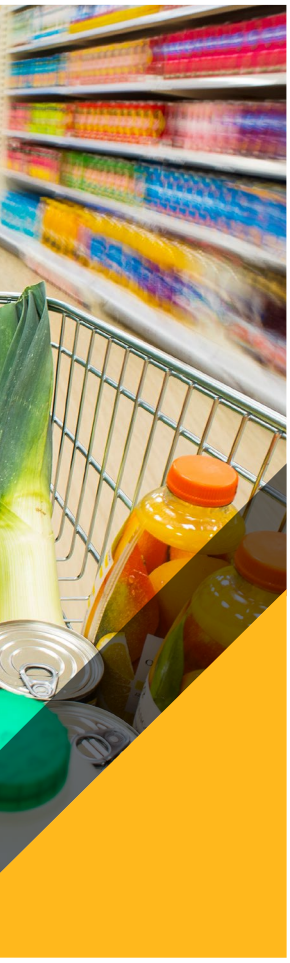
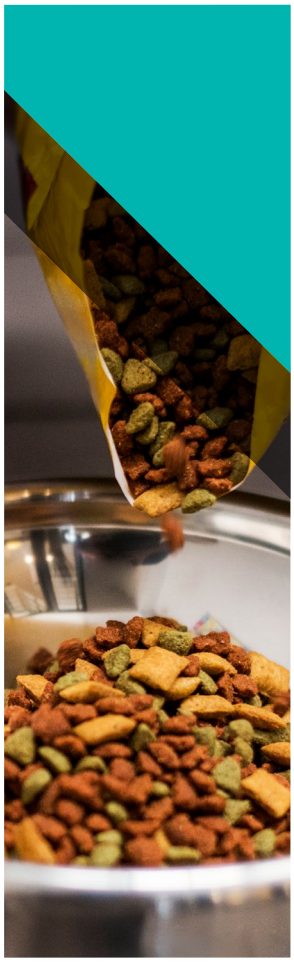
Food & Consumer Packaged Goods Litigation
2022 YEAR IN REVIEW


PERKINSCOIE

TABLE OF CONTENTS

INTRODUCTION

PERKINS COIE IS PLEASED TO PUBLISH ITS SEVENTH ANNUAL FOOD & CONSUMER PACKAGED GOODS (CPG) LITIGATION YEAR IN REVIEW. In 2022, the CPG industry continued to face a meaningful threat of class-action activity, with continued filings against companies in the food, beverage, and personal care space. As in past years, plaintiffs' lawyers are still mining regulatory handbooks, product shelves—and in 2022 in particular—laboratories in search of new theories with which to attack the industry.

One trend of note in 2022 is an uptick in cases challenging supposed "contaminants" in food—substances often only present in the billionths as a result of either the agricultural or manufacturing process—but that plaintiffs contend make the food less valuable. These are not "safety" cases per se, as the theory of harm is consistently economic. But in 2023 we expect to see more of these cases challenging the presence of substances like heavy metals, phthalates, and polyfluoroalkyl substances (PFAS). In 2022 we likewise saw continued focus on litigation related to Environmental, Social & Governance (ESG) claims, i.e., lawsuits that challenge a company's sustainability or environmental practices. As consumer interest and corporate practices coalesce around these issues, we predict consistent future activity by the plaintiffs' bar as well.

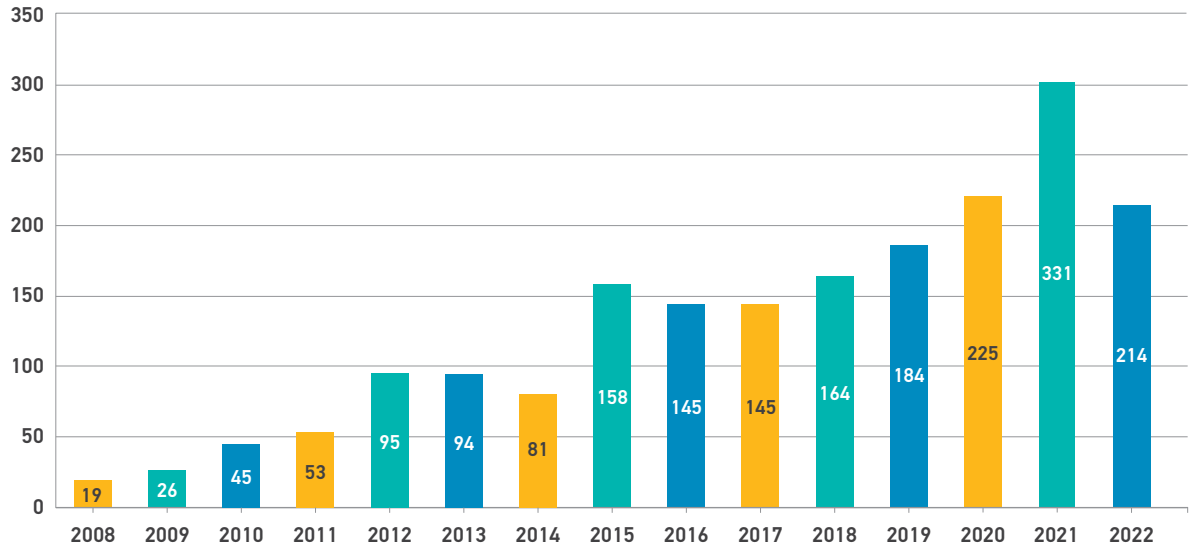
On the other side of the ledger, 2022 also saw continued favorable developments under the "reasonable consumer" standard, a defense used frequently in CPG litigation. There is an increasingly well-developed body of law that deepened in 2022, which sensibly holds that a "reasonable consumer" can read a product label to figure out what ingredients are in their foods, and whether or not there is more or less of that ingredient compared to others.

Beyond this yearly overview, we also monitor filings on a daily basis and provide real-time information to clients and key contacts via our Food and Consumer Packaged Goods Litigation Update. To receive this daily email report about cases filed, Proposition 65 notices, and industry decisions, please email PerkinsCoieFood&CPGLitigationUpdate@perkinscoie.com to inquire about this.

LEGAL TRENDS IN FOOD AND BEVERAGE

FOOD AND BEVERAGE CLASS ACTIONS

FIGURE 1



FOOD AND BEVERAGE CLASS ACTIONS: FILINGS BY JURISDICTION

FIGURE 2

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

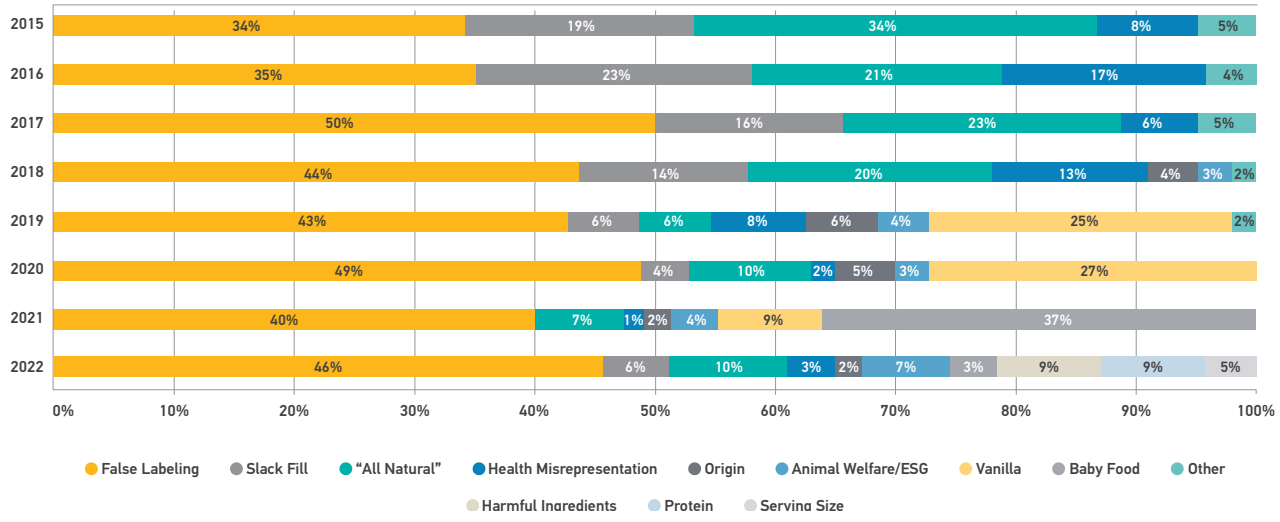
REASONABLE CONSUMER DEFENSE

Federal cases in 2022 continued to demonstrate the prominence of the reasonable consumer defense in CPG litigation.

At the appellate level, the U.S. Court of Appeals for the Eighth Circuit found that pet food representations such as "biologically appropriate," "made from fresh ingredients," and "never outsourced" would not be misleading to a reasonable consumer. *Song v. Champion Petfoods USA, Inc.*, 27 F.4th 1339 (8th Cir. 2022). The U.S. Court of Appeals for the Tenth Circuit held similarly in a case dismissing representations such as "Trusted Everywhere" and "Fresh and Regional" as non actionable. *Renfro v. Champion Petfoods USA, Inc.*, 25 F.4th 1293 (10th Cir. 2022). Outside of the CPG context, the U.S. Court of Appeals for the Ninth Circuit applied the reasonable consumer defense to hold that a consumer was not actually misled by any challenged advertising but instead the consumer's "own unreasonable assumptions," writing that "California's consumer protection laws

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*

do not require [defendant] to anticipate and affirmatively dispel these shoppers' idiosyncratic assumptions or wholly incorrect interpretations of its advertising." *Thomas v. Costco Wholesale Corp.*, No. 21-55335, 2022 WL 636637, at *2 (9th Cir. Mar. 4, 2022).

At the district court level, results demonstrate the continued salience of the reasonable consumer to the overall outcome of the case.

Courts have dismissed multiple strings of cases alleging that an advertised ingredient was not the "predominant" ingredient. In *Cox v. Star Brands*, the court dismissed allegations that the marketing of "White Fudge" covered pretzels was misleading to consumers because the "fudge" used did not contain what plaintiff considered sufficient milkfat. No. 3:22-CV-141-NJR, 2022 BL 400849, at *2 (S.D. Ill. Nov. 8, 2022). The court held that such allegations were not misleading to a reasonable consumer and joined a line of recent opinions finding similarly. *Spurck v. Demet's Candy Co., LLC*, No. 21 CV 05506 (NSR), 2022 WL 2971957 , at *3 (S.D.N.Y. July 27, 2022) ("A reasonable consumer would not infer that the Product was made with a specific fudge recipe or ingredient without additional representations on the packaging."); *Reinitz v. Kellogg Sales Co.,* 2022 WL 1813891 (C.D. Ill. June 2, 2022) (finding similarly regarding "Fudge" Pop-Tarts); *Lederman v. Hershey Co.*, No. 21-CV-4528, 2022 WL 3573034, at *4 (N.D. Ill. Aug. 19, 2022) ("[E]ven if the reasonable confectionery expert deems milkfat essential to fudge, Plaintiff has not shown that the reasonable 21st century consumer has the same expectations.") (emphasis in original); *Burns v. Gen. Mills Sales, Inc.*, No. 3:21-CV-1099-DWD, 2022 WL 3908783, at *5 (S.D. Ill. Aug. 30, 2022) ("Absent [] additional representations, no reasonable consumer would conclude fudge brownie mix necessarily contains milk and butter.").

Similarly, courts have dismissed challenges to "Strawberry" Pop-Tarts as not containing sufficient amounts of strawberries. *Harris v. Kellogg Sales Co.*, No. 21-CV-01040-SPM, 2022 BL 179752, at *3 (S.D. Ill. May 24, 2022) (finding that plaintiff's interpretation of the product's label was "unreasonable and not grounded in the reality of how the public understands and reacts to product advertising"); *Brown v. Kellogg Sales Co.*, No. 1:20-CV-7283-ALC, 2022 WL 992627, at *4 (S.D.N.Y. Mar. 31, 2022) ("No reasonable consumer would see the entire product label, reading the words 'Frosted Strawberry Pop-Tarts' next to a picture of a toaster pastry coated in frosting, and reasonably expect that fresh strawberries would be the sole ingredient in the Product"); *Chiappetta v. Kellogg Sales Co.*, No. 21-CV-3545, 2022 WL 602505, at *4 (N.D. Ill. Mar. 1, 2022) (finding similarly); *Russett v. Kellogg Sales Co.*, No. 7:21-CV-08572 (NSR), 2022 WL 2789837, at *4 (S.D.N.Y. July 15, 2022) (same).

In another case, the Southern District of New York distinguished claims that a product labeled "Lemon & Lemon Zest" did not actually contain lemon ingredients. *Angeles v. Nestle USA, Inc.*, No. 21-CV-7255 (RA), 2022 WL 4626916, at *4 (S.D.N.Y.

Sept. 30, 2022). The court held that the product merely represents that it tasted like lemons, not that it was "made with lemons" or "made with lemon zest," which might prompt a reasonable consumer to expect the product may include those ingredients. *Id.* In the U.S. District Court for the Northern District of Illinois, the court held that a vegetable oil product advertised as "with olive oil" did not mean the product label conveyed a misleading impression as to the level of olive oil in the product. *Ledezma v. Upfield US Inc.*, No. 22 C 1618, 2022 BL 388818, at *5 (N.D. Ill. Oct. 31, 2022).

Elsewhere, the reasonable consumer defense was central to dismissal of challenges to the levels of butter in "Golden Butter" crackers when the crackers actually contained butter. *Floyd v. Pepperidge Farm, Inc.*, Case No. 21-cv-525-SPM, 2022 WL 203071 (S.D. Ill. Jan. 24, 2022). And, courts relied on the reasonable consumer defense to dismiss allegations that the marketing of ice cream bars with chocolate coating was misleading when the products also contained oil. See, *e.g.*, *Beers v. Mars Wrigley Confectionary US, LLC*, No. 21 Civ. 2 (CS), 2022 WL 493555 (S.D.N.Y. Feb. 17, 2022); *Mitchell v. Whole Foods Market Group, Inc.*, No. 20 Civ. 8496 (ER), 2022 WL 657044 (S.D.N.Y. Mar. 4, 2022); *Yu v. Dreyer's Grand Ice Cream, Inc.*, 592 F. Supp. 3d 146 (S.D.N.Y. 2022); *Cerretti v. Whole Foods Mkt. Grp., Inc.*, 2022 WL 1062793, *2-3 (N.D. Ill. Apr. 8, 2022) (holding that an ice cream bar label depicting chocolate and the phrase "Dipped in Organic Chocolate" does not reasonably convey that the bars contain a particular amount of chocolate).

Amid numerous dismissals, district courts have also allowed cases to proceed where the allegations are deemed to be misleading to a reasonable consumer. See, *e.g. Wargo v. Hillshire Brands Co.*, 599 F. Supp. 3d 164 (S.D.N.Y. 2022) ("Made With Whole Grain" claim); *Sanders v. The Hillshire Brands Co.*, No. 21-cv-1155-SMY, 2022 BL 238075 (S.D. Ill. July 8, 2022) (same); *Johnston v. Kashi Sales, LLC*, No. 21-CV-00441-NJR, 2022 WL 4103973 (S.D. Ill. Sept. 8, 2022) (allowing claim regarding inclusion of "ripe strawberry" in breakfast bars); *Harris v. Kashi Sales, LLC*, 2022 WL 2390933 (N.D. Ill. July 1, 2022) (denying defendant's motion to dismiss regarding breakfast bars where "mixed berry" could be considered a flavor or ingredient).

Courts have reminded litigants that factual allegations must push the complaint across the line from possible to plausible. *Bynum v. Fam. Dollar Stores, Inc.*, 592 F. Supp. 3d 304, 313 (S.D.N.Y. 2022) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009)). Courts have reached different conclusions, based on the factual allegations put forward, as to the plausibility of claims under the reasonable consumer standard. Compare *Bynum*, 592 F. Supp. 3d at 313 (dismissing allegations that the labeling of "smoked" nuts was misleading to a reasonable consumer) with *Rudy v. Fam. Dollar Stores, Inc.*, 2022 WL 345081, at *4 (N.D. Ill. Feb. 4, 2022) (allowing similar claims to proceed, albeit on trimmed basis). See also *Kinman v. Kroger Co.*, 2022 WL 1720589 (N.D. Ill. May 27, 2022) (allowing claims regarding "smoked" gouda to proceed).

NATURAL EXPANDING

Natural Claims Continue Despite Setback in 2022

"Natural" claims continue to be a target for the plaintiffs' bar, with more than 20 filings in 2022. The plaintiffs' bar focused on beverages in particular, challenging natural claims on flavored waters, sodas, and teas. In these cases, plaintiffs asserted claims alleging that the use of flavor enhancers, food coloring and preservatives, including malic acid, ascorbic acid, and citric acid, rendered natural claims false and misleading.

In addition to beverages, plaintiffs also challenged food products, such as potato chips, popcorn, and gum, which allegedly contained maltodextrin, citric acid, and mixed tocopherols, a class of chemical compounds that is often derived from crops grown with genetically modified organisms (GMOs). Plaintiffs additionally targeted microcontaminants in snacks, including filing two lawsuits alleging that natural claims made in connection with microwave popcorn products are deceptive and misleading because the popcorn or its containers allegedly contain per- and polyfluoroalkyl substances (PFAS).

In 2022, almost a third of the cases were filed in California, including in the Northern and Southern District Courts and in Los Angeles County Superior Court. Whereas in 2021, almost half of these cases were filed in St. Louis City Superior Court in Missouri, in 2022 St. Louis City Superior Court saw only three "natural" lawsuits. The plaintiffs' bar didn't shy away from federal court—only four of the natural cases were filed in state court in 2022. Notably, in 2022, the plaintiffs' bar took a hit

to "natural" food and beverage labeling litigation. On September 9, 2022, Judge Buchwald of the U.S. District Court for the Southern District of New York ruled in favor of KIND LLC in a years-long battle regarding KIND's "All Natural/Non GMO" labeling on certain snacks. In multidistrict litigation matter *In re Kind LLC "Healthy and All Natural Litigation,"* No. 15-MD-2645, the court found that the plaintiffs failed to articulate a definition of "All Natural" that is held by reasonable consumers. In its ruling, the court noted that the "FDA has still not promulgated a regulation regarding the use of 'All Natural' on product labels," and indeed, "the FDA's solicitation of comments regarding a potential regulation of the term 'All Natural' demonstrates that the phrase is subject to numerous and distinct definitions, without a single objective meaning to consumers." This complete victory provides a roadmap for defendants facing similar claims—in cases with multiple plaintiffs, defendants should seek to establish that there is no commonly perceived definition of "natural" in connection with food and beverage products.

Despite this blow, the plaintiffs' bar continued to file additional "natural" lawsuits through the end of the year. We expect to continue to see "natural" claims filed in 2023 while consumers await FDA regulation regarding the use of "natural" claims on food and beverage labels.

FLAVORING AND INGREDIENT CLAIMS

The tide of vanilla litigation (finally) began to ebb in 2021, and all but disappeared in 2022. 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 federal courts grew increasingly impatient toward vanilla litigation, and 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. See, *e.g.*, *Wach v. Prairie Farms Dairy, Inc.*, No. 21 C 2191, 2022 WL 1591715, at *3 (N.D. Ill. May 19, 2022) (dismissing claims under "reasonable consumer" standard because implausible that consumer would expect "Premium Vanilla Ice Cream" to contain only real vanilla flavoring, or a non-negligible amount of real vanilla flavoring); *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, mint in chewing gum, honey in cough drops, 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.*

There were, however, some cases tied to flavoring or similar characteristics that survived Rule 12 and "reasonable consumer" review in 2021. In *Rudy v. Fam. Dollar Stores, Inc.*, for example, the court distinguished from the vanilla cases and held that a reasonable consumer could be misled by a product named "smoked almonds" because the name was plausibly ambiguous on its face in that it could reasonably refer to the smoking process. 2022 WL 345081 (N.D. Ill. Feb. 4, 2022). What's more, the court noted that, unlike competitor products, the product's front label did not modify "smoked" with the word "flavored." In *Elder v. Bimbo Bakeries USA, Inc.*, in denying a motion to dismiss, the court held that "All Butter Loaf Cake" could plausibly suggest that *all* shortening and flavoring came from real butter. 2022 WL 816631, at *2 (S.D. Ill. Mar. 17, 2022).

A close cousin of these flavoring claims are so-called "predominant ingredient" claims. These cases generally allege that a product name or flavor statement misleads consumers into believing that the product contained a predominant amount of, or only that ingredient. In *Jackson v. Kraft Heinz Food Co.*, for example, the plaintiff purchased pizza snacks containing cheddar, Monterey Jack, and mozzarella cheese. Plaintiff alleged that the "mozzarella cheese" claim on the package was misleading because the mozzarella had been mixed with other cheese, in addition to starch, whey, and nonfat milk. The court rejected plaintiff's interpretation as unreasonable, noting that nowhere did the packaging claim to provide a product made *only* with mozzarella cheese. 2022 WL 4591749 at * 1, 3. See also:

- *Hauger v. Dollar General Corporation*, No. 1:21-cv-01270, 2022 WL 2532487, at *5 (N.D. Ill. 2022) (Shadid, J.) ("Honey Graham Cracker" labeling on the graham crackers would not lead a reasonable consumer to believe that the graham crackers predominantly contained graham flour and honey);
- *Floyd v. Pepperidge Farm, Inc.*, No. 21-CV-525-SPM, 2022 WL 203071, at *1 (S.D. Ill. Jan. 24, 2022) (McGlynn, S.) (dismissing claims under "reasonable consumer" standard because implausible that consumer would expect "Golden Butter Crackers" to contain only butter, even where crackers contained a "non-de minimis" amount of butter substitutes);
- *Cerretti v. Whole Foods Mkt. Grp., Inc.*, No. 21 CV 5516, 2022 WL 1062793, at *3 (N.D. Ill. Apr. 8, 2022) (Shah, M.) (dismissing claims under "reasonable consumer" standard where ice cream bar did indeed contain chocolate, even though chocolate contained vegetable oils);
- *Chiappetta v. Kellogg Sales Co.*, Case No. 21-cv-03545, 2022 WL 602505 (N.D. Ill. Mar. 1, 2022) (Aspen, M.) (dismissing claims under "reasonable consumer" standard because implausible that consumer would interpret the word "Strawberry," combined with a picture of half of a strawberry and a Pop-Tart oozing red filling, to mean that the Product's filling consists of "only strawberries and/or more strawberries than it does" have.)

HEAVY METALS

In 2022, the baby food industry was still feeling the effects of the February 2021 congressional report finding "significant levels" of four heavy metals—arsenic, lead, cadmium, and mercury—in a variety of baby foods. Many of the lawsuits filed in the flurry of litigation that immediately followed that report are still pending. However, several of these cases were tossed out in 2022 on standing grounds. See *In Re: Gerber Products Company Heavy Metals Baby Food Litigation*, 1:21-cv-269 (E.D. Va. Oct. 17, 2022) (dismissed on standing and primary jurisdiction grounds); *Kimca v. Sprout Foods, Inc.*, 2:21-cv-12977 (D.N.J. Apr. 25, 2022) (dismissed on standing grounds); *In re Plum Baby Food Litigation*, 1:21-cv-02417 (D.N.J Oct. 31, 2022) (dismissed on standing grounds finding no economic injury). For the remaining cases, it is still unclear whether any of these false advertising lawsuits will be successful. Plaintiffs in these cases face many uncertainties.

Separate and apart from the baby food cases, heavy metals and other alleged contaminants remained a hot issue for plaintiffs' counsel in 2022. For example, consumers filed two lawsuits against Mars, Inc. in 2022, alleging that their Skittles candy contained titanium dioxide, which allegedly made the candy unfit for human consumption. See *Thames v. Mars, Inc.*, 3:22-cv-04145 (N.D. Cal. filed July 14, 2022); *Mignin v. Mars, Inc.*, 1:22-cv-04243 (N.D. Ill. filed Aug. 11, 2022). Both cases were voluntarily dismissed following the defendant filing motions to dismiss. Similar cases were filed against other manufacturers for other products, such as tampons and pain relievers, over the use of titanium dioxide. See, *e.g., Morrison v. Johnson &*

Johnson Consumer Inc., 3:22-cv-01276 (S.D. Cal. filed Aug. 29, 2022); *Paulson v. This is L. Inc.*, 1:22-cv-04665 (N.D. Ill. filed Aug. 31, 2022).

PROTEIN

In 2022, plaintiffs continued to bring lawsuits alleging that food companies overstated the amount of protein in their products by using a total protein figure (the nitrogen method) for a front-of-pack protein content claim rather than a protein figure adjusted for digestibility. See, *e.g., Pino v. Birch Benders, LLC*, 22 cv 02194 (N.D. Cal. filed April 7, 2022).

Particularly, there was a steep rise in claims related to proteins filed against meat alternative companies. In essence, these cases claim, citing 21 C.F.R. § 101.9(c)(7), that defendant miscalculates and overstates the products' protein content, miscalculates and overstates the quality of the protein found in its products, and/or the products mislead consumers into believing that the products provide equivalent nutritional benefits to that found in traditional meat-based products. See, *e.g.*, *Yoon v. Beyond Meat, Inc.*, 5:22-cv-1032 (C.D. Cal. filed June 24, 2022); *Garcia v. Beyond Meat, Inc.*, 4:22-cv-00297 (S.D. Iowa filed Sept. 9, 2022); *Miller v. Beyond Meat, Inc.*, 1:22-cv-06336 (S.D.N.Y. filed July 26, 2022).

As discussed last year, the plaintiffs' theory in these protein cases is primarily based on the protein labeling regulation, 21 C.F.R. § 101.9(c)(7). That section of the C.F.R. 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 Protein Digestibility Corrected Amino Acid Scoring (PDCAAS), is optional unless "a protein claim is made for the product." When required, this statement of the "corrected amount of protein per serving" shall be expressed in the nutrition facts panel as a percent daily value (%DV). In other words, where the products display a front-of-pack protein claim (e.g., "10 g protein"), they must include a %DV for protein in the nutrition facts panel, and that %DV must be calculated using a PDCAAS test. The regulation does not speak to how companies should calculate protein content for purposes of a front-of-pack protein content claim. The plaintiffs have nevertheless 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).

However, on January 11, 2022, in a public statement posted on its website, the FDA clarified that "Determination of compliance for protein nutrient content claims will be based on the use of the methods provided in 21 C.F.R. 101.9(c)(7)," i.e., either the nitrogen method or the PDCAAS method. The FDA has clearly stated that the protein figure is not required to be adjusted for digestibility, directly at odds with plaintiffs' theory.

Not surprisingly, recent protein decisions reveal a defendant-friendly trend on this issue. First, in February 2022, in *Nacarino v. Kashi*, 3:21-cv-07036 (N.D. Cal. Feb. 09, 2022), the court dismissed the case affirmatively holding that it is not false or misleading to state the amount of protein on the front of the package using the nitrogen content method explaining that the FDA has expressly authorized defendant's protein statement. This decision started a wave of other dismissals. See, *e.g.*, *Brown v. Kellogg*, 21 cv 07388 (N.D. Cal. Apr. 1, 2022); *Brown v. Van's International Food, Inc.*.3:22-cv-00001 (N.D. Cal May 10, 2022); *Chong v. KIND LLC*, 21-cv04528-RS (N.D. Cal. Feb. 15, 2022).

SERVING SIZE

False labeling litigation—including alleged misstatements of the number of servings per container—continued to be active in 2022.

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 *Womick v. The Kroger Co.*, for example, plaintiff alleged that front-of-pack claims that statements about coffee canisters containing enough grounds to make a certain number of cups of coffee are misleading because, when following the brewing instructions on the back panel, the canister actually produces much less than promised. No. 3:21-cv-00574 (S.D. Ill. Jun. 11, 2021). While the court trimmed plaintiff's claim for injunctive relief on standing grounds, plaintiff was permitted to proceed with his consumer deception claims, noting that plaintiff had adequately

alleged that he would not have purchased the canisters but for the misrepresentation, and had alleged that other brands either do not contain representations identifying the number of cups that can be made from their canisters or display the number of cups that can be made from the contents without overstating the number. 2022 WL 673095 (S.D. Ill. Mar. 7, 2022). Nine similar putative class actions have been consolidated before the U.S. District Court for the Western District of Missouri. 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 March 2022, the Missouri District Court denied the defendants' motion to dismiss plaintiffs' second amended consolidated complaint and the parties have proceeded to discovery.

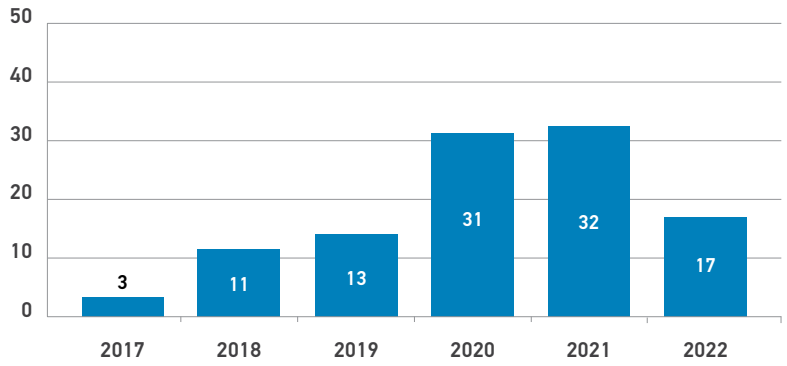
Similar litigation has been filed against infant formula companies, alleging that certain powdered infant formula products misrepresent the number of bottles of infant formula that each package can produce. In July 2022, PBM Nutritionals, which makes infant formula for brands, such as Sam's Club's Member's Mark, Target's Up & Up brand, BJ's Wholesale Club's Berkley Jensen label, Walmart's Parent's Choice, Burt's Bees Baby, and Earth's Best, agreed to settle such claims as part of a nationwide class action settlement consisting of up to a $2 million settlement fund and injunctive relief (i.e., labeling amendments). See *White v. PBM Nutritionals, LLC*, Case No. 22PH-CV00931 (Cir. Ct., Phelps Cty., Missouri). Abbott Laboratories, the manufacturer of Similac infant formula, entered a similar class action settlement in September 2022, agreeing to pay up to $19.5 million to settle these claims. See *Ramsey-Standage v. Abbott Laboratories*, Case No. 22PH-CV00853 (Cir. Ct., Phelps Cty., Missouri).

LEGAL TRENDS IN ENVIRONMENTAL, SOCIAL, AND GOVERNANCE

Environmental, Social, and Governance (ESG) concerns grew in prominence in 2022. Outside of the litigation space, federal regulators at the U.S. Securities and Exchange Commission (SEC) and the Federal Trade Commission (FTC) have taken a keen interest in ESG representations, recognizing ESG's salience in investor and consumer decision-making. In December 2022, the FTC announced it was proposing updates to its "Green Guides" to provide considerations for marketers when making environmental claims. In April 2022, the FTC filed complaints against two retailers for products advertised as sustainable "bamboo," when they were actually made with rayon. These cases resulted in settlements totaling $5.5 million.

ESG-RELATED CLASS ACTIONS: FILINGS BY YEAR

FIGURE 4



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

Given increased attention to ESG representations across the board, it is unsurprising that 2022 saw class-action litigation targeting the CPG industry, including the cases reviewed below:

- "Reef-Safe"—California courts allowed claims to proceed against sunscreens marketed as "reef-safe" when the court held that the complaints plausibly alleged that the products contained ingredients that could be harmful to reefs. *Battle v. Taylor James, LLC*, No. CV 21-07915-FWS-KES, 2022 WL 2162930, at *4 (C.D. Cal. June 15, 2022); *Locklin v. StriVectin Operating Co., Inc.*, No. 21-CV-07967-VC, 2022 WL 867248, at *1 (N.D. Cal. Mar. 23, 2022).
- "Reef-Friendly"—Similarly, courts have allowed multiple cases challenging "reef friendly" sunscreens to proceed past a motion to dismiss. See *Moran v. Bondi Sands (USA) Inc.*, No. 21-CV-07961-JSW, 2022 WL 1288984, at *5 (N.D. Cal. Apr. 29, 2022) (relying on *Locklin* to find that claims against "reef friendly" sunscreen could proceed, albeit in trimmed form); *Moran v. Edgewell Pers. Care, LLC*, No. 21-CV-07669-RS, 2022 WL 3046906 (N.D. Cal. Aug. 2, 2022) (dismissing all allegations except those regarding "Reef Friendly – No Oxybenzone or Octinoxate" claim); *White v. Kroger Co.*, No. 21-CV-08004-RS, 2022 WL 888657, at *1 (N.D. Cal. Mar. 25, 2022) (finding that "reef-friendly" claim did not constitute puffery).
- "Sustainably Sourced"—The U.S. District Court for the District of Massachusetts allowed a case to proceed when it alleged that the labeling of tilapia as "sustainably sourced" was false or misleading when they were produced using certain fish farming practices. *Spindel v. Gortons, Inc.*, No. 22-10599-PBS, 2022 WL 3648823 (D. Mass. Aug. 24, 2022). The U.S. District Court for the Northern District of Illinois held likewise in a case regarding salmon products labeled "Simple. Sustainable. Seafood." *Rawson v. ALDI, Inc.*, No. 21-CV-2811, 2022 WL 1556395, at *7 (N.D. Ill. May 17, 2022). In a case against a chocolate product manufacturer, the U.S. District Court for the Southern District of California allowed allegations to proceed when a consumer alleged that the claim "sustainably sourced" was misleading when the chocolate was allegedly produced using methods that were harmful to the environment, even when the representation was certified by a third party. *Walker v. Nestle USA, Inc.*, No. 3:19-CV-723-L-DEB, 2022 WL 901553, at *1 (S.D. Cal. Mar. 28, 2022).

- "Recyclable"—The Northern District of Illinois held that the term "recyclable" would not convey to a reasonable consumer that the product "will be recycled," but instead the term communicates that the product "can be recycled." *Curtis v. 7-Eleven, Inc.* 2022 WL 4182384, at *13-14 (N.D. Ill. Sep. 13, 2022) ("A reasonable consumer would not read into the word 'recyclable' a guarantee that there are local facilities that recycle that type of plastic. 'Recyclable' does not mean 'Will Be Recycled at a Facility Near YOU!'") (emphasis in original); see also *Swartz v. Coca-Cola Co.*, No. 21-cv-04643-JD, 2022 BL 414519, at *2 (N.D. Cal. Nov. 18, 2022) (dismissing case when plaintiff as plaintiffs did not "plausibly allege that defendants' representations deviate from the commonly understood meaning of recyclable or the Green Guides definition."); *Duchimaza v. Niagara Bottling*, 2022 WL 3139898 (S.D.N.Y. Aug. 5, 2022) (finding that compliance with Green Guides meant that product's labeling would not be misleading to reasonable consumer).
- Aspirational Statements—The Superior Court of the District of Columbia held that aspirational statements, without more, could not form the basis of a consumer protection claim under District of Columbia consumer protection law. *Earth Island Inst. v. Coca-Cola Co.*, No. 2021 CA 001846 B (D.C. Super. Ct. Nov. 10, 2022) ("As future, aspirational goals, these statements cannot successfully create a valid claim under the [D.C. Consumer Protection Procedures Act] until they have been found to be inaccurate or misleading.").

PROCEDURAL LITIGATION DEVELOPMENTS AFFECTING THE CPG INDUSTRY

LITIGATION DEVELOPMENTS AFFECTING THE CPG INDUSTRY

Many procedural developments affected CPG industry litigation in 2022. We review some of the most important developments below.

STANDING

Standing challenges have continued to be critical in defending putative class actions targeting CPG companies. For example, standing has proven to be dispositive in multiple challenges regarding baby food products. See, *e.g.*, *Kimca v. Sprout Foods, Inc.*, No. 2:21-cv-12977-SRC-JSA, 2022 WL 1213488, at *5 (D.N.J. Apr. 25, 2022) (finding FDA benchmarks and other data cited by plaintiffs were too speculative and arbitrary to conclude that plaintiffs plausibly alleged the baby food products were unsafe); *In re Gerber Prod. Co. Heavy Metals Baby Food Litig.*, No. 121CV269MSNJFA, 2022 WL 10197651, at *5 (E.D. Va. Oct. 17, 2022) (holding that plaintiffs lacked standing because their arguments regarding injury-in-fact ran "afoul of logic"); *In re Plum Baby Food Litig.*, No. 121CV02417NLHSAK, 2022 WL 16552786, at *14 (D.N.J. Oct. 31, 2022) ("[T]he facts as alleged in this matter do not establish an injury-in-fact direct and concrete enough to bring these claims in court whose power is limited by design by Article III the Constitution.").

Elsewhere, the U.S. District Court for the Northern District of California ruled that the bare allegation of a "price premium" was "sufficient to adequately allege a cognizable injury" when the allegations lacked details about prices paid or differences between the challenged premium product and nonpremium product. *Horti v. Nestle HealthCare Nutrition, Inc.*, No. 21-CV-09812-PJH, 2022 WL 2441560, at *8 (N.D. Cal. July 5, 2022) (concluding that plaintiffs lacked standing in challenge regarding glucose control beverage). The U.S. District Court for the District of New Jersey found similarly in a challenge to a "100% Recyclable" claim. *Haggerty v. Bluetriton Brands, Inc.*, No. CV2113904ZNQDEA, 2022 WL 17733677, at *4 (D.N.J. Dec. 16, 2022) (dismissing case based on lack of standing when plaintiff failed to plead "facts regarding comparable, cheaper products" and merely restated her "burden to articulate how that value is to be determined").

Federal courts also continue to address standing issues regarding unpurchased products and standing to seek injunctive relief. Regarding standing to pursue claims regarding unpurchased products, many courts have adopted an approach that allows plaintiffs to pursue claims over unpurchased products that are "substantially similar" to the challenged product. See, *e.g.*, *Sinatro v. Barilla Am., Inc.*, No. 22-CV-03460-DMR, 2022 WL 10128276, at *12 (N.D. Cal. Oct. 17, 2022) (allowing claims over an additional 52 dry pasta products). Other courts have rejected standing for unpurchased products because the plaintiff failed to demonstrate the existence of a "case or controversy" over products that she did not purchase. *Jackson v. Dole Packaged Foods, LLC*, No. 3:22-CV-1448-DWD, 2022 WL 18027600, at *2 (S.D. Ill. Dec. 30, 2022) (trimming class action for products plaintiff did not purchase noting "[s]ubstantially similar or not, she does fail to allege that any of the other eight Dole products caused her harm or created an 'injury in fact.'").

Many courts have also noted that a plaintiff cannot seek injunctive relief for unnamed class members who might face risk of future injury when the named plaintiff does not face that risk. See *Rice v. Dreyer's Grand Ice Cream, Inc.*, No. 21 C 3814, 2022 WL 3908665, at *2 (N.D. Ill. Aug. 30, 2022) (dismissing complaint for lack of subject matter jurisdiction to the extent it sought injunctive relief); *Castillo v. Unilever U.S., Inc.*, 2022 WL 704809, at *4 (N.D. Ill. Mar. 9, 2022) (reaching the same result in materially identical circumstances). Similarly, many courts have also held that when a plaintiff already knows the truth about the alleged misrepresentation, the plaintiff lacks standing to seek injunctive relief. *Chiappetta v. Kellogg Sales Co.*, No. 21-CV-3545, 2022 WL 602505, at *10 (N.D. Ill. Mar. 1, 2022) (dismissing claims for injunctive relief because plaintiff knew that strawberry Pop-Tarts contained apples and pears, in addition to strawberries, so that she would be unlikely to be harmed in the future).

CLASS CERTIFICATION AND DAMAGES

While 2022 saw several major developments regarding class certification and damages issues, the two identified below are particularly relevant to the CPG industry.

First, the Ninth Circuit issued an *en banc* ruling regarding class certification standards. In *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, the Ninth Circuit expressly overruled a prior case holding that "no class may be certified that contains members lacking Article III standing," which the panel concluded should not apply when a class was seeking injunctive or other equitable relief. 31 F.4th 651, 682 n. 32 (9th Cir.) (en banc), *cert. denied sub nom. StarKist Co. v. Olean Wholesale Grocery Coop., Inc.*, 143 S. Ct. 424 (2022). The majority opinion further held classes with uninjured members can be "fixed" by modifying class definitions and that class certification proof should be held to a preponderance of the evidence standard.

Second, the Northern District of California issued an important decision regarding statutory damages. *Montera v. Premier Nutrition Corp.*, No. 16-CV-06980-RS, 2022 WL 3348573, at *1 (N.D. Cal. Aug. 12, 2022).[1] The court saw a jury verdict determining actual damages against a glucosamine supplement manufacturer in the amount of $1,488,078.49. Plaintiff sought statutory damages of $91,436,950 and prejudgment interest. The court found this requested amount was "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable" and reduced the statutory damages award to $8,312,450 and $4,583,004.90 in prejudgment interest. *Id.* (quoting *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919)). Outside of the CPG context, the Ninth Circuit took up the issue of statutory damages in a separate case and concluded that statutory damages are subject to constitutional limitations when they constitute "a largely punitive per-violation amount results in an aggregate that is gravely disproportionate to and unreasonably related to the legal violation committed." *Wakefield v. ViSalus, Inc.*, 51 F.4th 1109, 1124 (9th Cir. 2022).

CLASS SETTLEMENTS

Settlements of class actions remained strong in 2022. In *McMorrow, et al. v. Mondelēz International Inc.*, the Southern District of California granted final approval to a case alleging that the marketing of belVita products was misleading given the products' added sugar content. No. 17-cv-2327 (S.D. Cal.). The settlement involved an $8 million common fund and injunctive relief to exclude marketing terms such as "wholesome" or "nutritious." In *Hesse v. Godiva Chocolatier, Inc.*, the Southern District of New York approved a claims-made settlement providing up to $15 million to class members submitting valid claims. 1:19-cv-972 (S.D.N.Y., final judgment entered Jul. 1, 2022). In another case, the U.S. District Court for the Central District of California granted final approval to a settlement regarding a glucosamine supplement providing either $5 per package (up to $25) or 60% of the retail price paid per package, depending on whether class members provided proof of purchase and household claim limitations. *Casey v. Doctor's Best Inc.*, No. 8:20-cv-1325 (C.D. Cal., final approval granted Jul. 11, 2022). According to a recent status update in the Doctor's Best matter, the distribution to the class is estimated to be over $2 million. *Id.*, Dkt. No. 56.

[1]For further information about statutory damages issues, see Charles C. Sipos & Lauren Watts Staniar, Billion-Dollar Breakfast Bars: Statutory Damages and Unconstitutional Settlement Pressure Under New York's General Business Laws, New York Law Journal (Nov. 16, 2021).

REGULATORY DEVELOPMENTS AFFECTING THE CPG INDUSTRY

REGULATORY DEVELOPMENTS AFFECTING THE CPG INDUSTRY

Throughout 2022 and extending into 2023, 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.

FTC SEEKS PUBLIC COMMENT ON POTENTIAL UPDATES TO ITS GREEN GUIDES

The Federal Trade Commission (FTC) announced on December 14, 2022, that it is seeking public comment with respect to proposed revisions and updates to the "Green Guides for the Use of Environmental Claims." In its press release, the FTC advised that it is updating the Green Guides "based on the increasing consumer interest in buying environmentally friendly products."

Bureau of Consumer Protection Director Samuel Levine explained that the FTC "will make any updates necessary to ensure the Green Guides provide current, accurate information about consumer perception of environmental benefit claims. This will both help marketers make truthful claims and consumers find the products they seek."

Specific issues on which the FTC expects to receive public comments include (1) carbon offsets and climate change; (2) the term "recyclable"; (3) the term "recycled content"; and (4) the need for additional guidance regarding claims such as "compostable," "degradable," "ozone-friendly," "organic," and "sustainable," as well as those regarding energy use and energy efficiency.

While the Green Guides have no force of law, to the extent the FTC provides additional guidance for claims such as "sustainable," legal compliance will strengthen defenses in class actions challenging such claims.

CALIFORNIA RECYCLING STANDARDS

In recent years, California has enacted aggressive legislation regulating recycling and plastic packaging claims that has significant impacts on the consumer products industry.

In late 2021, Governor Gavin Newsom signed Senate Bill 343, which prohibits the use of symbols or other claims suggesting recyclability, including the "chasing arrows symbol," on any product or packaging that fails to meet a California regulator's strict recyclability criteria. To be "considered recyclable" under SB 343, products/packaging must be of a type that is: (1) collected by recycling programs in jurisdictions encompassing at least 60% of the state's population; and (2) sorted into defined streams for recycling processes by at least 60% of the state's recycling programs. The new law also requires any companies that make recyclability claims to maintain records "supporting the validity of the representation."

A separate bill, AB 1201, created similar restrictions on what can be labelled as "compostable" or "biodegradable." Significantly, beginning on January 1, 2023, companion bill AB 1200 prohibits the distribution, sale, or offering for sale of food packaging that contains PFAS, at or above 100 parts per million.

Most recently, in June 2022, Governor Newson signed the Plastic Pollution Prevention and Packaging Producer Responsibility Act (SB 54), setting aggressive targets for reducing and reusing single-use packaging and requiring plastics producers to create a California Plastic Pollution Mitigation Fund to help those communities most affected by the effects of plastic pollution. SB 54 requires that California achieve a 25% reduction of plastics in single-use products by 2032 and a 30% recycling, reuse, or composting rate for single-use plastics used in the state by 2028, with increasing targets over time.

PFAS REGULATIONS

Per- and polyfluoroalkyl substances (PFAS) are a group of over 4,000 synthetic chemicals. Litigation concerning PFAS chemicals is nothing new. Over the past two decades, thousands of complaints have been filed against hundreds of companies concerning these so-called "forever chemicals." Much of this past litigation is related to environmental contamination. Now, however, an increasing number of class actions are being brought against consumer products companies, alleging false and misleading product labeling based on the presence of PFAS in their products.

Recently, plaintiffs have begun to bring consumer class actions against restaurant chains and food packaging manufacturers, alleging that the presence of PFAS in their products renders the product labeling misleading in some manner. For example:

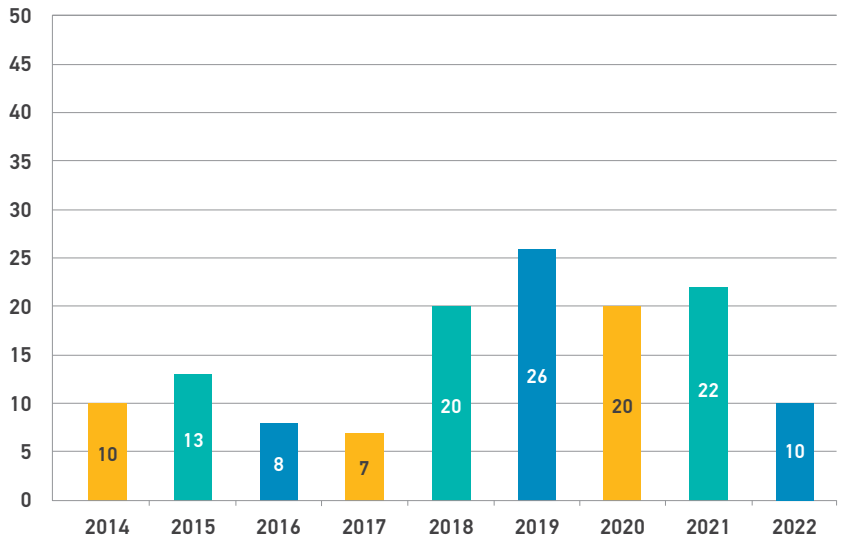
- *Hussain v. Burger King Corporation*, Case No. 22-cv-02258 (N.D. Cal.): The company's "safe" and "sustainable" representations are false and misleading due to the presence of PFAS.
- *Clark v. McDonald's Corporation*, Case No. 22-cv-00628 (S.D. Ill.): Brand identity revolving around food safety is misleading due to the presence of PFAS.
- *Little v. NatureStar North America LLC*, et al., Case No. 22-cv-00232 (E.D. Cal.): The claim that disposable tableware products are "compostable" is false and misleading due to the presence of PFAS.
- *Hamman, et al. v. Cava Group Inc.*, Case No. 22-cv-00593 (S.D. Cal.): The restaurant's "healthy" and "sustainable" representations are false and misleading due to the presence of PFAS.

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 400% above the 2014 number, a growth from 10 to almost 40 cases. The number declined somewhat between 2020 and 2022, dropping to 22 and now to 10 cases in the past year. Trends in pet food litigation largely mirror those in food litigation generally. As these cases continue to work their way through the courts, an emerging body of case law is developing. In many instances, decisions have tracked analyses from food and beverage matters—e.g., litigation over the term "natural." But issues unique to pet food are prompting court decisions unique to the segment.

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-from.

These cases have continued to work their way through the courts. For example, in *Bush v. WellPet, LLC*, the District of Massachusetts found that laboratory analysis was insufficient to state an actionable challenge to "grain-free" pet food because the complaint failed to establish that any grain or gluten found was intentionally added to the product. 534 F. Supp. 3d 179 (D. Mass. 2021). Similarly, the U.S. District Court for the Southern District of Florida found that a plaintiff had not suffered an injury-in-fact and failed to establish that the bags of "grain-free" dog food he purchased actually contained wheat. *Deluna v. Am. Journey (PET), LLC*, No. 21-60483-CIV, 2021 WL 5149790 (S.D. Fla. Nov. 1, 2021). In another case, the same court found that plaintiff lacked standing when the analysis relied upon did "not specify on which product the independent analysis was performed, the methodology of the analysis, or the results of the analysis[.]" *Sabater v. Am. Journey (PET), LLC*, 570 F. Supp. 3d 1160 (S.D. Fla. 2021). Elsewhere, the Central District of California granted final approval to a settlement that provided $5.00 without proof of purchase or up to $100.00 with proof of purchase regarding claims that a limited ingredient formula contained wheat and chicken despite labeling to the contrary. *Gifford v. Pets Global, Inc.*, Case No. 2:21-cv-02136, Dkt. No. 70 (C.D. Cal. Dec. 13, 2022). That settlement further provided that the company would audit suppliers for five years and agree to injunctive relief to phase out current "chicken-free" and "grain-free" claims. The Eastern District of Missouri trimmed a case alleging that pet food products contained wheat and soy

despite labeling to the contrary. *Barker v. Nestle Purina PetCare Co.*, No. 4:21-CV-01075-MTS, 2022 WL 1288355 (E.D. Mo. Apr. 29, 2022). In *Bakopoulos v. Mars Petcare US Inc.*, 592 F. Supp. 3d 759 (N.D. Ill. 2022), the Northern District of Illinois also 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."

PET SUPPLEMENTS

In 2022, plaintiffs filed several class-action suits alleging that the marketing and labeling of pet supplements were misleading. Multiple cases alleged that pet supplements containing glucosamine and chondroitin contained misleading representations regarding joint health. See *Perry v. Manna Pro Products*, No. 4:22-cv-127 (E.D. Mo. Feb. 1, 2022); *Venti v. Garmin Corp.*, No. 5:22-cv-782 (C.D. Cal. May 6, 2022); *Goshert v. Compana Pet Brands*, No. 3:22-cv-4617 (N.D. Cal.). The Central District of California certified a class action on similar allegations, which is now on appeal to the Ninth Circuit. *Lytle v. Nutramax Lab'ys, Inc.*, No. EDCV190835FMOSPX, 2022 WL 1600047 (C.D. Cal. May 6, 2022). Other cases alleged that pet supplement products were "all natural" or contained less than the labeled amount of active ingredients. See *Hayes v. Earth Animal Ventures, Inc.*, No. 2022-L-160 (Ill. Cir. Ct., DuPage Cnty. Feb. 14, 2022) (alleging "all natural" dog food contained synthetic ingredients); *Dotson v. Mars Inc.*, No. 22STCV18817 (Cal. Sup. Ct., Los Angeles Cnty. Jun. 8, 2022) (same); *Carmen v. Zesty Paws LLC*, No. 1:22-cv-5529, (N.D. Ill. Oct. 9, 2022) (alleging lower levels of active ingredients).

AFLATOXIN

Following a recall of dog food products allegedly containing aflatoxin, several putative class actions have been filed in the U.S. District Court for 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. *In re: Midwestern Pet Foods Marketing, Sales Practices and Product Liability Litigation*, Case No. 3:21-cv-00007 (S.D. Ind.). In January 2023, an unopposed motion for preliminary approval of a class-action settlement was filed. *Id.* Dkt. Nos. 133, 134 (Jan. 9, 2023).

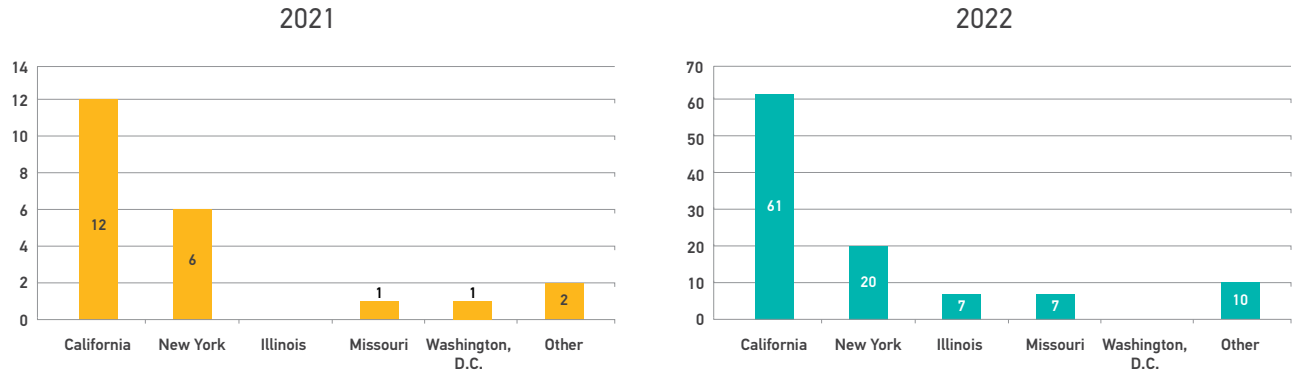
LEGAL TRENDS IN SUPPLEMENTS

LEGAL TRENDS IN SUPPLEMENTS

A record high number of consumer class-action filings were made against dietary supplement companies in 2022. Following a steady decrease in the number of filings in 2020 (45 total filings) and 2021 (22 total filings), the number of filings spiked nearly 400% in 2023 to 105 filings. There was an increase in filings across all jurisdictions: California led the way with 61 filings in 2022. New York followed second with 20 filings, and Illinois and Missouri tied for third with seven filings each.

DIETARY SUPPLEMENT CLASS ACTIONS: FILINGS BY JURISDICTION

FIGURE 6

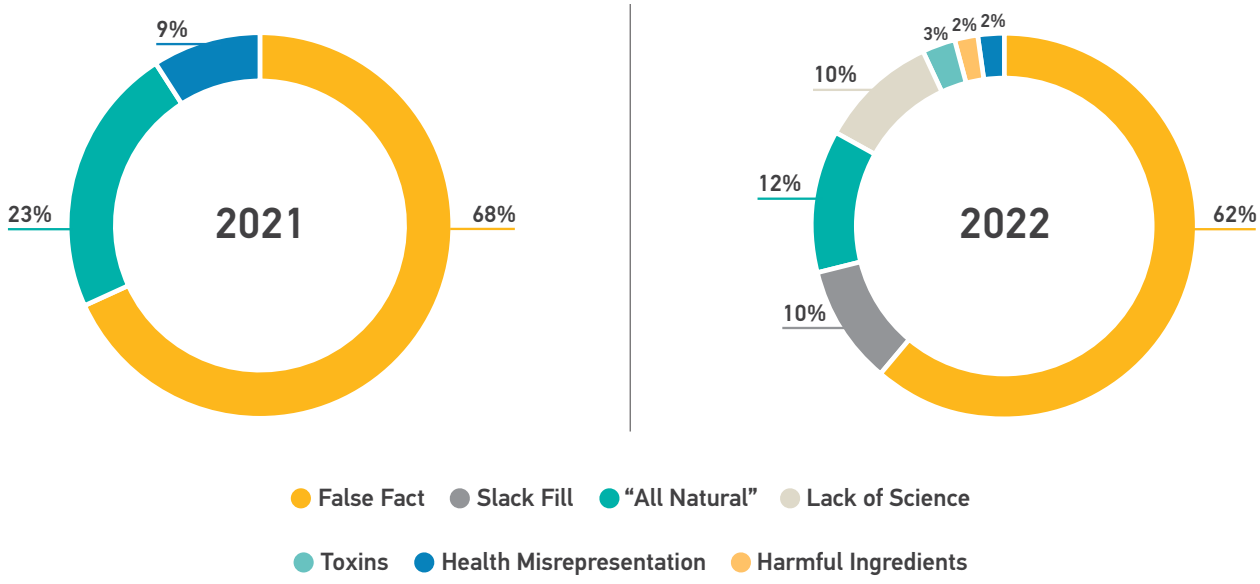


Data compiled by Perkins Coie based on a review of dockets from courts nationwide.

As in previous years, a significant number of the filings (65) in 2022 involved false labeling claims, which accounted for 62% of all filings. Filings involving "all natural" claims increased as well, jumping from five filings in 2021 to 13 filings in 2022. There were also significant increases in the total number of filings involving slack fill (10) and lack of science (10) claims.

INDUSTRY FILINGS AND TRENDS: CATEGORIES

FIGURE 7



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

AGGREGATE STATUTORY DAMAGES V. DUE PROCESS

Plaintiffs have routinely used the threat of statutory damages under N.Y. G.B.L. (GBL) §§ 349 and 350 to pressure defendants into settling false advertising consumer class actions. Sections 349 and 350 authorize statutory damages of $50 and $500 per violation, respectively. Though N.Y. C.P.L.R. (CPLR) § 901(b) prohibits consumers from bringing GBL claims as class actions, the Supreme Court held that this is a "procedural" rule that does not preclude federal courts sitting in diversity from awarding statutory damages in class actions. *See generally Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.* Co., 559 U.S. 393 (2009).

No court had yet issued a GBL statutory damages award in a false advertising class action until the recent decision in *Montera v. Premier Nutrition Corp.*, 2022 WL 3348573 (N.D. Cal. Aug. 12, 2022). *Montera* is one of many cases in the Northern District of California challenging the advertising of a glucosamine supplement called "Joint Juice." Although Premier Nutrition claimed that Joint Juice is effective at reducing joint pain, the plaintiff alleged that Joint Juice does not relieve joint pain and is worthless. The jury awarded the plaintiff $1.49 million in actual damages. However, relying on GBL §§ 349 and 350, the plaintiff sought an additional $91 million in statutory damages, an amount approximately 60 times the "damage" to individual class members.

Acknowledging that there is "little guidance" on the issue, the *Montera* court nonetheless recognized its discretion under both Supreme Court and Ninth Circuit precedent to reduce statutory damages where imposing them would be "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Id.* at 6. The court noted the New York Legislature's "explicit concern about the punitive nature of aggregated statutory damages," which spurred the legislature to enact CPLR 901(b)'s waiver of statutory damages in class actions to avoid "annihilating punishment of the defendant." *Id.* at *4-5. This, the court held, "differentiates this case from others involving high awards of statutory damages." *Id.* at 5.

Relying on legislative concern regarding the "immense punitive consequences" of GBL statutory damages, the court considered whether to reduce the statutory damages award by applying the test for determining the constitutionality of a punitive damages award. *Id.* Ultimately, the court concluded that the wide disparity between the actual harm suffered by plaintiffs and the proposed statutory damages violated the defendant's due process rights and clearly favored a reduction. *Id.* at 6. Accordingly, the court reduced the plaintiff's "grossly excessive" amount to $8.3 million, equal to $50 per unit sold. *Id.*

The *Montera* decision has significant implications for both plaintiffs and defendants in consumer class actions, including those involving dietary supplements. As the first federal court decision to directly consider and order a reduction of statutory damages, it benefits defendants by weakening the threat of astronomical statutory damages and resulting inducement to settle a case. The decision provides helpful authority for combatting class-wide statutory damages claims and settlement demands where the aggregated amounts would be so excessive that they become punitive. On the other hand, defendants still face the possibility of a significant statutory damages award on a per unit purchased basis, particularly since the *Montera* court declined to evaluate the propriety of an aggregate statutory damages award until after the jury had rendered its verdict. *Montera* will certainly affect federal court GBL class actions; however, the extent of that impact is yet unclear.

"NATURAL" CLASS ACTIONS ON THE RISE

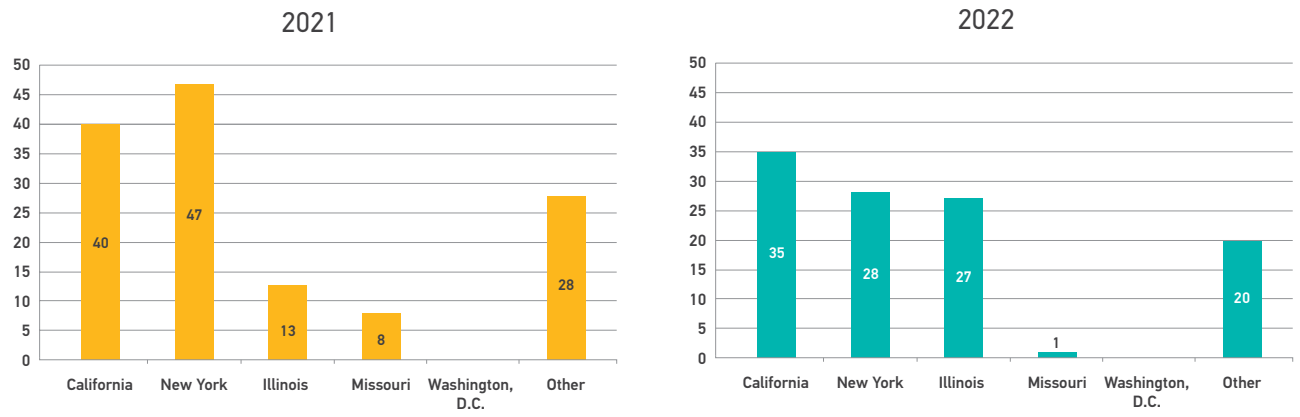
Consumer class actions involving "natural" claims have routinely been filed against food companies over the years. Now, the number of "natural" class-action filings involving dietary supplements have been steadily increasing. As noted above, class actions involving "natural" claims spiked in 2022, reaching the second highest total number of filings last year. The increase in litigation is due in part to the fact that the FDA has not yet defined "natural." Therefore, given this ambiguity, any use of the term on product packaging (e.g., "soothes naturally" or "support your health naturally") poses a risk to dietary supplement companies. Plaintiffs routinely allege that if the product contains anything that is not natural, artificial, or synthetic, then any use of the term "natural" is false and misleading to a consumer. *See generally Orrico v. Nordic Naturals, Inc.*, 1:22-cv-03195-

NRM-CLP (E.D.N.Y May 31, 2022). Consequently, until the FDA defines the term "natural" and provides more clarity for purposes of food and supplement labeling, consumer class-action filings involving "natural" claims will likely continue to rise.

LEGAL TRENDS IN PERSONAL CARE PRODUCTS

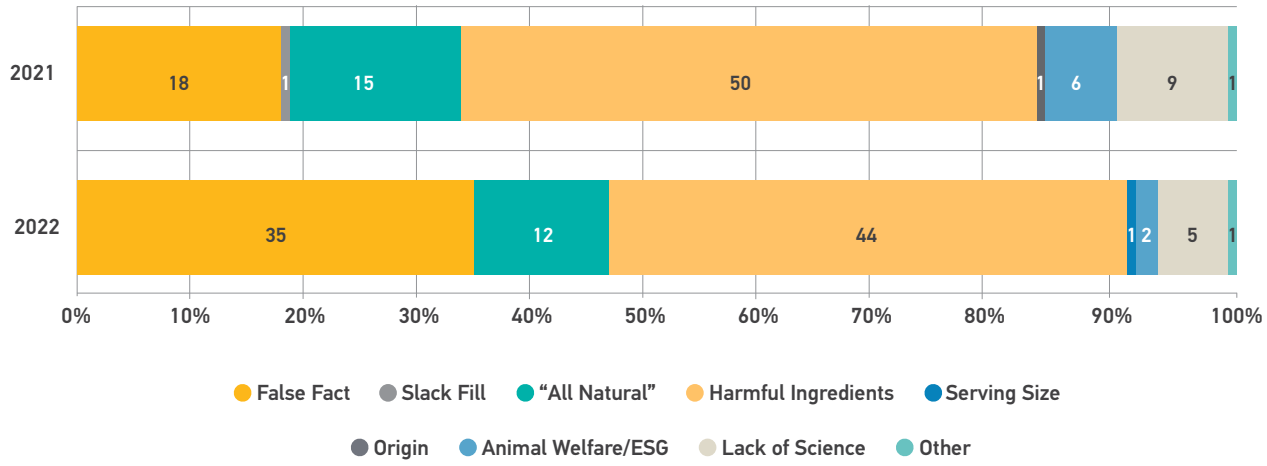
PERSONAL CARE CLASS ACTIONS: FILINGS BY JURISDICTION

FIGURE 8



INDUSTRY FILINGS AND TRENDS: CATEGORIES

FIGURE 9



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

FEDERAL LEGISLATION

Enacted on December 29, 2022, the Modernization of Cosmetics Regulation Act (MoCRA) is the most significant statutory expansion to the U.S. Food and Drug Administration's (FDA) authority over cosmetics since 1938. MoCRA makes several important changes to federal oversight of cosmetics, including:

- **Mandatory recall authority over cosmetics.** For the first time, the FDA will have mandatory recall authority over cosmetic products when the agency determines with a reasonable probability that (1) the cosmetic product is adulterated or misbranded, (2) the use of or exposure to the cosmetic will cause serious adverse health consequences or death, and (3) the responsible entity has refused to voluntarily cease distribution and/or recall the violative cosmetic product.
- **Adverse event reporting and recordkeeping.** MoCRA requires the reporting of serious adverse events associated with the use of cosmetic products in the United States. A "serious adverse event" includes, among other things, inpatient

hospitalization or death. Responsible parties required to report adverse events include those who manufactured, packed, or distributed such products, and responsible parties are required to have their names appear on the product label. Responsible parties are required to keep records on adverse events associated with the use of the cosmetic for three years (for small businesses) to six years (for other businesses).

- **Good manufacturing practices for cosmetic facilities.** MoCRA provides the FDA the authority to promulgate good manufacturing practices (GMPs) regulations for facilities manufacturing or processing cosmetic products. GMPs are regulatory requirements regarding hygiene practices, process controls, and sanitation, among other matters. The FDA already has GMPs in place for many other product categories, such as drugs, food, and dietary supplements. The FDA last issued revised, nonbinding cosmetic GMP guidance in 2013, but the agency has not previously promulgated GMP regulations for cosmetics. Failure to meet these new cosmetic GMPs could result in a finding that the cosmetic is adulterated. The regulations may provide the FDA the authority to inspect records to demonstrate compliance with GMPs. The bill requires the FDA to also promulgate simplified GMPs for smaller businesses. Before promulgating the regulations to implement the GMPs, the bill requires the FDA to consult with cosmetics manufacturers and consumer organizations. The bill requires the FDA to promulgate these GMP regulations within two years of the bill's enactment and requires final regulations within three years of enactment.
- **Identification of fragrance allergens on product labels.** MoCRA requires cosmetic labels to identify each fragrance allergen in a product once the FDA issues its forthcoming fragrance allergen rule, which will consider European Union (EU) and other international requirements. If a cosmetic product label does not include required fragrance disclosures, it will be considered misbranded under section 602(b) of the Food, Drug, and Cosmetic Act (FDCA).
- **Asbestos and perfluoroalkyl and polyfluoroalkyl substances (PFAS) in cosmetics.** MoCRA requires the FDA to issue proposed regulations to establish and require standardized testing methods for detecting and identifying asbestos in talc-containing cosmetic products. In addition, MoCRA mandates that the FDA issue a report regarding the use of PFAS in cosmetic products and the scientific evidence regarding the safety and risks associated with the use of PFAS in cosmetics.
- **Preemption.** MoCRA expressly preempts state and local requirements that differ from MoCRA's standards related to registration and product listing, GMPs, records, recalls, adverse event reporting, or safety substantiation. MoCRA also contains a savings clause and certain limitations regarding the law's preemptive effect.

Notably, the cosmetics provisions will not require the FDA to review and, if warranted, ban or restrict chemicals, as originally proposed.

Many of MOCRA's provisions will go into effect over time, with some becoming effective a year after the bill's enactment and others awaiting finalized regulations. The cosmetic industry will have opportunities to provide notice and comment on proposed regulations.

STATE LEGISLATION

- We also saw increased state regulatory activities in the state legislatures, focusing on the regulation of micro-contaminants in cosmetics and personal care products, in particular addressing PFAS. PFAS are a broad class of manmade compounds added to cosmetics to make them smoother, more spreadable, and longer-lasting. In 2022 states passed the following legislation banning PFAS, among other contaminants:
- **California:** On September 29, 2022, Gov. Gavin Newsom signed the California PFAS-Free Cosmetic Act (AB 2771), which bans intentionally added PFAS (perfluoroalkyl or polyfluoroalkyl substances) known as "forever chemicals" from cosmetics sold in California as of January 1, 2025.
- **Colorado:** In 2022, Colorado enacted the PFAS Chemicals Consumer Protection Act, which seeks to limit sources of PFAS introduced into the state. The law also prohibits—or "phases out"—the sale and distribution of cosmetics after January 1, 2025, if they contain intentionally added PFAS chemicals.
- **New York:** Gov. Kathy Hochul signed S8291A into law, which prohibits the sale or offer for sale of any cosmetic product or personal care product containing mercury. The ban takes effect on June 1, 2023. Mercury has long been used in skin-

lightening or whitening creams marketed toward women of color—meant to remove blemishes, age spots, and wrinkles—as well as hair relaxers and treatments.

- **Washington:** On March 31, 2022, Gov. Jay Inslee signed HB 1694 into law, giving the Washington State Department of Ecology the authority to address PFAS in "priority products," including personal care products, cosmetics, and dental floss under the Safer Products for Washington Program. Washington state defines PFAS as "a class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom," a broad definition that includes potentially thousands of substances. While the new law is not a complete ban on the use of PFAS, it does require Washington's Department of Ecology to determine an initial set of regulatory actions for PFAS in Chemical Action Plan (CAP)-identified products by June 1, 2024, and then adopt rules to implement the determinations by December 1, 2025.

Additionally, animal welfare laws are gaining traction at the state level, with legislators increasingly considering restricting animal testing. In December 2022, New York state became the tenth state to ban the sale of cosmetics tested on animals when Gov. Kathy Hochul signed into law the New York Cruelty-Free Cosmetics Act. The law, which prohibits the sale and manufacturing of cosmetics that have been tested on animals, went into effect in January 2023. New York follows California, Hawaii, Illinois, Louisiana, Maine, Maryland, Nevada, New Jersey, and Virginia, which have all taken similar action.

REGULATORY ENFORCEMENT

Historically, the FDA has taken a fairly light approach to federal regulation of cosmetics and personal care products. This will change at the end of 2023 when certain provisions of MoCRA become effective, including the FDA's new Good Manufacturing Practices regulations and recall authority. In 2022, however, the FDA continued to issue warning letters to companies that made unapproved drug claims. On August 9, 2022, the FDA announced that it had issued three warning letters to companies for introducing mole and skin tag removal products into interstate commerce that are unapproved new drugs, in violation of the Federal Food Drug, and Cosmetic Act (FD&C Act). The FDA noted that the mole and skin tag removal products sold had not been evaluated by the FDA for safety, effectiveness, or quality and require FDA approval. There are no FDA-approved over-the-counter drug products for the removal of moles and skin tags.

The FDA also continued its focus on asbestos in cosmetics, including conducting ongoing sampling and testing to assess the presence of asbestos in talc-containing cosmetics. In January 2022, the FDA released a white paper developed by the Interagency Working Group on Asbestos in Consumer Products (IWGACP) that contains scientific opinions for the testing of talc-containing cosmetics, and talc intended for use in cosmetics, for the presence of asbestos. The white paper, "Scientific Opinions on Testing Methods for Asbestos in Cosmetic Products Containing Talc (including Talc Intended for Use in Cosmetics)," outlines the scientific opinions of the IWGACP related to the detection and identification of asbestos fibers in talc-containing cosmetic products. The FDA will continue to monitor the safety of products on the market, including cosmetic products potentially contaminated with asbestos.

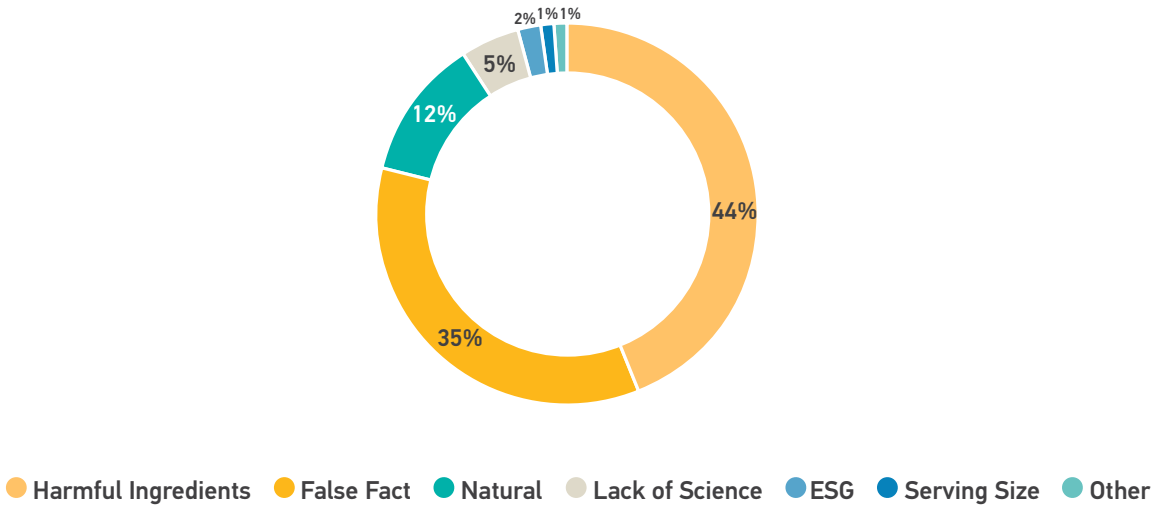
LITIGATION

Perkins Coie tracks all new lawsuits filed against personal care products and cosmetics companies across the country. By jurisdiction, in 2022 California saw the most filings nationwide, followed by New York and Illinois. Across the nation, 40% of filings allege that a harmful ingredient is present in the product. For example, consumers alleged that several cosmetics, including lipsticks, foundation, and mascaras contain PFAS, while other claims allege that certain sunscreens and dry shampoo products are contaminated with the carcinogen benzene. We also saw claims alleging certain hair straighteners and/or relaxers contain endocrine disrupting chemicals. Pure false advertising cases represented 36% of the filings in 2022. For example, we have seen filings challenging the effectiveness of cosmetic products with SPF for "Up to 24H Fresh Wear," when the products allegedly do not and cannot provide 24 hours of SPF without reapplication. "Natural" cases are still prevalent in the personal care space and we have seen challenges brought against "clean beauty" programs in 2022.

Additionally, "lack of science" suits allege that science does not support claims of effectiveness of a particular product. The year of 2022 also brought additional product origin cases, including one lawsuit filed against L'Oreal alleging that American shoppers are overpaying for its beauty products because they have been misled into believing the products are actually made

PERSONAL CARE CLASS ACTIONS: FILINGS BY TYPE

FIGURE 10



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

in France. In this lawsuit, the plaintiff alleges that L'Oreal's labeling of its products "L'Oreal Paris" and use of French words such as "sans huile" (oil-free) and "fini mat" (matte finish) lead consumers to believe that its products are French.

PFAS

Not surprisingly, given the attention to PFAS in the regulatory space, plaintiffs' lawyers increasingly turned their attention to PFAS in 2022. In fact, in December 2021, both Shiseido and CoverGirl were hit with putative class-action lawsuits related to alleged PFAS in their cosmetics products. First, on December 14, 2021, a putative class-action lawsuit was filed in the Southern District of New York against Shiseido, on behalf of all consumers who purchased bareMinerals products, which are marketed as clean and natural beauty products for normal, everyday use, but which allegedly contain PFAS. In this case, the plaintiffs allege that they tested bareMinerals products and discovered that they contained PFAS, which is supported by the June 15, 2021, scientific study in the *Journal of Environmental Science and Technology Letters*, which disclosed results of testing of bareMinerals products.

Shortly thereafter, on December 29, GMO Free USA d/b/a/ Toxin Free USA, a nonprofit, filed a lawsuit in the District of Columbia Superior Court against COVERGIRL cosmetics and Coty, Inc. regarding the marketing and sale of COVERGIRL brand TruBlend Pressed Powder, alleging that despite environmental and product safety representations, the product contains PFAS. In this lawsuit, plaintiff took aim at Coty's sustainability report, which touts its environmental initiatives along with its "Product Safety" strategy.

These lawsuits were quickly followed by several additional lawsuits filed in 2022 against personal care products and cosmetics companies, in which plaintiffs allege that various products, including mascaras, liquid foundations, concealers, and lipsticks, which are marketed as clean, environmentally friendly, and natural products for normal, everyday use, contain harmful PFAS. Many of these lawsuits are still pending.

BENZENE

Another wave of litigation filed in 2022 against personal care and cosmetics companies involved allegations of dry shampoos containing the chemical benzene. On October 31, 2022, laboratory and testing company Valisure LLC submitted a citizen petition to the FDA requesting the FDA's Commissioner of Food and Drugs issue a regulation, request recalls, and revise industry guidance among other actions in response Valisure's test results which allegedly detected high levels of benzene in specific batches of certain dry shampoo products. This citizen petition—like Valisure's other petitions—led plaintiffs' firms to

file a new wave of class-action and product liability lawsuits against several hair care companies.
In December 2022, class-action lawsuits were filed against Johnson & Johnson and Wella, in which plaintiff alleges that the companies sold dry shampoo products containing benzene, and failed to disclose its presence on the labeling of the products. In both lawsuits, the plaintiff claims Valisure tested for benzene in various dry shampoos, finding levels of benzene that exceed the minimum allowed by the FDA. Plaintiff alleges that the presence of benzene and the failure to disclose its presence on the packaging renders both companies' dry shampoo products adulterated and misbranded.

TITANIUM DIOXIDE

The FDA has approved the use of titanium dioxide (TiO2) as a color additive in food, drugs, and cosmetics, including drugs and cosmetics intended for use around the eyes. (See 21 C.F.R. §§ 73.575, 73.1575, 73.2575.) Nevertheless, consumers have begun bringing putative class actions challenging the presence of TiO2 in consumer products, alleging that the presence of TiO2 makes the products unsafe. Several lawsuits were filed against personal care companies, including one against This is L. Inc., in which the plaintiff alleged that the company's "100% Organic Core Tampons" misleads consumers to believe that the tampons were made entirely from cotton and/or organic ingredients when the product contains TiO2, as well as polyester and paraffin.

LEGAL TRENDS IN CANNABIS

LEGAL TRENDS IN CANNABIS

The cannabis marketplace has expanded dramatically in recent years. More than two-thirds of U.S. states have legalized cannabis for medical use, with 19 states allowing cannabis for recreational use. The market for hemp products, including those with hemp-derived cannabidiol (CBD), continues to grow across the country following the passage of the 2018 Farm Bill. Moreover, while states continued to lead the way in regulating cannabis, the federal government took significant steps regarding cannabis this year, including proposing several key bills. While these proposals did not pass, they indicate increasing federal attention regarding cannabis market regulation.

HIGH-LEVEL TRENDS

- Given the growth in the cannabis market, we expect to see greater numbers of class actions filed against cannabis companies. Our survey of federal class-action cases found over 150 recent filings since 2019 against cannabis companies. With more class-action litigation cases expected, cannabis companies should proactively mitigate potential litigation risks. For example, cannabis companies are increasingly seeing litigation involving allegations of (1) autodialed, unsolicited messages and (2) allegedly mislabeled amounts of CBD or THC, the substance responsible for a marijuana "high," in products.
- Federal cannabis law continues to lag behind that of the states, including regarding CBD products. CBD products face a patchwork of state and even local laws regarding their marketing and sale. The sale of food and beverage products containing CBD remains nominally illegal at the federal level. California, among other states, has now legalized the sale of hemp-derived CBD food and beverage products.
- 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 was moving forward in evaluating a potential risk-based enforcement strategy to "further the goals of protecting the public and providing more clarity to the industry and the public" while also taking "potential steps to establish a clear regulatory pathway." In 2022, the FDA hired its first in-house cannabis advisor—a former state cannabis regulator—to provide guidance on the potential regulation of hemp and cannabis. In media interviews, this advisor has emphasized the agency's concerns about immediate health risks posed by the widely unregulated CBD market and cannabinoid products.

LEGISLATION

In 2022, Congress continued to debate credible proposals for legalizing cannabis, or descheduling it from it as a Schedule I controlled substance (a drug deemed to have no currently accepted medical use and a high potential for abuse, such as heroin). First, the House saw the reintroduction of the Marijuana Opportunity Reinvestment and Expungement Act (MORE Act). Second, Representative Nancy Macy (R-S.C.) and four co-sponsors introduced the States Reform Act, a conservative bill to legalize and regulate cannabis. Third, Senators Chuck Schumer, Cory Booker, and Ron Wyden introduced the Cannabis Administration and Opportunity Act (CAOA) to deschedule cannabis. In addition to these three bills, 2022 saw the closest the bipartisan cannabis banking bill, and the SAFE Banking Act, have come to passing Congress. Although Congress did not pass any of these proposals in 2022, Congress did pass the first cannabis research bill to promote scientific and medical research into cannabis.

At the state level, cannabis legislation continues to develop. Among other things, states continue to wrestle with regulating Delta-8 THC, an intoxicating cannabinoid derived from otherwise legal hemp, as well as other 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, more generally, the overall safety of CBD, especially for certain populations such as children or pregnant women.

Federal agencies have also particularly focused on what they claim are unsupported health claims regarding 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 announced "marketers making health-related representations for CBD products are subject to long-standing consumer protection standards" and "[s]erious health claims require the highest level of scientific substantiation."

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

LITIGATION

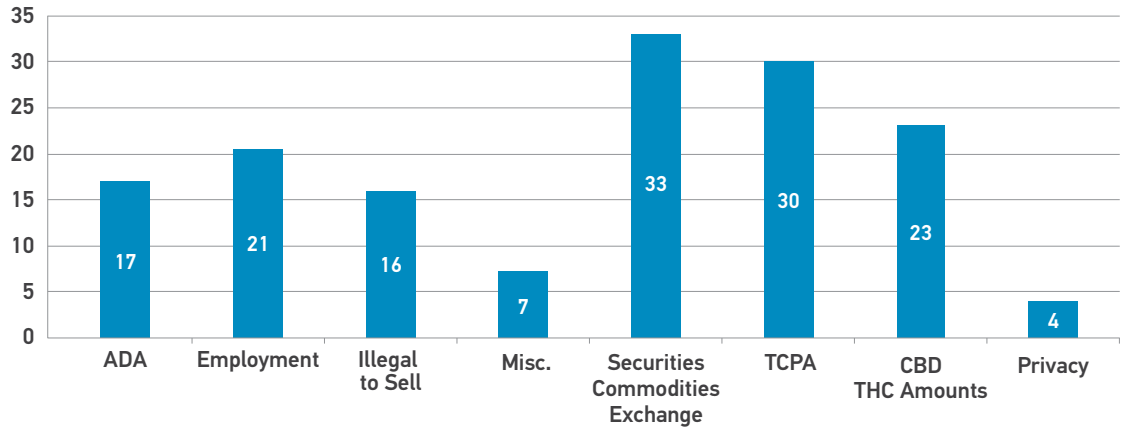
As the cannabis industry continues to grow, so too do the litigation risks facing the industry. Our survey of federal cannabis class actions filed between 2019 and 2022 revealed approximately 150 case filings. In 2022, we found 21 class-action matters.

The largest portion (approximately 22%) 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.

CANNABIS CLASS ACTIONS: FILINGS BY CATEGORY

FIGURE 11

2019-2022



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

About 20% 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 15% of claims concerning inaccurate THC and CBD labeling. These cases made up the plurality of new class actions filed against cannabis companies in 2022. In addition, as in prior years, a significant portion of cases, approximately 10%, alleged that a CBD product was "illegal to sell" pursuant to the FDA's recent public announcements. Cases in the former category allege that companies represented the amounts of THC or CBD in their products as either too far under or too far over the amount represented on the label. The cases in this latter category allege that the manufacturers' CBD products violate *state law* rules protecting consumers because the products are "illegal to sell" per the FDA's recent public statements.

The remaining cases in the survey largely involved employment-related or disability-related claims. These included individuals who alleged that they consumed a product and were subsequently fired from their employment, or asserted that a cannabis company's website did not accommodate visually-disabled users. 2021 also saw four privacy cases wherein putative classes filed lawsuits regarding the deletion of court records for marijuana arrests of minors.

In addition to class-action matters, the courts continue to see cases challenging the regulation of Delta-8 THC. In *AK Futures LLC v. Boyd Street Distro*, the Ninth Circuit held that a Delta-8 THC vape product could legally seek trademark protection, writing that if Congress "inadvertently created a loophole legalizing vaping products containing [D]elta-8 THC, then it is for Congress to fix its mistake." 35 4th 682, 693 (9th Cir. 2022). Meanwhile, lawsuits were filed in Texas, Georgia, Hawaii, and Kansas regarding state regulation of Delta-8 THC products.

PROPOSITION 65 TRENDS

PROPOSITION 65 TRENDS

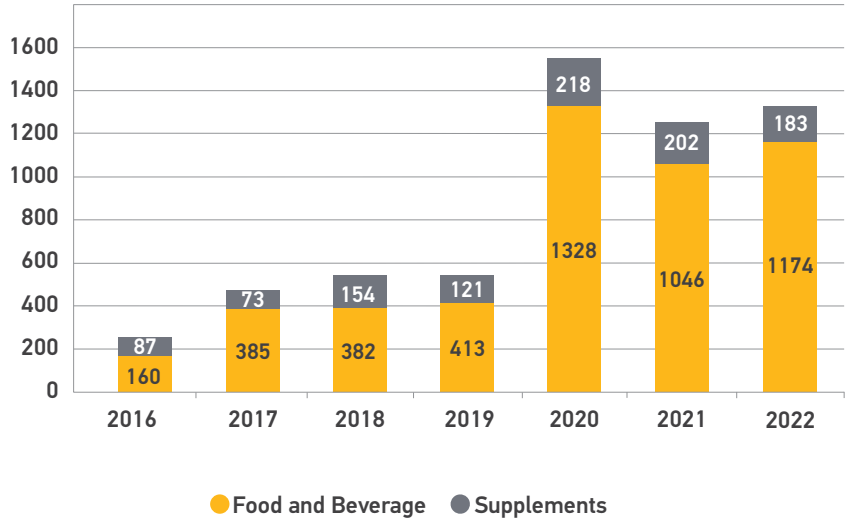
Proposition 65 was a California initiative approved by voters in 1986 and enacted into law as the Safe Drinking Water and Toxic Enforcement Act. Proposition 65 prohibits retailers and manufacturers from knowingly and intentionally exposing California consumers to a chemical known to the State of California to cause cancer, birth defects, or reproductive harm without first providing a "clear and reasonable warning." It is administered and regulated by the Office of Environmental Health Hazard Assessment, commonly referred to as OEHHA. Every CPG company that does business in California should be aware of and comply with, Proposition 65. Virtually all Proposition 65 claims and enforcement actions are brought by private plaintiffs. In 2021, private Proposition 65 plaintiffs issued nearly 3,200 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 12



Data compiled by Perkins Coie based on a review of Proposition 68 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. Indeed, there was a significant increase in notices from 2021 to 2022, indicating that this may be the "new normal."

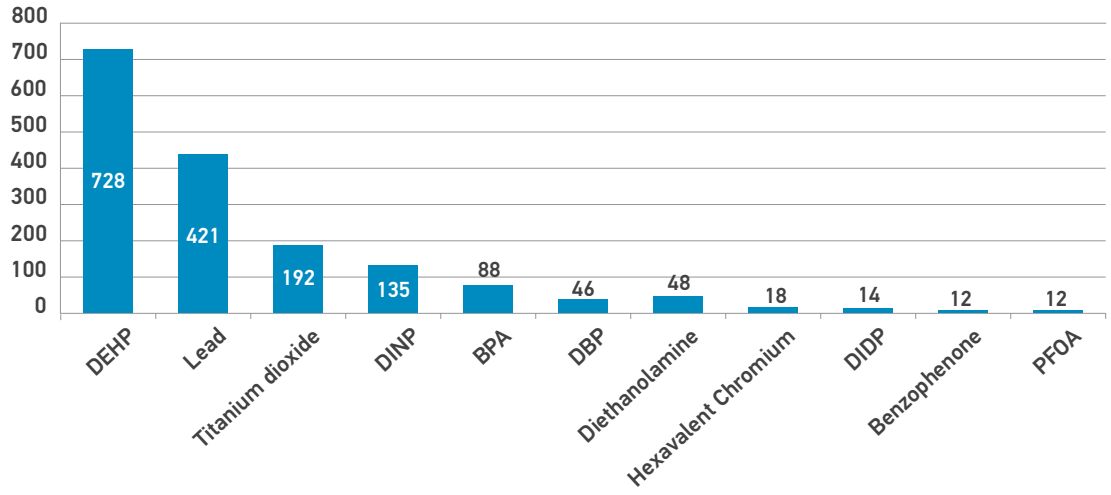
As in prior years, the pre-litigation notices primarily target foods containing heavy metals like lead, cadmium, and arsenic. Since the California Chamber of Commerce filed a lawsuit challenging the requirement to provide Proposition 65 warnings for dietary acrylamide, the number of acrylamide notices has dramatically decreased. In 2020, acrylamide accounted for nearly 40% of all Proposition 65 notices relating to foods; in 2021, that number dropped to 22%. In 2022, acrylamide notices accounted for less than 10% of all Proposition 65 notices relating to foods, while heavy metals alone accounted for over 90% of all pre-litigation notices issued to food, beverage, and supplement companies. The key product categories targeted by these notices remain the same as in previous years. For heavy metals these include seafood products, spices, and protein supplements, and for acrylamide, baked and fried snack foods such as chips, crackers, and cookies.

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 13



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 Bisphenol-A (BPA) in nylon apparel.

PERSONAL CARE PRODUCTS

In 2022, private plaintiffs increased their scrutiny of personal care products, issuing over 200 notices of violation targeting items such as cosmetics, sunscreen, hand sanitizers, soaps, and shampoos. Key products and chemicals targeted included:

PERSONAL CARE NOTICES

FIGURE 14

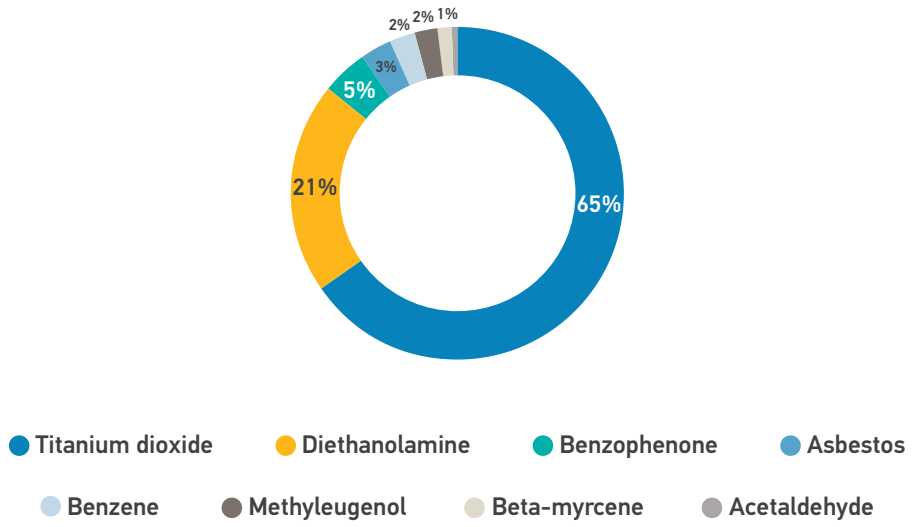


FIGURE 15

CHEMICAL	NOTICES
Titanium dioxide	143
Diethanolamine	45
Benzophenone	10
Asbestos	7
Benzene	5
Methyleugenol	5
Beta-myrcene	3
Acetaldehyde	1

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.

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

In May 2022, OEHHA announced that it would allow the rulemaking process relating to the modified short-form warnings to lapse, but that it intended to restart the rulemaking process soon. We continue to monitor these developments closely.

NEW ACRYLAMIDE WARNINGS AND COOKING EXEMPTION GUIDELINES

On March 29, 2021, the U.S. District Court for the Eastern District of California issued a preliminary injunction against the filing of new enforcement actions relating to dietary acrylamide. *Chamber of Commerce v. Bonta*, Case No. 2:19-CV-02019-KJM-EFB. In that case, the California Chamber of Commerce had challenged the existing safe harbor Proposition 65 warning as applied to acrylamide in food, arguing that such warnings are false and misleading and therefore, a violation of the First Amendment rights of its members. The district court's preliminary injunction order expressed concerns that the current warning for dietary acrylamide could, indeed, be misleading to consumers. As a result OEHHA proposed new warning language specific to dietary acrylamide exposures. Effective January 1, 2023, businesses may use this additional nonmandatory, safe harbor warning option that reads as follows:

> CALIFORNIA WARNING: Consuming this product can expose you to acrylamide, a probable human carcinogen formed in some foods during cooking or processing at high temperatures. Many factors affect your cancer risk, including the frequency and amount of the chemical consumed. For more information including ways to reduce your exposure, see www.P65Warnings.ca.gov/acrylamide.

Relatedly, OEHHA's long-awaited regulation that specifically addresses exposures to acrylamide from cooked and heat-processed foods was approved by California's Office of Administrative Law on December 20, 2022. The new regulation addresses what constitutes an "exposure" to acrylamide from cooked or heat-processed food and establishes safe harbor levels for several specific categories of foods. Foods in these categories that contain acrylamide at or below the specified

level do not need to carry an acrylamide warning as these levels are deemed to be the "lowest level currently feasible." Those food categories and safe harbor levels are reflected in the chart below:

FOODS/FOOD GROUPS	MAXIMUM AVERAGE CONCENTRATION (PPB)	MAXIMUM UNIT CONCENTRATION (PPB)
Almonds, specifically roasted almonds and chocolate-covered roasted almonds	225	–
Bread, including loaves, rolls, buns, baguettes:		
a. Nonwheat-based products	100	–
b. Wheat-based products	50	–
Cookies:		
a. Animal and animal crackers (sweet)	75	100
b. Thin and crispy	281	300
c. Sandwich wafers	115	–
Crackers, specifically savory crackers, including crispbread	350	490
Potato or sweet potato products:		
a. French fried potatoes	280	400
b. Sliced chips	281	350
c. All other products, including hash browns and potato puffs	350	490
Waffles	280	–

PROPOSITION 65 NOTABLE RULINGS

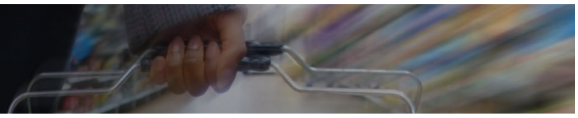
Lee v. Amazon.com, Inc., 76 Cal. App. 5th 200, 218 (2022), *as modified on denial of reh'g* (Apr. 8, 2022), *review denied* (June 15, 2022). In 2014, plaintiff Larry Lee issued a Notice of Violation alleging that Amazon.com failed to provide clear and reasonable Proposition 65 warnings for alleged exposures to mercury in certain skin-lightening creams sold by third parties on the Amazon.com marketplace. Amazon.com defended the lawsuit on the basis that, among other things, Amazon.com had immunity from Proposition 65 liability based on Section 230 of the federal Communications Decency Act (CDA), pursuant to which providers of "interactive computer services" are liable only for online speech that is directly attributable to them. Specifically, Amazon.com argued that Plaintiff was attempting to impose liability on Amazon.com for the speech of third-party sellers. While the trial court found in favor of Amazon, the appellate court reversed, holding that Amazon.com was not merely a publisher of third-party information, but was subject to its own Proposition 65 obligations. The California Supreme Court, in June 2022, declined review.

In *Environmental Health Advocates, Inc. v. SREAM, Inc.*, 83 Cal. App. 5th 721 (2022)[1], plaintiff argued that water pipes expose consumers to marijuana smoke because consumers use the water pipes to smoke marijuana. In other words, even though the water pipe itself indisputably does not contain marijuana smoke, the product must still bear a Proposition 65 warning for marijuana smoke because of its alleged "foreseeable use." Defendants, on the other hand, argued that the water pipes are nothing more than "passive vessels" used for the consumption of other products containing listed chemicals. In the same way that a wine glass does not cause an exposure to alcohol, a water pipe does not cause an exposure to marijuana smoke. The Superior Court of California, County of Alameda, ultimately agreed with defendant in the SREAM Case, holding

[1]Trial court case was Alameda Superior Court, Case No. HG20079925 ("SREAM Case")

that smoking devices that do not contain or directly expose consumers to listed substances are not subject to Proposition 65. In September 2022, a California appellate court issued a landmark decision, affirming the trial court's ruling that only "direct" exposures are subject to Proposition 65 warning requirements. *EHA v. SREAM, Inc*. (Court of Appeal, First Appellate District, Division Two, September 26, 2022, certified for publication).

ABOUT PERKINS COIE



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

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

The Perkins Coie CPG team is active outside the courtroom as well. Members of our team are frequent speakers and commentators, and publish in legal journals nationwide on emerging issues in this dynamic area of the law. Our work in the industry has led to numerous recognitions, including Perkins Coie being named a Food & Beverage Practice Group of the Year by *Law360*. We are also consistently ranked in Band 1 for Retail by *Chambers USA*.

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

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

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

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

JASMINE WETHERELL | COUNSEL
+1.310.788.3294
JWetherell@perkinscoie.com

NATALIE SANDERS | ASSOCIATE
+1.650.838.4840
NSanders@perkinscoie.com

THOMAS TOBIN | ASSOCIATE
+1.206.359.3157
TTobin@perkinscoie.com

PerkinsCoie.com/Food_Litigation