL 5140504, at *5 (N.D. Ill. Nov. 4, 2021); *Jones v. Orgain, LLC*, 2021 WL 4392783, at *3 (S.D.N.Y. Sept. 24, 2021); *Garadi v. Mars Wrigley Confectionery US, LLC*, 2021 WL 2843137, at *3 (E.D.N.Y. July 6, 2021) *Robie v. Trader Joe's Co.*, 2021 WL 2548960, at *6 (N.D. Cal. June 14, 2021); *Clark v. Westbrae Natural, Inc.*, 2021 WL 1580827, at *2 (N.D. Cal. Apr. 22, 2021); *Dashnau v. Unilever Mfg. (US), Inc.*, 2021 WL 1163716, at *6 (S.D.N.Y. Mar. 26, 2021); *Cosgrove v. Oregon Chai, Inc.*, 520 F.Supp.3d 562, 581 (S.D.N.Y. 2021); *Parham, v. ALDI, Inc.*, 2021 WL 709632, at *3 (S.D.N.Y. Feb. 15, 2021); *Twohig v. Shop-Rite Supermarkets, Inc.*, 519 F.Supp.3d 154, 162 (S.D.N.Y. 2021) ("A reasonable consumer would understand that 'vanilla' is merely a flavor designator, not an ingredient claim.").

But 2021 marked the year of breakout flavoring cases. As Mr. Sheehan's vanilla suits began to trend downward in 2021, newer categories began to trend upward, such as the strawberry content in strawberry Pop-Tarts, the chocolate in chocolate-coated ice cream bars, fudge in Keebler fudge cookies, butter in crackers, and the various fruit essences in sparkling water, among other creative challenges to flavoring. Similar to the vanilla suits, these suits allege deception to a reasonable consumer, and often, violations of 21 C.F.R. § 101.22(i), the FDA's regulation governing flavoring.

Many of these cases have met the same fate as the prior "vanilla" lawsuits: a prompt Rule 12 dismissal for failure to satisfy the "reasonable consumer" standard. For example, in *Cruz v. D.F. Stauffer Biscuit Co.*, a case challenging lemon as the characterizing flavor in lemon cookies, the court relied on dismissals of similar cases involving vanilla flavoring to determine that a reasonable consumer would not be misled by the labeling because "the Product's front label does not state that it is free of artificial flavors, suggest that real lemons are the only source of the cookies' lemon flavoring, or claim that the flavor from real lemons constitutes a certain percentage of the total lemon flavor." 2021 WL 5119395, at *6 (S.D.N.Y. Nov. 4, 2021). Any confusion as to the flavoring agent could be dispelled by the ingredient list on the back panel, which stated the product contained "natural and artificial flavors." *Id.*; see also *Wallace v. Wise Foods, Inc.*, 2021 WL 3163599, at *3 (S.D.N.Y. July 26, 2021) (relying on vanilla cases to hold that a reasonable consumer would not be deceived by chips labeled as "Cheddar & Sour Cream Flavored") (emphasis added); *Kamara v. Pepperidge Farm, Inc.*, 2021 WL 5234882, at *5 (S.D.N.Y. Nov. 9, 2021) (no reasonable consumer would be deceived by the packaging where "the ingredients list confirmed that butter predominated over other oils and fats"—indeed, it was the second ingredient after flour—and a reasonable consumer could believe that "butter" was a representation about flavor, not ingredients).

There were, however, some cases tied to flavoring or similar characteristics that survived Rule 12 and "reasonable consumer" review in 2021. In *Colpitts v. Blue Diamond Growers*, for example, the court distinguished from the vanilla cases and held that a reasonable consumer could be misled by a packaging color scheme evocative of fire, suggesting the product's smoke flavoring was drawn from a natural smoking process when the flavors were actually added flavors meant to imitate a smoky flavor. 527 F. Supp. 3d 562, 583 (S.D.N.Y. 2021). Even though "Natural Hickory Smoke Flavor" was among the ingredients listed on the package, in denying a motion to dismiss the court placed emphasis on the word "Smokehouse" on the front panel, appearing without any other modifying or clarifying language. *Id.* at 581–82; see also *Valcarcel v. Ahold U.S.A., Inc.*, 2021 WL 6106209, at *7 (S.D.N.Y. Dec. 22, 2021) (denying motion to dismiss because the product's name ("graham crackers") and the emphasis on the word "graham" (appearing "larger and distinct font" from the word "crackers") suggested to a reasonable consumer that the product's primary and predominant ingredient was graham flour, not enriched wheat flour); *Campbell v. Whole Foods Market Grp., Inc.*, 2021 WL 355405 (S.D.N.Y. Feb. 2, 2021) (denying motion to dismiss where name of the product was "Honey Grahams" and the package depicted a honey dipper, which, suggested that honey was the predominant sweetener in the product, not sugar).

HEAVY METALS

The year 2021 saw hundreds of filings on a single issue: heavy metals in baby food. In February 2021, a report from a House of Representatives subcommittee identified "significant levels" of four heavy metals—arsenic, lead, cadmium, and mercury—in a variety of baby foods. The report found that seven major baby food companies sold finished products with arsenic between 60 and 100 ppb and lead as high as 641 ppb and used ingredients with similarly high levels of arsenic, lead, cadmium, and mercury. Its authors argued that these levels can cause low IQ, behavioral problems, and mental health issues in children, among other health risks.

The follow-on litigation was swift. The report was published on February 4, and plaintiffs filed the first consumer class actions on February 5. There are now well over 100 consumer class action cases pending in jurisdictions throughout the country against the companies named in the House Report. Several of the companies are facing product liability claims as well. The consumer class action cases generally allege that the companies misrepresented the nature of the food by claiming that it was safe for consumption when the heavy metals rendered it harmful. Plaintiffs also allege the companies concealed the presence of heavy metals.

The Judicial Panel on Multidistrict Litigation denied several plaintiffs' motion to consolidate the consumer class actions over the summer. Since then, the cases have been consolidated in several jurisdictions around the country, usually on defendants' home turf, and many courts have appointed interim lead class counsel.

The first order on a defendant's motion to dismiss issued last month. U.S. District Court of the Northern District of California Judge Yvonne Gonzalez Rogers denied Plum Inc.'s motion to dismiss on January 12, 2022. *In re Plum Baby Food Litig.*, No. 21-cv-00913, ECF No. 125 (N.D. Cal., Jan. 12, 2022). She found the plaintiffs' claims were not conflict preempted because of a specific statute or regulation governing trace heavy metals in baby food. More motions to dismiss are pending, and decisions are expected in the next few months.

The U.S. Food and Drug Administration (FDA) and Congress acted on the House's report as well. The FDA launched "Closer to Zero," a plan to update action levels for heavy metals in baby food, as well as work with industry to address the issue. And members of Congress introduced the Baby Food Safety Act of 2021, which would set limits for heavy metals in food for children up to 36 months of age at extremely low levels.

For more on the baby food cases, check out our Consumer Protection Review blog.

Separate and apart from the baby food cases, heavy metals and other alleged contaminants remained a hot issue for plaintiffs' counsel in 2021. For example, consumers filed several lawsuits against Kraft and General Mills in April 2021 alleging that their macaroni and cheese products contain trace phthalates, which (according to the plaintiffs) they should have disclosed to consumers. Motions to dismiss in those cases are pending.

PROTEIN

In a new twist on an old tactic, plaintiffs' counsel tried to capitalize on perceived noncompliance with highly technical aspects of FDA labeling requirements. In 2021 several lawsuits were filed alleging that food companies overstated the amount of protein in their products by using a total protein figure for a front-of-pack protein content claim, rather than a protein figure adjusted for digestibility. *See, e.g., Minor v. Baker Mills, Inc.*, 20-cv-02901 (N.D. Cal., filed Apr. 28, 2020); *Chong v. Kind LLC*, 21-cv-04528 (N.D. Cal., filed June 11, 2021). Although plaintiffs saw initial success in *Minor*, two recent orders have discredited plaintiffs' theory and sounded a death knell on this highly technical claim.

The plaintiffs' theory in the protein cases is based on the protein labeling regulation, 21 C.F.R. § 101.9(c)(7). That section 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 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). The regulation does not speak to how companies should calculate protein content for purposes of a front-of-pack protein content claim. Plaintiffs nevertheless have argued that the front-of-pack claim must reflect the amount of "corrected protein" (calculated using a PDCAAS), rather than "total protein" (calculated using the nitrogen method) and that any front-of-pack claim based on a "total protein" score is necessarily misleading.

The plaintiffs won an early victory on this theory against Kodiak Cakes, see *Minor v. Baker Mills, Inc.*, No. 20-cv-02901 (N.D. Cal., filed Apr. 28, 2020), but the judge who authored that order—Judge Seeborg—recently reversed course and granted Kind's motion to dismiss in *Chong v. Kind LLC*, 21-cv-04528-RS, ECF 41 (N.D. Cal., Feb. 15, 2022) (Order Granting Motion to Dismiss). In the recent *Kind* order, Judge Seeborg concluded that *Minor* was "wrongly decided," and that FDA regulations expressly permit food companies to declare the total protein content of their products (unadjusted for digestibility) on a product's front of pack. *Id.* at *5. Plaintiffs' claim, which sought to punish the precise behavior that FDA permitted, was therefore preempted. *Id.* at *1. *Kind* followed another decision in a nearly identical protein labeling case against Kashi. *See Nacarino v. Kashi* Co., 21-cv-07036-VC, ECF 43 (N.D. Cal., Feb. 9, 2022). The court in *Nacarino* likewise reasoned that using the nitrogen method to calculate a front-of-pack protein claim was not misleading because the method is FDA approved. *Id.* at *1. FDA agrees: In a public statement

posted on its website on January 11, 2022, the FDA clarified that "Determination of compliance for protein nutrient content claims will be based on the use of the methods provided in 21 CFR 101.9(c)(7)," i.e., either the nitrogen method or the PDCAAS method. With *Chong and Nacarino* on the books, and *Minor* effectively overruled, plaintiffs' attempt to impose protein labeling requirements inconsistent with FDA regulations and industry practice was short lived.

SLACK FILL

While the overall volume of slack-fill complaints continued to decline, defendants obtained mixed results at the motion to dismiss phase, particularly at the federal level.

This trend is exemplified by two slack-fill complaints filed in different jurisdictions, each involving the same candy products manufactured by Tootsie Roll Industries, LLC. In both cases, plaintiffs averred that they had been misled by the size of the candy boxes at issue, which were allegedly underfilled due to the presence of nonfunctional slack-fill. And in both cases, the defendant moved to dismiss the operative complaint, citing multiple prior decisions that have held the packaging at issue was non-misleading. However, that is where the similarities end, because each court reached a different conclusion on the defendant's motion to dismiss.

In *Iglesia v. Tootsie Roll*, filed in the U.S. District Court of the District of New Jersey, the court granted the defendant's motion to dismiss, holding that "numerous other courts, including one that considered the same [p]roducts at issue in this case, have concluded that similar labeling cannot mislead or deceive a reasonable consumer." No. 3:20-cv-18751 (D.N.J. Oct. 18, 2021) (Op. at 13, citing *Daniel v. Tootsie Roll Indus. LLC*, 2018 WL 3650015 at *11--12 (S.D.N.Y. Aug. 1, 2018)). In *Iglesia,* the court highlighted the importance of net weight disclosures present on the product packaging, noting that a consumer "can easily calculate the number of candies contained in the [p]roduct boxes simply by multiplying the serving sizes by the number of servings in each box." *Id.*

On the other hand, in *Maisel v. Tootsie Roll*, filed in the U.S. District Court for the Northern District of California, the court denied the defendant's motion to dismiss, holding that the plaintiff had adequately alleged a reasonable consumer was likely to be misled by the discrepancy between the size of the product packaging and the amount of cany contained therein. *Maisel,* No. 20-cv-5204, 2021 WL 3185443 (N.D. Cal. July 27, 2021). In reaching this conclusion, the court noted that—despite the clear and accurate net weight disclosures on the product packaging—"the size of the box suggests something to the average person that recitation of numbers might not be sufficient to overcome." *Id.* at *4. The court also referenced the fact that the plaintiff had included "references to consultation of experts" in supporting her claim that the slack-fill was impermissible, "nonfunctional" slack-fill, under applicable federal and state regulations. *Id. Compare, Coleman v. Mondelez Internat'l Inc.*, 2:20-cv-8100 (C.D. Cal. July 26, 2021) (denying motion to dismiss slack-fill complaint related to "Swedish Fish" packing), *with Daniel v. Mondelez Int'l Inc.*, 287 F.Supp.3d 177 (E.D.N.Y. 2018) (granting motion to dismiss involving same product).

Indeed, when it comes to the slack-fill arena, courts have become less willing to accept boilerplate challenges to the amount of food contained in manufacturers' packaging. And as in *Maisel*, some plaintiffs are bolstering complaints with allegations pertaining to "expert" opinions and comparator products, to pass muster. See, e.g., *Stewart v. Kodiak Cakes, LLC*, 537 F.Supp.3d 1103, 1139 (S.D. Cal. 2021) ("Plaintiffs include a picture of Defendants products next to a similar sized competitor product."); *Barrett v. Optimum Nutrition*, No. 2:21-cv-04398 (C.D. Cal. Jan. 12, 2022) ("Plaintiff also juxtaposes Defendants' [p]roduct with the packaging of a competitor product as a factual counterexample to the notion that the slack-fill is necessary.") (denying motion to dismiss); *Krause-Pettal v. Unilever U.S., Inc.*, No. 20-cv-1672, 2021 WL 1597931, at *5 (S.D. Cal. Apr. 23, 2021) ("[A]fter discovering the 'slack-fill' in Defendant's products, [plaintiff] purchased two competitors' products, and discovered 'there was no slack-fill at the bottoms of the packages demonstrating to him there was no functional reason to have empty space at the bottom of Defendant's packaging.'") (denying motion to dismiss).

Nonetheless, the "reasonable consumer" standard continues to be a critical pleading standard that courts deploy to dispense insufficient claims of consumer deception. For example, Annie's Inc., represented by the Perkins Coie LLP food litigation team, warded off a putative class action lawsuit filed in the U.S. District Court of the Southern District of New York alleging

that Annie's fruit snacks contained non-functional slack-fill, and therefore misled consumers as to the amount of fruit snacks contained therein. In *Klausner v. Annie's Inc.*, No. 7:20-cv-08467 (S.D.N.Y. Jan. 24, 2022), the court dismissed the plaintiff's complaint and found that the fruit snack packaging was not deceptive as a matter of law, because the front label of the packaging, "discloses in large, color differentiated font, the actual amount of Fruit Snacks in each box," and the "plaintiff does not allege that this information is inaccurate." *Id.* at 9 (internal citations omitted). Invoking a long line of precedential case law, the court wrote, "reasonable consumers would not be misled by non-functional slack-fill as a matter of law where the products clearly disclosed accurate net weight and/or the total product count." *Id.* (citations omitted).

SERVING SIZE

False labeling litigation—including alleged misstatements of the number of servings per container—continued to be active in 2021.

Plaintiffs filed a number of such cases against coffee companies, alleging that they misrepresent the amount of ground coffee in their packages by claiming on the front-of the-pack that the container "makes up to" a certain number of cups of coffee, when in reality the package yields fewer cups. In *Ashton v. J.M. Smucker Co.*, for example, plaintiffs alleged that the front-of-pack claim "MAKES UP TO 210 6 FL OZ CUPS" was misleading because instructions on the back panel directed consumers to use one tablespoon of ground coffee per six ounces of water, and the package contained only 156 tablespoons of ground coffee. No. 20-992, 2020 WL 8575140 (C.D. Cal. Dec. 16, 2020). The defendants moved to dismiss plaintiffs' complaint on several grounds, including lack of injury (asserting plaintiffs relied on "flawed arithmetic to theorize that the [p]roducts are unable to make the represented number of cups") and failure to meet the reasonable consumer standard (plaintiffs' theories and calculations "amount to naked assertions without factual enhancement"). But in the end, the court largely denied the defendants' motion to dismiss, holding there were questions of fact making dismissal premature. *Ashton* and four other putative class actions were subsequently consolidated before the U.S. District Court of the Western District of Missouri, where the litigation is ongoing. See, *In re Folgers Coffee Mktg. and Sales Pract. Litig.*, 532 F.Supp.3d 1416 (U.S. Jud. Pan. Mult. Litig., Apr. 1, 2021) (Transfer Order).

In similar litigation pertaining to ground coffee serving size, the Kraft Heinz Company resolved several cases against it as part of a nationwide class action settlement consisting of an up-to $16 million settlement fund and injunctive relief (i.e., labeling amendments). *See Ferron v. Kraft Heinz Foods Company*, No. 20-cv-62136, 2021 WL 2940240 (S.D. Fla. July 13, 2021).

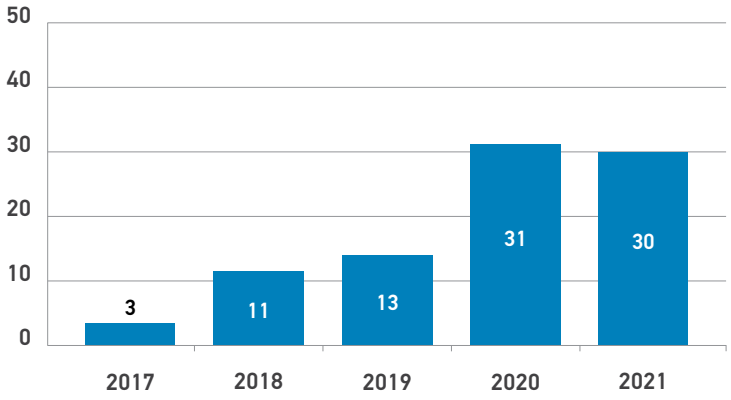
Finally, several other serving size cases have been voluntarily dismissed pursuant to stipulation following the court's denial of the defendants' motion to dismiss. *See, Lorentz v. Kroger Co.*, 532 F.Supp.3d 901 (C.D. Cal. 2021) (denying motion to dismiss); No. 2:20-cv-6754, Dkt. No. 47 (order granting joint stipulation for voluntary dismissal, entered Sept. 9, 2021).

ENVIRONMENTAL, SOCIAL, AND GOVERNANCE

2021 saw the extension of an increasing trend in class action litigation: lawsuits that challenge the environmental, sustainability, and animal welfare practices of corporate defendants—an area often referred to under the rubric of Environmental, Social, and Governance (ESG). Similar to the run of "natural" cases several years prior, ESG lawsuits are often stalking horses for plaintiffs' own independent policy goals and objectives. And these cases likewise carry forward the trend of nonprofit organizations initiating class or class-like lawsuits that seek some broader labeling or practice changes. As reflected in relevant decisions over the past year, these cases actually threaten to undermine important ESG objectives, as the litigation has tended to target corporate defendants committed to improvement in these areas, but allegedly falls short of whatever plaintiff-specific standard is being advanced in the lawsuit. The numbers bear out the increasing significance of this area of the law, as reflected in Figure 4, below:

ESG RELATED CLASS ACTIONS: FILINGS BY YEAR

FIGURE 4



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

For example, in *Myers v. Starbucks Corp.*, 2021 WL 1921120 (C.D. Cal. May 5, 2021), the U.S. District Court of the Central District of California granted in part and denied in part a putative class action targeting several defendants whose products referred to the sourcing of cocoa ingredients. One of the defendants referred to the cocoa in its products as being "traceable from the farms into our factory," which the plaintiffs alleged misleadingly suggested that the cocoa was ethically sourced. The court nonetheless dismissed the defendant from the suit, reasoning that the statement was factually accurate—the company did buy traceable cocoa—and that a "reasonable consumer" would not read the statement to assume that all of the company's cocoa was traceable. By contrast, the court denied the motion to dismiss as to a defendant whose cocoa was labeled as "ethically sourced." Here, the court reasoned that for Federal Rule of Civil Procedure (Rule) 12 purposes the complaint had plausibly alleged that it is currently impossible to source truly "ethical" (in the plaintiffs' view) cocoa and as such, the statement was potentially misleading. The *Myers* decision thus illustrates that sometimes a corporate defendant's good deeds—here a company's efforts to source cocoa from growers who ethically produce—can be used against it in the hands of aggressive plaintiffs' counsel. *Myers* also points up that verifiable statements might be less potentially actionable than those that go to some broader policy objective.

Sometimes ESG lawsuits target specific legal defenses as much as they do particular statements, again as part of activity to make defendants more vulnerable to litigation. So, for example, in *Cohen v. Conagra Brands*, 16 F.4th 1283 (9th Cir. 2021), the Ninth Circuit held that to sustain a preemption-based defense to a lawsuit challenging certain labeling claims on the defendants' chicken nuggets and fried chicken products—claims that the plaintiffs alleged were false because of alleged artificial ingredients present in the products—the defendants cannot rely on the USDA-approval symbol alone and must introduce evidence that the USDA's Food Safety and Inspection Service (FSIS) actually reviewed the labels. So while the issue

in *Cohen* is narrow doctrinally (the quantum of proof needed to sustain an FSIS-inspection defense at the pleading stages), it nonetheless demonstrates that industries previously protected by strong USDA-preemption based defenses are not exempt from targeting by the plaintiffs' bar.

Recyclability claims are likewise frequently targeted. Lawsuits target the allowability of these claims on products alleged not to be recyclable by every consumer if they happen to reside far from adequate recycling facilities. The year 2021 saw the settlement of one of these cases *Last Beach Cleanup v. TerraCycle*, No. 21-cv-6086. In *Last Beach*, a nonprofit plaintiff alleged that TerraCycle, a company that provides consumers with the ability to mail in difficult to recycle items, allegedly was unable to recycle all the items carrying on-label TerraCycle recyclability claims. TerraCycle agreed to settle the matter on terms requiring it to provide substantiation as to the particular materials it processes for recycling. *Last Beach*, in addition to evidencing the presence of nonprofits in the ESG litigation sphere, thus also shows the importance of thorough substantiation to support recyclability claims, particularly for difficult to process materials.

But nonprofit groups are not always successful in pursuing ESG claims against corporate defendants, with issues related to standing or reliance often serving as a defense. For example, in *Greenpeace v. Walmart, Inc.*, 2021 WL 4267536 (N.D. Cal. Sept. 20, 2021), the Northern District of California dismissed a California Unfair Competition Law (UCL) (Bus. & Prof. Code § 17200) lawsuit filed against Walmart alleging that its private label brands labeled "recyclable" were not, in fact, being recycled due to an alleged inability to separate the products from the general waste stream. The court reasoned that the plaintiff, Greenpeace, had not actually alleged that it relied to its detriment on any of Walmart's alleged misrepresentations as is required under California's UCL statute. *Walmart* thus demonstrates that while there is increasing litigation activity by nonprofits in ESG matters, consumer protection laws do not necessarily allow those nonprofits to engage in free-ranging litigation efforts where there is no allegation that the nonprofit has been harmed as required under the law.

Finally, ESG-based class actions are not limited to the food and beverage sphere. In *Lee v. Canada Goose US, Inc.*, 2021 WL 2665955 (S.D.N.Y. Jun. 29, 2021), the court largely denied a motion to dismiss in a putative class action challenging the use of the term "ethical, responsible, and sustainable sourcing" in connection with the defendant's fur jackets. The plaintiffs alleged the challenged claim was misleading because of animal welfare issues in the company's supply chain. Although the defendant complied with industry certification standards, the court nonetheless reasoned that a "reasonable consumer" might interpret "sustainably sourced" to mean compliance with some higher undefined standard that the plaintiff would favor. *Lee* thus serves as a reminder that defined, provably true claims—such as a statement that a company complies with a specific and identifiable industry standard—are, at least in the current litigation environment, more defensible than what might be considered less concrete claims such as "sustainably sourced."

PROCEDURAL LITIGATION DEVELOPMENTS IMPACTING THE CPG INDUSTRY

STANDING

When it comes to standing for CPG cases, 2021 was the year of good and bad.

The U.S. Supreme Court issued a watershed standing decision on the last day of the 2021 term: *TransUnion v. Ramirez*, 141 S. Ct. 2190 (2021). *TransUnion* is a Fair Credit Reporting Act case. The plaintiff sued TransUnion on behalf of himself and a putative class because TransUnion incorrectly listed on the plaintiffs' credit reports that they were on a no-fly list. The putative class had about 8,000 people, but only about 2,000 had their incorrect credit reports distributed to potential creditors. The plaintiffs also alleged there were certain defects in the formatting of the notice they received regarding their credit reports and that TransUnion did not distribute the reports when required by law. The case went to trial and the jury awarded the class $60 million in damages. TransUnion challenged the verdict in part based on the theory that individuals whose credit reports were not distributed did not have standing and therefore were not entitled to damages.

The Supreme Court issued three relevant holdings regarding standing: First, the 6,000 class members whose incorrect credit reports were not distributed to creditors did not suffer a past injury sufficient to give rise to standing—the mere existence of incorrect information in the reports was not an injury-in-fact. Second, the risk that TransUnion would distribute the incorrect reports to creditors was not sufficiently concrete to give those individuals standing. Third, class members lacked standing based on the technical defects in the credit reports and TransUnion's failure to distribute some reports. Consumers were not harmed by those technical defects, and a mere statutory violation by TransUnion does not create Article III standing.

But *TransUnion's* impact on consumer class actions remains to be seen, even six months later. That's in part because *TransUnion* was an appeal from a jury verdict, so the Court knew precisely who was harmed and who was not. CPG cases rarely progress that far and named plaintiff's allegations of harm are sufficient for standing purposes at the motion to dismiss stage. But there are two areas where *TransUnion* may assist standing arguments. First, *TransUnion* forecloses any allegation that a named plaintiff has standing based on a risk of harm, as the Court found in *Caudel v. Amazon.com, Inc.*, 2021 WL 4819602 (E.D. Cal. Oct. 15, 2021) (granting motion to dismiss on standing grounds where plaintiff alleged she might lose videos in her Amazon queue, but that eventuality had not yet occurred). Second, claims arising under California's UCL based on a pure statutory violation likely do not survive *TransUnion*.

The Ninth Circuit issued two important standing decisions as well. In *In re Coca-Cola Products Marketing & Sales Practices Litigation*, 2021 WL 3878654 (9th Cir. Aug. 31, 2021), the court denied plaintiffs' bid for injunctive relief standing in a long-running case involving alleged artificial flavors in Coca-Cola. The court reasoned that each of the named plaintiff's proffered reason for seeking an injunction—that they would consider purchasing properly labeled Coke again or had a generalized interest in accurate labeling—was insufficient to establish a likelihood of future harm after *TransUnion*. And in *Friends of the Earth v. Sanderson Farms, Inc.*, 992 F.3d 939 (9th Cir. 2021), the Ninth Circuit affirmed summary judgment for defendant after reasoning that the plaintiff advocacy group entirely failed to show the diversion of resources necessary for Article III standing.

But there were also challenging standing cases. In *Animal Legal Defense Fund v. Hormel,* 258 A.3d 174 (D.C. 2021), the District of Columbia Court of Appeals held that nonprofits qualifying as "public interest organizations" under District of Columbia law need not satisfy Article III to bring suit in D.C. Superior Court under the district's consumer protection statute. This may contribute to a trend we have seen recently in CPG cases: nonprofits suing companies for false advertising "on behalf of" District of Columbia consumers in D.C. Superior Court and structing their complaints in a way to avoid removal to federal court.

CLASS CERTIFICATION, PREDOMINANCE, AND DAMAGES

In the class settlement context, 2021 saw a continued trend of arguably conflicting decisions by district courts on key issues of predominance in food and beverage class actions—with a key case from the Ninth Circuit waiting in the wings that could provide critical guidance.

In food and beverage class actions, the certification decision often turns on issues of predominance under Rule 23(b)(3), although courts not infrequently come to conflicting results in similar cases. So, for example in *McMorrow v. Mondelez*, 2021 WL 859137 (S.D. Cal. Mar. 8, 2021), the court granted Rule 23(b)(3) certification of a putative class action challenging the labeling of breakfast biscuits as misleading. The defendant challenged the plaintiffs' survey-based damages model as insufficiently measuring with precision any "price premium" associated with the challenged labeling claims. The court nonetheless certified the class, reasoning that the plaintiffs' damages model adequately measured any premium associated with the challenged labeling claims. By contrast, in *Vizcarra v. Unilever*, 339 F.R.D. 530 (N.D. Cal. Oct. 27, 2021), the court denied class certification on damages grounds in a case involving alleged misleading "vanilla" labeling, by reasoning that the plaintiffs' damages model did "not test or isolate the price premium, if any, resulting from the Vanilla Representations." So, the issue of what precision is needed to test an alleged misleading claim, and thus isolate any price premium tied to that claim, remains in flux in the district courts.

It is possible that the Ninth Circuit may, however, soon issue guidance bearing on whether and in what form damages-based predominance arguments can succeed in defeating class certification. In *Olean v. Bumble Bee Foods*, the Ninth Circuit heard argument en banc in September 2021 on whether, before certifying a class, a district court must find more than a *"de minimis"* number of class members has suffered injury. In *Olean*, a price-fixing matter, the injury claimed was purportedly inflated prices paid by consumers due to the defendants' conduct. The evidence showed that many tuna purchasers—as much as 28%—paid no such premium. So, while *Olean* does not deal with the issue of labeling-based price premium models specifically, it could place guardrails on certifying classes where the evidence shows that some percentage of the putative class was uninjured, regardless of the particular damages model advanced.

CLASS SETTLEMENTS

Important circuit-level decisions concerning approval of class settlements were handed down in 2021, with the Ninth Circuit in particular placing increased scrutiny on the relationship between attorneys' fees awarded and the amount of relief made available to the class.

In *Briseño v. Henderson* the Ninth Circuit identified what it called a "squadron" of red flags in a claim-made class settlement that would have put to rest a years-long dispute over cooking oil labeled as "natural." 998 F.3d 1014, 1019 (9th Cir. 2021). Applying a heightened level of scrutiny, the panel called out three aspects of the settlement that the panel believed raised fairness concerns. First, class counsel "receive[d] a disproportionate distribution of the settlement"—almost $7 million when the class only received $1 million. *Id.* at 1026. Second, the parties agreed to a "clear sailing agreement" in which the defendant agreed not to challenge class counsel's requested fee award. *Id.* And third, the agreement contained a "kicker" or "reverter" clause in which the defendant, not the class members, would receive the remaining funds if the court reduced the agreed-upon attorneys' fee award. *Id.* Moreover, the *Briseño* court also held that the lower court erred when it placed "some value" on the injunctive relief including as part of the settlement, when it was, instead, "virtually worthless" because the defendant had already removed the "100% natural" label two years before the parties had even settled. *Id.* at 1028. Other cases in 2021 likewise analyzed, and ultimately rejected, class settlements applying a similarly-exacting level of review. See In re S*amsung Top-Load Washing Mach. Mktg.*, Sales Pracs. & Prod. Liab. Litig., 997 F.3d 1077, 1091 (10th Cir. 2021); *McKinney-Drobnis v. Oreshack*, 16 F.4th 594, 610 (9th Cir. 2021); *Kim v. Allison*, 8 F.4th 1170, 1180 (9th Cir. 2021). *Briseño* and its progeny are a cautionary tale of what not to do when structuring a class action settlement, at least in the Ninth Circuit.

The Ninth Circuit also struck a blow to coupon-based class action settlements in 2021. Almost one year after the court determined that rebates could qualify as coupon relief under the Class Action Fairness Act (CAFA) in *Chambers v. Whirlpool Corp.*, 980 F.3d 645 (9th Cir. 2020), the court in *McKinney-Drobnis v. Oreshack*, 16 F.4th 594 (9th Cir. 2021), determined that vouchers provided to the class as part of a settlement were also "coupons" under the CAFA, subjecting the settlement to heightened scrutiny. *Id.* at 598. In *McKinney-Drobnis*, a spa-services company sought to settle with class members after a lawsuit accused it of unfair price hikes. *Id.* at 599.

The court found that three factors suggested the vouchers were coupons: (1) class members would likely have to supplement the voucher with their own money; (2) not all products or services were available at every defendant's location; and (3) the vouchers had an expiration date and there was no secondary market for the vouchers. *Id.* at 604–05. Because of these reasons (and because the court felt the kicker clause and clear sailing agreement suggested collusion), the court reversed the settlement approval. *Id.* at 605, 610–11. *McKinney-Drobnis* suggests that it is increasingly difficult for coupon settlements to garner approval in the Ninth Circuit.

Finally, in late 2020, the U.S. Court of Appeals for the Eleventh Circuit in *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2020), held that class representative incentive awards are precluded as a matter of law. The decision raised eyebrows across the country, since incentive awards are routinely approved in other circuits. The Eleventh Circuit had a second chance to review its *Johnson* decision in *In re Equifax Inc. Customer Data Security Breach Litigation*, 999 F.3d 1247 (11th Cir. 2021). Yet the Eleventh Circuit upheld *Johnson* and reversed the district court's settlement approval only to the extent that it approved incentive awards, holding that "service awards are prohibited as a matter of law in this Circuit." *Id.* at 1281–82.

REGULATORY DEVELOPMENTS IMPACTING THE CPG INDUSTRY

REGULATORY DEVELOPMENTS IMPACTING THE CPG INDUSTRY

Throughout 2021 and extending into 2022, 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.

USDA NATIONAL BIOENGINEERED (BE) DISCLOSURE STANDARD

On January 1, 2022, the National Bioengineered ("BE") Food Disclosure Law, passed by Congress in July 2016, came into full effect. The USDA's BE standard requires that all bioengineered foods or foods containing bioengineered ingredients affirmatively label to disclose that fact. The USDA's requirement can be satisfied through a statement on the label, through the use of a USDA-approved symbol, by placing an electronic or digital link on the label, or by providing the information through text-messaging with a phone number identified on the package. As explained in USDA guidance, the BE standard "defines bioengineered foods as those that contain detectable genetic material that has been modified through in vitro recombinant deoxyribonucleic acid (rDNA) techniques and for which the modification could not otherwise be obtained through conventional breeding or found in nature." See USDA, BE Frequently Asked Questions, (https://www.ams.usda.gov/rules-regulations/be/faq/general). While the BE Standard imposes new labeling requirements, it also expressly preempts any conflicting state-based standards relating to BE ingredients. So, on balance the standard should reduce litigation pertaining to nondisclosure of the presence of BE ingredients.

The BE standard's preemption provision does not, however, immunize companies from potential litigation if they make affirmative representations that BE ingredients are not present—although "reasonable consumer" defenses remain applicable to those claims. See, e.g., *Stewart v. Kodiak Cases*, 2021 WL 4950297, at *5 (N.D. Cal. Oct. 25, 2021) (dismissing on "reasonable consumer" grounds case challenging defendant's "Non-GMO" claim, explaining that a "reasonable consumer" would not assume "Non-GMO" means that cows used to make dairy ingredients were provided non-GMO feed).

FTC GREEN GUIDES SET FOR REVISION IN 2022

On July 2, 2021, as part of its regular revisitation of industry guidance, the FTC announced that it intended to consider revisions to its "Green Guides," codified at 16 C.F.R. § 260, which contain FTC recommended practices for "Use of Environmental Marketing Claims." See 86 Fed.Reg. 35239 (Jul. 2, 2021). The Green Guides were last revised in 2012, and as discussed elsewhere in this report in the intervening years marketing and labeling claims pertaining to ESG issues have become increasingly frequent. Although the Green Guides do not have the force of law, to the extent that the FTC defines certain claims like "recyclable" with more precision in revised guides, legal compliance might strengthen defenses in class actions challenging these sorts of claims.

CALIFORNIA ENACTS STATE-BASED RECYCLABILITY STANDARDS

On October 5, 2021, Gov. Newsom signed into law Senate Bill 343, which will empower the State of California to determine what products can or cannot carry the now familiar "three arrow" symbol for recycling. Based on standards the state is now developing, the ability to label products with that symbol will be based on whether the product is "statewide recyclable" requiring that at least 60% of the state's population has access to recycling facilities that can actually process the material, and that the material is actually sorted into defined streams for recycling processing. The new law directs state agencies to evaluate between now and January 2024 what materials will meet these state standards.

FTC FINALIZES REVISED "MADE IN USA" RULE

On July 1, 2021, the FTC announced the publication of a significant revision of its "Made in USA" standard for products making unqualified "Made in USA" claims on product labels. See 86 Fed.Reg. 37022 (July 14, 2021). The updated FTC rule requires that "all or virtually all" of the ingredients are made or sourced in the United States of America. 16 C.F.R. § 323.2. The FTC expressly declined to adopt a percentage-based standard in favor of a case-by-case approach. 86 Fed. Reg. 37022, 37026--27. The regulation also carves out USDA-regulated foods and the preemption schemes for those products but is otherwise silent on FDA-regulated foods—with the inference being that such foods are subject to the rule. See 16 C.F.R. § 323.5. The rule also has a provision that appears to keep intact state-based laws that regulate unqualified "Made in USA" claims, although the language of the regulatory sub-section leaves room for interpretation on that point and will be an issue we monitor in the coming months. See 16 C.F.R. § 323.6(b) ("For purposes of this section, a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this part if the protection such statute, regulation, order, or interpretation affords any consumer is greater than the protection provided under this part, as determined by the Commission on its own motion or upon the petition of any interested party.").

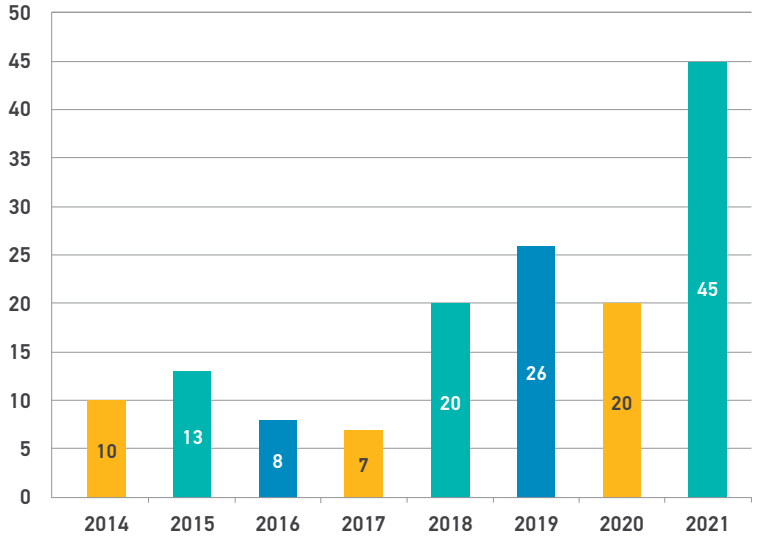
PET FOOD

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 below, filings in 2019 were nearly 160% above the 2014 number, a growth from 10 to almost 30 cases. The number declined somewhat in 2020 dropping to 20 cases; and then increased in 2021 to 45 cases. Trends in pet food litigation largely mirror those in food litigation generally. As these cases 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 this segment of the CPG industry.

PET FOOD CLASS ACTIONS: FILINGS BY YEAR

FIGURE 5



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. In 2021, these cases continue to work their way through the courts. *See, e.g., Bush v. WellPet LLC, No.* 1:21-cv-10059 (D. Mass., filed Jan. 12, 2021) (dog food marketed as "grain-free" alleged to contain grain); *Gleitz v. American Journey (Pet) LLC,* No. 0:21cv60409 (S.D. Fla., filed Feb. 22, 2021) (American Journey pet food alleged to contain wheat despite "grain-free" representation); *Gifford v. Pets Global, Inc.*, No. 2:21-cv-02136 (C.D. Cal., filed Mar. 9, 2021) (Zignature Limited Ingredient Formula alleged to contain wheat and chicken despite labeling to the contrary); *Barker v. Nestle Purina Petcare Co.*, No. 4:21-cv-01075 (E.D. Mo., filed Aug. 30, 2021) (Grain-free "Sensitive Skin and Stomach" and Beneful Grain Free products alleged to contain wheat and/or soy). In *Bakopoulos v. Mars Petcare US Inc.*, the U.S. District Court for the Northern District of Illinois allowed a case to proceed—albeit on a trimmed basis—when laboratory tests purportedly found quantifiable amounts of chicken and grains, despite product labeling of "Grain Free" and "No Chicken." No. 20 CV 6841, 2021 WL 2915215 (N.D. Ill. July 12, 2021).

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.

"WILD" VERSUS. FARMED FISH

In January 2021, a plaintiff filed a putative class action against Champion Petfoods, alleging that the "wild-caught" phrase on the labeling of its Acana pet 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.*, No. 3:21-cv-167 (N.D. Cal., filed Jan. 8, 2021). In August 2021, the Northern District of California trimmed the case, but ultimately allowed it to proceed when the products at issue were represented as "brimming with wild-caught rainbow trout" and the products contained some wild-caught fish, but no rainbow trout. No. 21-CV-00162-EMC, 2021 WL 3373934, at *11-*12 (N.D. Cal. Aug. 3, 2021). The case was ultimately voluntarily dismissed in October 2021.

PRESENCE OF HEAVY METALS AND OTHER CONTAMINANTS

The U.S. Court of Appeals for the Seventh Circuit affirmed summary judgment in a much-watched case where consumers alleged that commercial dog food contained heavy metals and other contaminants harmful to their pets. *Weaver v. Champion Petfoods USA Inc.*, 3 F.4th 927 (7th Cir. 2021). The case is particularly notable as an application of the reasonable consumer defense, with the court writing "[t]o survive summary judgment, [the plaintiff] needed to offer evidence that reasonable consumers were likely to be misled in a material way by the phrase 'biologically appropriate,' and he has failed to do so." In a long-running case regarding excessive amounts of Vitamin D in dog food, a Kansas federal judge granted final approval to a $12.5 million nationwide multidistrict litigation. *In re: Hill's Pet Nutrition Inc. Dog Food Products Liability Litigation*, No. 2:19-md-02887 (D. Kan., Dkt No. 133, Jul. 30, 2021). Elsewhere, the Northern District of California allowed claims to proceed following a voluntary recall of dog food containing pentobarbital when the product labeling claimed it provided "100% complete and balanced nutrition." *In re: Big Heart Pet Brands Litigation*, No. 4:18-cv-861 (N.D. Cal., Dkt. No. 177, Apr. 27, 2021).

AFLATOXIN

Following a recall of dog food products allegedly containing aflatoxin, several putative class actions have been filed in the U.S. District Court of the Southern District of Indiana alleging injury to plaintiffs' pets, including death and serious illness, after they consumed Sportmix pet food products. These cases have been consolidated, and recent court filings indicate that the parties are engaged in settlement efforts. See Order Granting Motion to Consolidate Cases, *In re: Midwestern Pet Foods Marketing, Sales Practices and Product Liability Litigation*, No. 3:21-cv-00007 (S.D. Ind., Dkt. 19, Mar. 29, 2021).

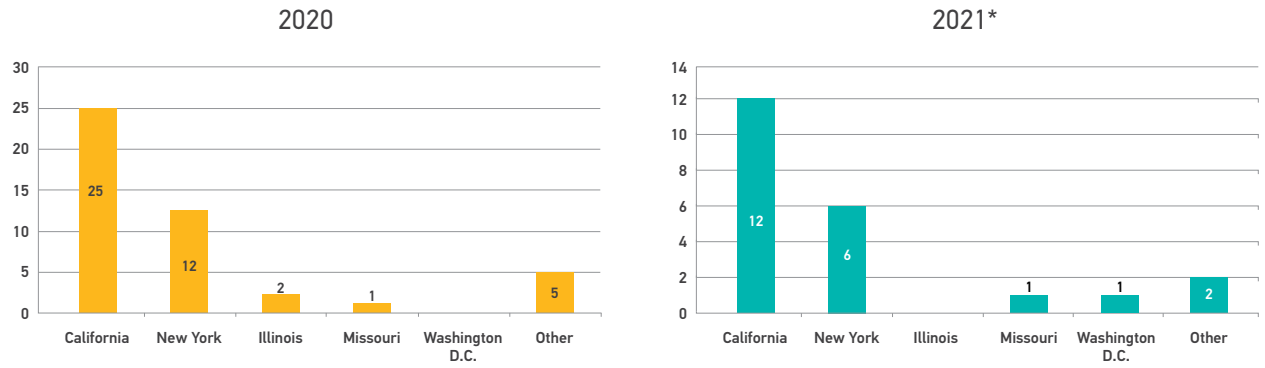
SUPPLEMENTS

LEGAL TRENDS IN SUPPLEMENTS

Since a record high 65 filings were made against dietary supplement companies in 2019, there has been a steady decline in the number of filings in the subsequent two years. There were 45 total filings in 2020 and just 22 filings in 2021. Interestingly, the reduction in filings was consistent (50% decrease) across all jurisdictions. California, once again, had the most filings, comprising more than half of all filings in 2021.

DIETARY SUPPLEMENT CLASS ACTIONS: FILINGS BY JURISDICTION

FIGURE 6

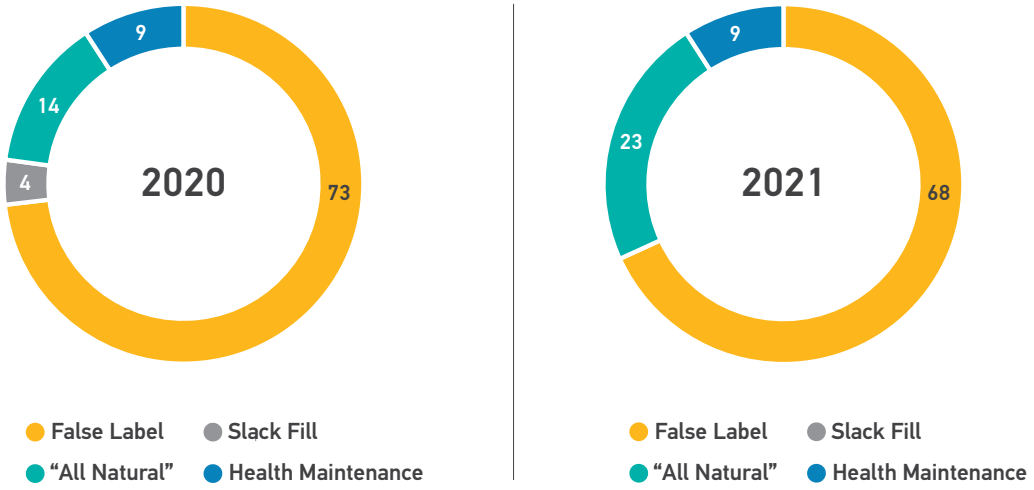


Data compiled by Perkins Coie based on a review of dockets from courts nationwide.

A significant majority of the filings in 2021 involved false labeling claims. In fact, cases involving false labeling claims accounted for nearly 70% of all filings. Coming in at a distant second were filings involving "all natural" claims. The total number of "all natural" filings, however, remained steady year over year from 2020 to 2021. The remaining two filings in 2021 involved health misrepresentations claims.

INDUSTRY FILINGS AND TRENDS: CATEGORIES

FIGURE 7



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

LACK-OF-SUBSTANTIATION CLAIMS LACK SUBSTANCE

False advertising claims, particularly aimed at dietary supplements, often rest upon allegations that marketing claims are unsubstantiated i.e., not supported by reliable scientific evidence. However, there has been a trend in recent years indicating that courts may not recognize a private right of action for false advertising claims based on a "lack-of-substantiation" theory. Building on well-established circuit-level precedent, *see Kwan v. SanMedica Int'l, LLC*, 854 F.3d 1088 (9th Cir. 2017), "lack-of-substantiation" remained an important defense in 2021.

A significant majority of the filings in 2021 involved false labeling claims. In fact, cases involving false labeling claims accounted for nearly 70% of all filings.

For example, in October of 2021, the Northern District of California dismissed a plaintiff's false advertising claims in a consumer class action affirming that "[i]t is well settled law that private litigants may not bring false advertising claims based on an alleged lack of substantiation." *Yamasaki v. Zicam LLC,* 2021 WL 4951435, at *4 (N.D. Cal. Oct. 25, 2021). In *Yamasaki,* the plaintiff alleged that certain Zicam cold remedy products were falsely advertised as "clinically proven to shorten colds" because the claim is not supported by scientific evidence. *See id.* However, the court found that the plaintiff's amended complaint lacked any factual allegations supporting a reasonable inference that Zicam's "clinically proven" statements were false. *See id.* at *5. The court highlighted the fact that the plaintiff failed to identify any studies in which the defendant's products were evaluated, nor any studies regarding the efficacy of the product's active ingredients. *See id.*

The plaintiff tried to overcome California's bar on lack-of-substantiation claims with two arguments, both of which the court rejected. *See id.* First, the plaintiff argued that reasonable consumers would interpret "clinically proven" to mean there is a scientific consensus about the efficacy of the challenged Zicam products. *See id.* The plaintiff alleged no such consensus existed because Zicam has not published its clinical studies (which are proprietary to Zicam) in a peer-reviewed journal. *See id.* However, the court found that the plaintiff failed to plausibly allege reasonable consumers would construe "clinically proven" to mean "scientific consensus." *See id.* Second, the plaintiff argued that homeopathic products can never be clinically proven. *See id.* The court rejected this argument too, noting that the plaintiff did not actually plead this theory in her amended complaint. *See id.* As a result, the Court found that Plaintiff failed to state a claim for relief and dismissed the amended complaint in its entirety. *See id.*

The prohibition against private plaintiffs bringing consumer protection claims based on lack of substantiation is not limited to California. In *Fitzpatrick, et. al. v. Vital Pharmaceuticals, Inc.*, 2021 WL 6776238 (S.D. Fla. June 7, 2021). he U.S. District Court of the Southern District of Florida recently dismissed, in part, the plaintiffs' false advertising claim that the defendant's energy drink, which is marketed as containing creatine, does not provide any of the metabolic benefits of creatine. The court ruled that the plaintiffs did not set forth any factual support for their allegation that the energy drink's benefits are deceptive, concluding that their claims "rest on a lack of substantiation, instead of a provable falsehood." *Id.* Accordingly, for consumer claims based on state laws in California and elsewhere, private citizen plaintiffs cannot rely upon mere allegations that a defendant's marketing claims are not supported by reliable scientific evidence. Instead, plaintiffs must allege facts that support actual falsehood of the marketing claims.

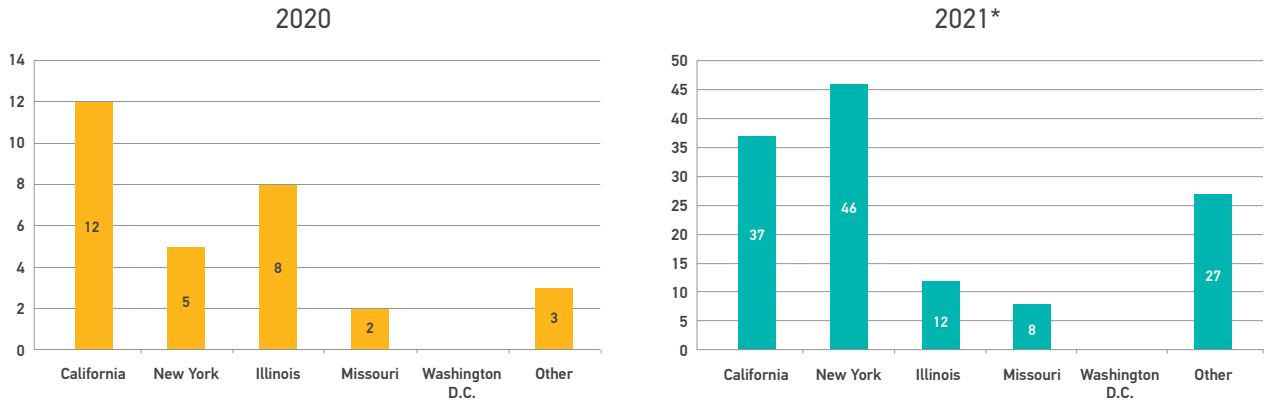
PREEMPTION FOR PRODUCT FORMULATION

The Central District of California granted the defendants' motion for summary judgment against a plaintiff who alleged false labeling claims relating to the defendants' glucosamine sulfate supplements on preemption grounds. See *Hollins v. Walmart Inc.*, 2021 WL 3748315 (C.D. Cal. Aug. 17, 2021). The defendants argued that the FDA had promulgated regulatory standards for labeling of dietary supplements in 21 C.F.R. § 101.36 and specified the exact testing protocol that must be used to determine compliance with the standards set forth in 21 C.F.R. § 101.9(g)(2), which plaintiffs did not comply with. *See id.* at *1. The court ruled that since the plaintiff failed to (1) utilize the requisite AOAC method in its testing, nor (2) an alternative method that the court deemed reliable and appropriate, "[t]his case cannot proceed on the basis of a testing method that has not be validated, subjected to peer review, published, or documented in a standard operating procedure." *Id.* at *5. Accordingly, the plaintiff's claims were preempted and summary judgment was awarded in favor of the defendants. *See id.*

PERSONAL CARE PRODUCTS

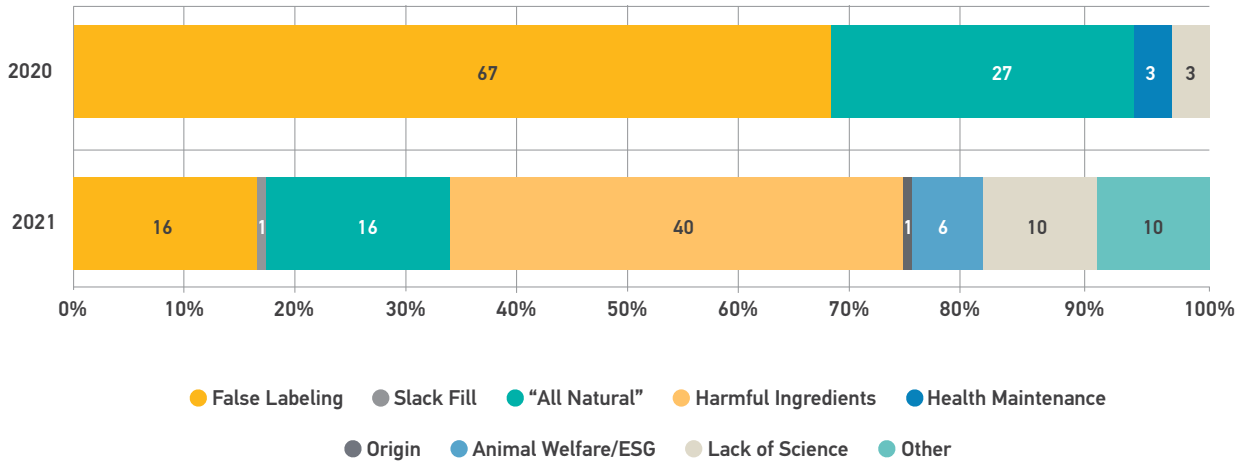
PERSONAL CARE CLASS ACTIONS: FILINGS BY JURISDICTION

FIGURE 8



INDUSTRY FILINGS AND TRENDS: CATEGORIES

FIGURE 9



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

FEDERAL LEGISLATION

Cosmetics sold in the United States are regulated by the FDA under the Federal Food, Drug, and Cosmetic Act (FDCA) of 1938. Indeed, the United States has not passed a major federal law governing the cosmetics industry in over 80 years. However, recently there has been renewed interest in consumer safety and greater awareness regarding chemicals in personal care products. Based on newly-emerging research regarding the presence and potential health effects of a substance known as PFAS (perfluoroalkyl or polyfluoroalkyl substances) in consumer goods, several pieces of legislation were introduced at the federal level to amend the FDCA and address this issue. Cosmetics and personal care products were central to the regulatory efforts in these proposed laws.

- First, on June 17, 2021, Sens. Susan Collins (R-Maine) and Richard Blumenthal (D-Conn.) and Rep. Debbie Dingell (D-Mich.) introduced in the House and Senate the No PFAS in Cosmetics Act, which would ban the intentional use of PFAS chemicals

in cosmetics products. Specifically, the No PFAS in Cosmetics Act would direct the FDA to issue a proposed rule banning the intentional addition of PFAS in cosmetics, as defined by the FDA, within 270 days of enactment, and require a final rule to be issued 90 days thereafter. The bill is pending review.

- Also on June 17, 2021, Sens. Dianne Feinstein (D-Calif.) and Susan Collins (R-Maine) reintroduced the bipartisan Personal Care Products Safety Act, a landmark bill to protect consumer health and strengthen the FDA's efforts to regulate personal care products. The bill was first introduced several years ago but has failed to pass. The Personal Care Products Safety Act would empower the FDA to review product ingredients and provide companies with clear guidance, including the use of certain ingredients in products and whether consumer warnings are necessary. Importantly, the Act also requires the FDA to issue recalls on products likely to cause significant harm if companies refuse to do so voluntarily—an authority the FDA currently lacks. Specifically, the Personal Care Products Safety Act will require companies to register with the FDA, disclose ingredients used, and attest that they have safety records for their products. The Act will also require companies to report serious adverse events, such as infections that require medical treatment, to the FDA within 15 days and an annual summary of all reported adverse health events. The Act also directs the FDA to issue a ban on products that intentionally contain PFAS.
- On June 29, 2021, Rep. Jan Schakowsky (D-Ill.) introduced in the House of Representatives the Safer Beauty Bill Package, which includes four standalone cosmetics bills: (1) Toxic-Free Beauty Act of 2021; (2) Cosmetic Supply Chain Transparency Act of 2021; (3) Cosmetic Safety for Communities of Color and Professional Salon Workers Act of 2021; and (4) Cosmetic Fragrance and Flavor Ingredient Right to Know Act of 2021. Together, the bills would ban 11 allegedly harmful chemicals found in beauty products, increase protections for women of color and salon workers who are most often exposed to these chemicals, and make ingredient transparency a new industry standard. These bills are pending committee review.
- On November 4, 2021, Rep. Sean Patrick Maloney (D-NY) introduced the Natural Cosmetics Act, which would require the FDA to create definitions of "natural" and "naturally-derived" ingredients used in personal care products within two years of the law's enactment. The Act also requires the FDA to consider how each ingredient in a cosmetic is processed, and the presence of any impurity that would have an adverse impact on human health, in the establishment of the definitions and to base such definitions on scientific data, including the consumer understanding. This bill is pending committee review.

STATE LEGISLATION

Increased federal regulatory activity is consistent with similar activity in state legislature. California and New York previously enacted laws concerning regulation of certain substances—including PFAS—in personal care products, and other states followed suit in 2021.

- New York: In 2019, the New York's Legislature enacted amendments to Environmental Conservation Law Article 35 and Article 37 to establish limits on the amount of 1,4 dioxane that can be present in personal care and cosmetics products sold or offered for sale in the State of New York. The law establishes a maximum allowable concentration of 2 ppm of 1,4 dioxane on December 31, 2022, and 1 ppm on December 31, 2023, for personal care products. The law also establishes maximum allowable concentration of 10 ppm of 1,4 dioxane on December 31, 2022, for cosmetics.
- California: As we reported last year, 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.
- Maine: In July 2021, Maine became the first state to enact a law, scheduled to take effect in 2030, that would ban all PFAS from being intentionally added to any product sold there. The Act to Stop Perfluoroalkyl and Polyfluoroalkyl Substances Pollution, enacted July 15, 2021, contains an exception for PFAS-containing products that the state's Department of Environmental Protection determines are "essential for health, safety or the functioning of society and for which alternatives are not reasonably available."
- Maryland: On May 30, 2021, Maryland passed House Bill 643 (HB0643), which takes effect on January 1, 2025. Except under

specified circumstances, HB0643 bans the manufacturing and sale of cosmetic products that contain several chemicals, including PFAS, formaldehyde, and Diethylhexyl phthalate, among others.

- Massachusetts: In Massachusetts, Sen. Jo Comerford and Rep. Jack Lewis filed An Act Restricting Toxic PFAS Chemicals in Consumer Products to Protect Our Health, S.1387 / H.2350. This Act would ban toxic PFAS from personal care products, among other products.
- Washington State: In Washington State, several senators sponsored Senate Bill 5480, an act relating to the use and disclosure of toxic chemicals in cosmetics products. The bill intends to prohibit use of toxic chemicals found in cosmetic and personal care products, requires manufacturers to disclose information on their websites to provide consumers and workers with ingredient information about cosmetic products that encourages informed purchasing decisions and reduces public health impacts from exposure to potentially harmful chemicals, and joins in other jurisdictions in creating a safer global standard for cosmetic products and bringing more sustainable, safer ingredients to the marketplace.

REGULATORY ENFORCEMENT

Cosmetics and personal care products are not FDA-approved, but they are FDA-regulated. While the FDA takes a fairly light approach to federal regulation of cosmetics and personal care products, the agency continued to issue warning letters to companies that made unapproved drug claims in 2021.

Notably, on March 22, 2021, the FDA announced that it issued warning letters to two companies selling products labeled as containing cannabidiol (CBD) in ways that violate the FDCA. The FDA has not approved any over-the-counter (OTC) drugs containing CBD, so the warning letters addressed the illegal marketing of unapproved drugs labeled as containing CBD. The letters explain that, as CBD has known pharmacological effects on humans with demonstrated risks, it cannot be legally marketed as an inactive ingredient in OTC drug products that are not reviewed and approved by the FDA. Additionally, the letters cite substandard manufacturing practices, including failure to comply with current good manufacturing practices.

The FDA also addressed asbestos in cosmetics. Indeed, in October 2021, the FDA announced that it made progress on efforts to understand the presence of asbestos in cosmetic products. In the fall of 2018, the FDA formed the Interagency Working Group on Asbestos in Consumer Products, with members from eight federal agencies to support the development of standardized testing methods for asbestos and other mineral particles of health concern in talc that could potentially affect consumer product safety. In October, the FDA published final results from the agency's year-long sampling assignment to test talc-containing cosmetic products for the presence of asbestos. The Fiscal Year 2020-2021 results showed that all 50 samples were negative for asbestos. The FDA will conduct another talc sampling assignment in 2022, with 50 additional talc-containing cosmetic product samples selected for blind testing and will communicate any results that indicate the presence of asbestos, if found.

Finally, the FDA tracked voluntary recall of products that contained allegedly harmful chemicals, including benzene. In December, the FDA announced that a multinational consumer goods company issued a voluntary product recall of aerosol dry conditioner spray products and aerosol dry shampoo spray products from several lines of products produced in the United States due to the presence of benzene.

LITIGATION

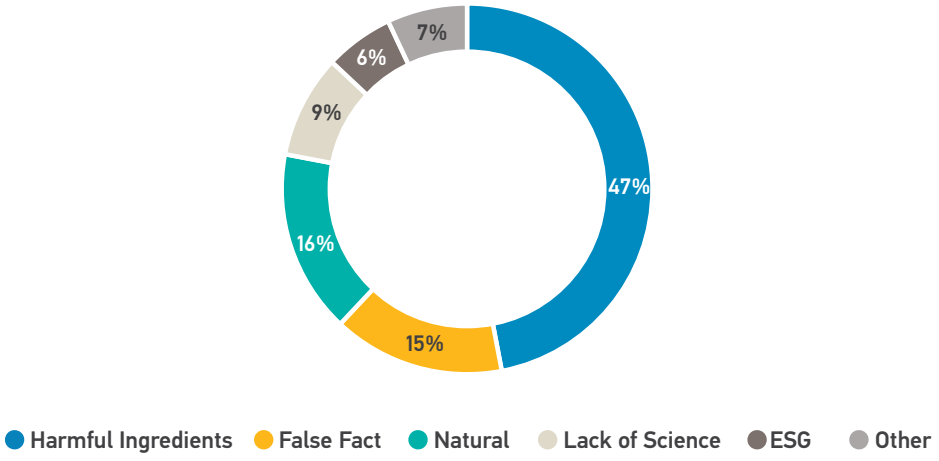
Perkins Coie tracked personal care filings in 2021 and saw some interesting similarities and deviations from food and beverage filings.

About half of filings allege that some kind of harmful ingredient is present in the product. For example, consumers alleged that certain sunscreens and deodorant products are contaminated with the carcinogen benzene, that shampoos contain a preservative known as DMDM hydantoin that causes hair loss, and that "non-toxic" cleaning supplies and beauty products are not in fact non-toxic. This category is not as common as in the food and beverage space, outside of the Proposition 65 context.

But other categories common in the food and beverage space are leaking over into personal care; for example, pure false

PERSONAL CARE CLASS ACTIONS: FILINGS BY TYPE

FIGURE 10



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

advertising cases. The year 2021 saw filings challenging "flushable" wipes that are not in fact flushable, skincare products that are not in fact "oil free," or vitamin E oils that actually contain numerous filler oils. Like in food and beverage, "natural" cases are also prevalent in the personal care space. These suits allege that a product (lotion, deodorant, shampoo, etc.) cannot be labeled as "natural" due to alleged synthetic ingredients. With the industry and consumer push toward more clean beauty products, this filing trend is unsurprising.

Personal care has several emerging filing categories as well. "Lack of science" suits allege that science does not support claims of effectiveness of a particular product. Most suits in this category targeted toothpaste and mouthwash products claiming gum and enamel repair, but some affect hand sanitizer products claiming they "kill 99.9% of germs." Other emerging areas include challenges based on the "pink tax" (meaning consumers are charged more for products marketed to women) and product origin cases, which have been popular in the food and beverage space and are now creeping into the personal care category. For example, one suit against the makers of "South of France" beauty products alleged the products are actually made in Kentucky.

About half of filings allege that some kind of harmful ingredient is present in the product. For example, consumers alleged that certain sunscreens and deodorant products are contaminated with the carcinogen benzene.

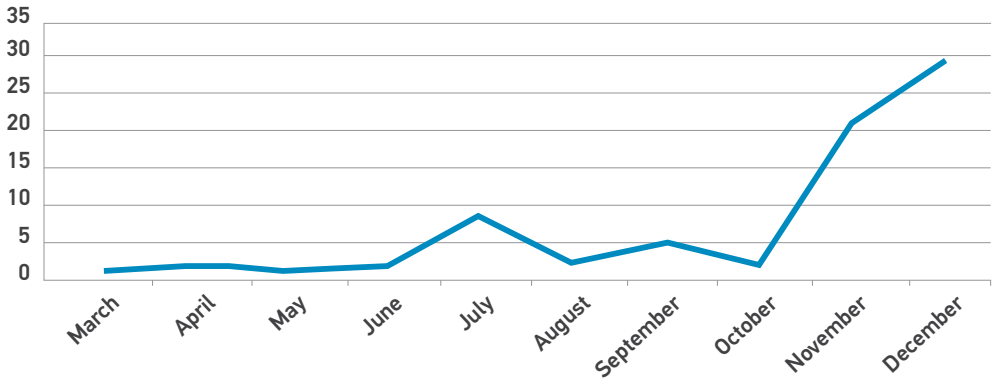
BENZENE

Putative class actions targeting principally sunscreens and antiperspirants allegedly containing trace benzene, which was classified as a carcinogen by the International Agency for Research on Cancer in 2017, hit the scene in 2021. The FDA has set a conditional limit of 2 ppm for benzene in consumer products.

There have been more than 75 benzene related class actions filed in 2021. The wave of litigation began in March and April of 2021 with three complaints against hand sanitizer companies, alleging that their products are not in fact "natural" and that they are adulterated because they contain dangerously high levels of benzene. Then, following a May 24, 2021 citizen petition from Connecticut-based digital pharmacy Valisure to the FDA that included test results of 294 batches of sunscreen and after-sun products, 21 new consumer class actions were filed against sunscreen manufacturers between May and October 2021. With eight actions filed against one manufacturer alone in five districts across the country, on October 8, 2021, the federal Judicial Panel on Multidistrict Litigation ordered all actions filed against Johnson & Johnson to be centralized in the

BENZENE CLASS ACTION FILINGS

FIGURE 11



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

Southern District of Florida. Johnson & Johnson and Coppertone both announced voluntary recalls of several batches of their sunscreen products out of an abundance of caution.

Following up on its May report, Valisure submitted a second citizen petition on November 3, 2021, containing test results of several brands and batches of antiperspirant and deodorant body sprays. In the wake of the second Valisure report, 22 consumer class actions were filed in November and 30 in December against several major manufacturers of antiperspirants, deodorants, and even foot sprays. This led to several voluntary recalls of certain aerosol spray products. Other benzene-related voluntary recalls have followed, including aerosol dry shampoo and dry conditioner sprays.

The FDA issued a statement on December 23, 2021 that it is investigating the "root cause" of benzene contamination, noting "[t]his contamination may be related to inactive ingredients such as carbomers (thickening agents), isobutane (a spray propellant), or other drug components made from hydrocarbons." The FDA reminded manufacturers to avoid using benzene and compounds that may form benzene under certain conditions (such as sodium benzoate), and to test for benzene in their products.

PINK TAX

As mentioned, the pink tax is an emerging area of filings, coming on the heels of a New York law banning different (higher) pricing for "substantially similar" goods or services that are marketed to women, as opposed to men. The law went into effect on September 30, 2020. The New York law does not provide a private right of action, but nevertheless, consumers have been challenging gender-based pricing under states' consumer protection laws. These suits have been largely unsuccessful so far, dismissed at the outset or sent to arbitration. For example, in September 2021, in *Lowe v. Walgreens Boots Alliance, Inc.*, the court dismissed with prejudice a case alleging that a retailer charged consumers more for its women's hair regrowth treatment products than its men's products even though the products are substantively identical in their active ingredient concentrations. 2021 WL 4772293, at *1 (N.D. Cal. Sept. 23, 2021). The court held that the plaintiff's California statutory claims were preempted under federal law, to the extent that they sought label changes, because the products at issue "are generic versions of brand-name drug Rogaine" and as such, they "must exactly mirror the approved text of the Rogaine labels in order to qualify them for approval as a generic drug." *Id.* at *4.

Similarly, the U.S. Court of Appeals for the Eighth Circuit issued a ruling in May 2021, tossing a suit alleging an antiperspirant manufacturer and various retailers discriminate against women by charging them more for antiperspirants than men. *Schulte v. Conopco, Inc.*, 997 F.3d 823 (8th Cir. 2021). The court noted the products are different enough that the products do not trigger Missouri's anti-discrimination laws—the product lines had different packaging, labels, and scents that are targeted toward different preferences. *Id.* at 826. "If [the plaintiff's] primary concern is price, she is free to purchase Men + Care antiperspirant,"

the panel wrote. "Her choice not to illustrates a difference in demand based on product preferences, not the purchaser's gender." *Id.* at 826–27.

Despite this early success with pink tax lawsuits, manufacturers should nevertheless be vigilantly reviewing their products and pricing for potential gender discrimination claims and partner with vendors where appropriate.

NON-TOXIC

Demand for "non-toxic" cleaning and beauty products is growing. Under the Green Guides issued by the U.S. Federal Trade Commission (FTC), marketers who claim that their product is non-toxic need competent and reliable scientific evidence that the product is safe for both people and the environment. Several class action lawsuits have been filed in 2021 against manufacturers of household products, including cleansing products touted as "non-toxic. " The plaintiffs assert that the home cleaning products are false and misleading as marketed because they allegedly contain harmful ingredients.

Such suits have led to at least one class action settlement in 2021. Method (owned by S.C. Johnson & Son, Inc.) entered into a class action settlement for $2.25 million allowing it to label, market and advertise its products using language including "natural," "naturally-derived," "hypoallergenic," and/or "non-toxic." *Connary et al. v. S.C. Johnson & Son Inc.*, No. RG20061675 (Sup. Ct. Cal. - Alameda Cnty.).

Other suits have proceeded to a motion to dismiss stage with mixed success. In *Rivera v. S.C. Johnson & Son, Inc.*, the U.S. District Court for the Southern District of New York dismissed without prejudice a case alleging that the labeling of Windex cleaning products as "non-toxic" is misleading to consumers "because those products contain ingredients that may be harmful to humans, pets, or the environment." 2021 WL 4392300, at *1 (S.D.N.Y. Sept. 24, 2021). The court concluded that, although the "plaintiffs have plausibly alleged that a reasonable consumer might share their understanding of the meaning of 'non-toxic'" based on dictionary definitions of "toxic" and decisions from the Better Business Bureau's National Advertising Division, nevertheless the plaintiffs did not adequately allege "that the product is actually toxic, even according to their own definition." *Id.* at *4–5. Although the plaintiffs alleged that the products contain harmful ingredients such as acetic acid, ammonium hydroxide, and isopropanolamine, the "plaintiffs essentially acknowledge that they do not know the actual concentrations of the ingredients in the Products," even though they could have tested the products or consulted with experts. *Id. Rivera*, however, is but one successful suit in a line of denied dismissals because "toxic" is susceptible to multiple definitions, including "harmful." *See Bush v. Rust-Oleum Corporation*, 2021 WL 24842, at *5 (N.D. Cal. Jan. 4, 2021); *In re: S.C. Johnson & Son, Inc. Windex Non-Toxic Litigation*, 2021 WL 3191733, at *8 (N.D. Cal. July 28, 2021).

CANNABIS

LEGAL TRENDS IN CANNABIS

Recent years have seen a dramatic increase in the cannabis marketplace. More than two-thirds of the states have legalized cannabis for medical use, with 18 states allowing cannabis for recreational use. The market for hemp products, including those with hemp-derived CBD, continues to grow across the country following the passage of the 2018 Farm Bill.

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 120 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 amounts of CBD or THC, the substance responsible for a marijuana "high," in products.

Our survey of federal cannabis class actions filed between 2019 and 2021 thus revealed approximately 130 new case filings.

- Federal cannabis law continues to lag behind that of the state laws, including regarding CBD products. 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. Nevertheless, numerous states, such as California, have now legalized the sale of hemp-derived CBD food and beverage products.
- 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." In March 2020, the agency announced it recognized the "significant public interest in CBD," and that it is 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." In 2020, the FDA also issued reports to Congress regarding CBD product safety and labeling. In January 2021, outgoing FDA Commissioner Stephen Hahn issued a statement that better data was needed before issuing regulations regarding use and safety of CBD products. In October 2021, the FDA released a plan to accelerate research into the safety of cannabis-derived products. Throughout 2021, the FDA has lacked key decision-makers regarding CBD regulation, namely a permanent commissioner, which may have contributed to delays in more robust CBD enforcement policy this year. In November 2021, President Biden announced his intention to nominate Dr. Robert Califf as FDA commissioner. Dr. Califf previously served as FDA commissioner in the Obama administration between February 2016 and January 2017.

LEGISLATION

In 2021, Congress saw three credible proposals for the legalization, or descheduling, of cannabis. First, in May 2021, the House saw the re-introduction of the Marijuana Opportunity Reinvestment and Expungement Act ("MORE Act"). In September 2021, the bill passed through the House Judiciary Committee by a vote of 26—15, with two Republicans crossing party lines. Second, Rep. Nancy Mace (R-S.C.) and four co-sponsors introduced the States Reform Act, a conservative bill to legalize and regulate cannabis in November 2021. Third, Senate Majority Leader Chuck Schumer (D-N.Y.), Senator Cory Booker (D-N.J.), and Senator Ron Wyden (D-Ore.) circulated a discussion draft of the Cannabis Administration and Opportunity Act (CAOA) to deschedule cannabis. In addition to these three descheduling bills, 2021 also saw the reintroduction of the bipartisan cannabis banking act, entitled the SAFE Banking Act.

With regard to CBD, Congress saw several proposals to permit expressly the use of CBD in certain FDA-regulated products. Bipartisan proposals seek to regulate CBD as a dietary supplement, namely S. 1698, the Hemp Access and Consumer Safety Act, and H.R. 841, the Hemp and Hemp-Derived CBD Consumer Protection and Market Stabilization Act of 2021. The draft CAOA also proposes regulating CBD as a dietary supplement. Separately, the bipartisan H.R. 6134, the CBD Product Safety and Standardization Act of 2021, proposes directing the FDA to issue rules regarding hemp-derived CBD in food, specifying

permissible amounts of hemp-derived CBD per serving in food product, conditions of intended use, and labeling and packaging requirements. The SAFE Banking Act's protections include hemp-related legitimate businesses (including those engaged in the production and sale of hemp-derived CBD products) and the service providers of those businesses.

At the state level, cannabis legislation continues to develop. As just a few of the many examples, New York passed a sweeping cannabinoid hemp regulatory program. California passed AB 45, which permitted the sale of CBD in food and beverages in that state. Meanwhile, states continue to wrestle with regulating Delta-8 and other psychoactive cannabinoids.

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 the overall safety of CBD, more generally, especially for certain populations, such as children or pregnant women.

Federal agencies have also particularly focused on what they assert are unsupported health claims on CBD product marketing, especially in light 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 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." In May 2021, the FTC further announced "marketers making health-related representations for CBD products are subject to long-standing consumer protection standards" and "serious health claims require the highest level of scientific substantiation." Also in 2021, the FDA issued six warning letters for products containing CBD.

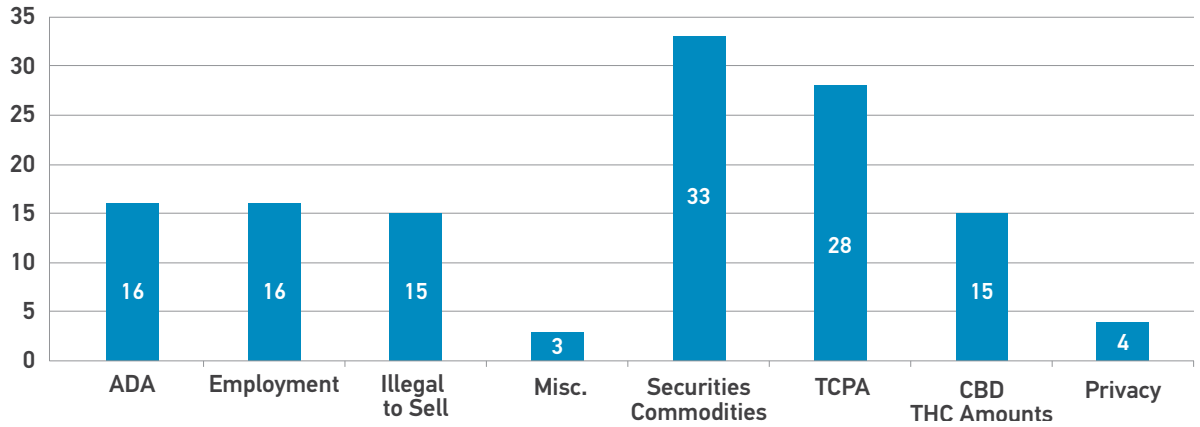
LITIGATION

As the cannabis industry continues to grow, so too do the litigation risks facing the industry. Perkins Coie identified over 100 recent class action cases filed against cannabis companies since 2019. In 2019, our survey identified 55 class action cases filed, and in 2020, we identified 46 filings. In 2021, we identified 29 filings.

CANNABIS CLASS ACTIONS: FILINGS BY CATEGORY

FIGURE 12

2019-2022



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

Our survey of federal cannabis class actions filed between 2019 and 2021 thus revealed approximately 130 new case filings. The largest portion (approximately 25%) 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. About 21% of cannabis cases involved the Telephone Communications Protections Act (TCPA), alleging that consumers received unsolicited, autodialed communications from cannabis companies.

For cannabis product manufacturers, the most significant cases are the approximately 23% of claims alleging: (i) that the labeled amount of THC or CBD was inaccurate or (ii) that the 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' 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 often staying these cases on primary jurisdiction grounds. See *Snyder v. Green Roads of Florida LLC*, 430 F. Supp. 3d 1297 (S.D. Fla. 2020); *Colette v. CV Scis., Inc.*, No. 219CV10227VAPJEMX, 2020 WL 2739861 (C.D. Cal. May 22, 2020); *Glass v. Global Widget, LLC*, No. 219CV01906MCEKJN, 2020 WL 3174688 (E.D. Cal. June 15, 2020).

Other cases in the survey, the remaining cases, 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. The year 2021 also saw four additional privacy cases wherein putative classes brought suit regarding the deletion of court records for marijuana arrest records for minors.

PROPOSITION 65

PROPOSITION 65 TRENDS

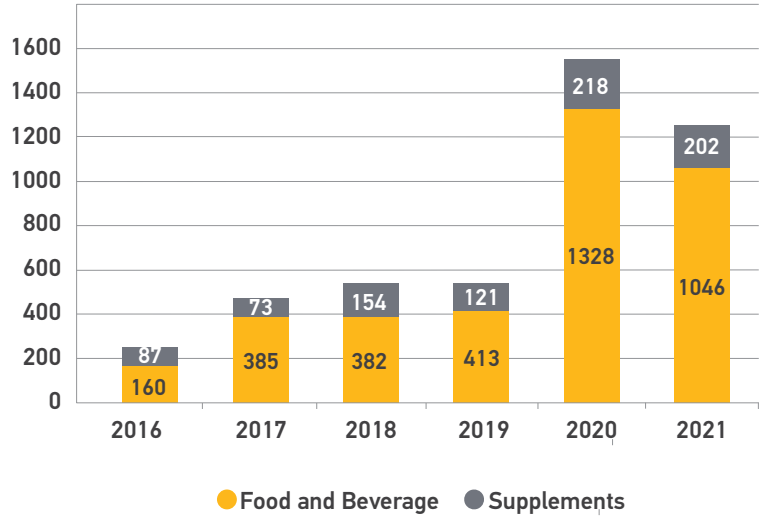
Proposition 65 was a California initiative approved by voters in 1986 and enacted into law as the Safe Drinking Water and Toxic Enforcement Act. Proposition 65 prohibits retailers and manufacturers from knowingly and intentionally exposing California consumers to a chemical known to the State of California to cause cancer, birth defects, or reproductive harm without first providing a "clear and reasonable warning." It is administered and regulated by the Office of Environmental Health Hazard Assessment, commonly referred to as OEHHA. Every CPG company that does business in California should be aware of, and comply with, Proposition 65. Virtually all Proposition 65 claims and enforcement actions are brought by private plaintiffs. In 2021, private Proposition 65 plaintiffs issued over 3,100 notices of violation.

FOOD, BEVERAGE, AND DIETARY SUPPLEMENTS

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

PRE-SUIT NOTICES OF VIOLATION

FIGURE 13



Data compiled by Perkins Coie based on a review of Proposition 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 2021.

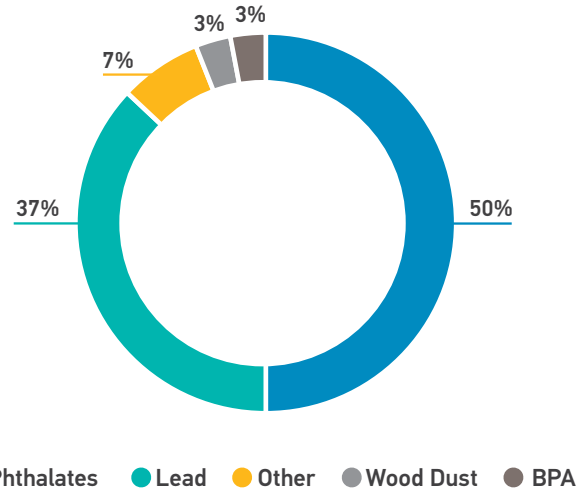
As in prior years, the pre-litigation notices primarily target foods containing acrylamide and heavy metals like lead, cadmium, and arsenic. Since the California Chamber of Commerce filed a lawsuit in challenging the requirement to provide Proposition 65 warnings for dietary acrylamide (discussed in further detail in the Proposition 65 Year In Review), the number of acrylamide notices has dramatically decreased. In 2020, acrylamide accounted for nearly 40% of all Proposition 65 notices relating to foods; in 2021, that number dropped to 22%. Now, heavy metals alone account for over 75% of all pre-litigation notices issued to food, beverage, and supplement companies. The key product categories targeted by these notices remain the same as in previous years: for acrylamide—baked and fried snack foods such as chips, crackers, and cookies; for heavy metals—seafood products, spices, and protein supplements.

GENERAL CONSUMER PACKAGED GOODS

General consumer packaged goods 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 14



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

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

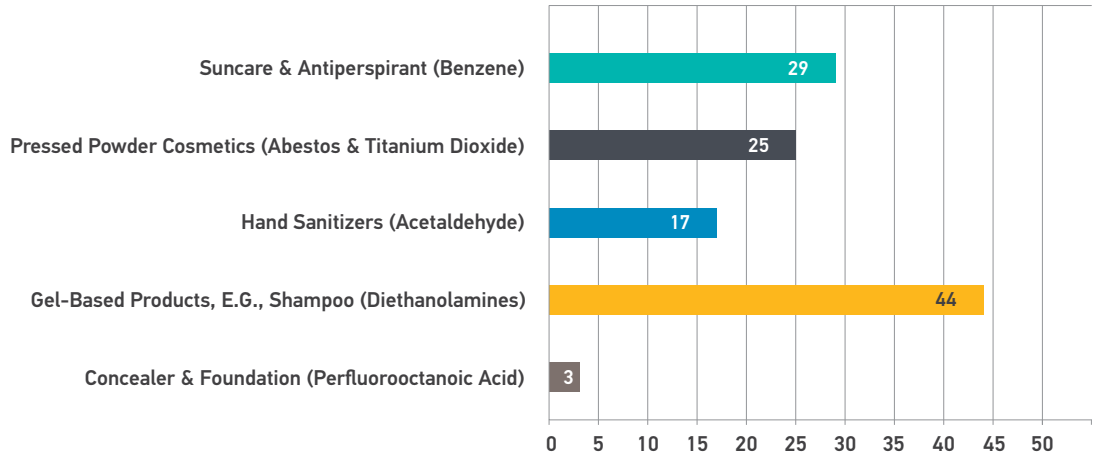
New trends we have observed include notices of violation issued for hexavalent chromium compounds in leather gloves and footwear, n-nitrosodiethylamine in latex-based products such as workout bands, and BPA in nylon apparel.

PERSONAL CARE PRODUCTS

In 2021, private plaintiffs increased their scrutiny of personal care products, issuing approximately 118 notices of violation targeting items such as sunscreen, hand sanitizers, soaps, shampoos, and cosmetics. Key products and chemicals targeted included:

PERSONAL CARE NOTICES

FIGURE 15



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

As the "clean beauty" trend continues to gain popularity, we expect to see an increased focus on personal care items.

PROPOSITION 65 REGULATORY UPDATES

PROPOSED AMENDMENTS TO SHORT-FORM WARNING LANGUAGE

As Perkins Coie previously reported, on January 8, 2021, OEHHA announced proposed regulations that would significantly restrict how businesses may use short-form Proposition 65 warnings. After receiving over 200 public comments, the majority of which urged OEHHA not to adopt the regulations, OEHHA released a modified proposal on December 13, 2021. The modified proposal still imposes dramatic restrictions on the use of short-form warnings, including:

- Expanding the text of the short-form warning 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.

- Limiting the use of short-form warnings to products with 12 square inches or less of label space.

The modified proposal would also permit warnings to use additional "signal words" such as "CA WARNING" or "CALIFORNIA WARNING."

INCREASED REGULATION OF PFAS CHEMICALS

PFAS are a group of over 4,000 man-made chemicals that have been used in industry and consumer products since the 1940s. Touted for their durability, these substances are primarily chains of carbon-fluorine bonds, which is one of the strongest chemical bonds known. These strong bonds lead to incredibly stable chemicals—so stable, in fact, that they're often called "forever chemicals." They have wide-ranging applications, such as in moisture-resistant food packaging, textiles that resist stains, and pipes and wires that resist corrosion, and are used in numerous consumer products (carpets and upholstery, paints, adhesives, cosmetics, ski waxes, outdoor gear, etc.).

In the past decade, the EPA has ramped up its focus on regulation of PFAS chemicals. OEHHA is following suit. OEHHA listed perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) as reproductive toxicants in November 2017. On December 24, 2021, OEHHA also listed PFOS, including its salts and transformation and degradation *precursors*, as carcinogens. Shortly thereafter, on December 31, 2021, OEHHA also listed perfluorononanoic acid (PFNA) and its salts as reproductive toxicants.

In March 2021, OEHHA announced its intention to list PFOA as a carcinogen. The public comment period has been closed since May 3, 2021, but OEHHA has not yet taken any final action. In addition, on October 1 2021, OEHHA announced its intention to list perfluorodecanoic acid (PFDA) as a reproductive toxicant. The Proposition 65 Developmental and Reproductive Toxicant Identification Committee (DARTIC) held a meeting on December 14, 2021 to evaluate the evidence but ultimately declined to list PFDA.

Companies selling products that contain PFAS should closely monitor OEHHA's listings given the increased regulatory activity.

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. We are able to leverage that experience to counsel clients to mitigate risk before lawsuits arise, and to 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 PerkinsCoieFood&CPGLitigationUpdate@perkinscoie.com. And our accompanying Food Litigation Blog provides real-time information on significant arguments and emerging trends in food and beverage litigation.

Contact Us

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

FOOD LITIGATION CO-CHAIRS

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

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

CONTRIBUTORS

BARAK COHEN | PARTNER
+1.202.654.6337
BCohen@perkinscoie.com

JULIE HUSSEY | PARTNER
+1.858.720.5750
JHussey@perkinscoie.com

REGINA L. LAMONICA | PARTNER
+1.312.324.8586
RLaMonica@perkinscoie.com

STEVEN HWANG | SENIOR COUNSEL
+1.310.788.3217
SKHwang@perkinscoie.com

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

LAUREN STANIAR | COUNSEL
+1.206.359.3316
LStaniar@perkinscoie.com

JASMINE WETHERELL | COUNSEL
+1.310.788.3294
JWetherell@perkinscoie.com

CARRIE AKINAKA | ASSOCIATE
+1.310.788.3394
CAkinaka@perkinscoie.com

THOMAS TOBIN | ASSOCIATE
+1.206.359.3157
TTobin@perkinscoie.com

PerkinsCoie.com/Food_Litigation