Perkins Coie



Q3 | 2024

# Food and CPG Legal Trends

# Perkins Coie is pleased to publish its Q3 Food and CPG Legal Trends Report.

This report is a bite-size version of our annual year in review, providing timely insights on trends. In the third quarter of 2024, the Consumer Packaged Goods (CPG) industry continued to face a meaningful threat of class-action activity, with continued filings against companies in the food, beverage, and personal care space. Recent months have also seen significant regulatory developments relevant to food, beverage, and CPG companies on both the federal and state levels.

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

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# Regulatory Developments

As we exit the third quarter of 2024, there have been a number of regulatory developments affecting food and consumer packaged goods (CPG) companies at both federal and state levels. We review these key developments below.

# **Federal Developments**

- USDA Updates Guideline on Substantiating
  Animal-Raising or Environment-Related Labeling
  Claims. USDA's Food Safety and Inspection
  Service (FSIS) released an updated Guideline on
  Substantiating Animal-Raising or EnvironmentRelated Labeling Claims for meat and poultry
  product labeling. FSIS explains that this nonbinding,
  updated Guideline builds on the significant work
  the agency has undertaken to date to protect
  consumers from false and misleading labels and
  to implement President Biden's Executive Order on
  Promoting Competition in the American Economy.
  Read more here.
- FDA Reorganization Establishes Human Foods
   Program. On October 1, 2024, FDA officially implemented its reorganization into the newly created Human Foods Program (HFP). FDA explains that the establishment of the HFP well positions the agency to deliver on its mission to protect and promote public health through

- science-based approaches on a range of issues such as preventing foodborne illness, reducing diet-related chronic disease, and overseeing safety of chemicals in food.
- FDA Holds Public Meeting on the Development of an Enhanced Systematic Process for Post-Market Assessment of Chemicals in Food. On September 25, 2024, FDA held a public meeting to discuss the agency's proposed enhanced systematic process for post-market assessment of chemicals in food, including food additives, color additives, generally recognized as safe substances, substances used in contact with food, and chemicals present as unintentional contaminants. FDA is accepting comments through December 6, 2024. Read more here.
- FDA Issues Draft Guidance on New Voluntary
   Targets for Sodium Reduction in Food. Published
   in August 2024, this <u>Draft Guidance builds upon</u>

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FDA's October 2021 Final Guidance on Voluntary Sodium Reduction Goals, which set out non-binding targets for reducing sodium in commercially processed, packaged, and prepared foods. The August 2024 Draft Guidance proposes additional sodium reduction targets for 16 food categories and 163 subcategories across three years.

- FDA Publishes Webpage on Microplastics and Nanoplastics in Foods. On the agency's new webpage, FDA notes that there is insufficient scientific evidence regarding any migration of microplastics and nanoplastics from food packaging into foods and beverages. The agency found that "current scientific evidence does not demonstrate that the levels of microplastics or nanoplastics detected in foods pose a risk to human health." FDA plans to monitor the research on microplastics and nanoplastics going forward.
- FDA Announces Updates to Animal Food
  Ingredient Oversight. FDA's Center for Veterinary
  Medicine announced the expiration of its
  Iongstanding Memorandum of Understanding
  (MOU) with the Association of American Feed
  Control Officials (AAFCO), effective October 1,
  2024. This MOU—which has been in place for
  nearly two decades—heralds a significant shift
  in oversight for animal food ingredients. FDA has
  released documents regarding the transition period

- after expiration of the MOU. More specifically, the agency released two draft guidances on August 8, 2024, along with a Request for Comments on its pre-market animal food ingredient review programs. Read more here.
- EPA Extends Deadline for PFAS Reporting. On September 4, 2024, EPA issued a direct final rule extending the compliance period for submitting the reports required by the "Toxic Substances Control Act Reporting and Recordkeeping Requirements for Perfluoroalkyl and Polyfluoroalkyl Substances" (PFAS Reporting Rule) by about eight months. In particular, EPA cited the agency's own technological constraints as the reason for the reporting extension. The new due dates are (i) January 11, 2026, rather than May 8, 2025, for most companies, and (ii) July 11, 2026, instead of November 10, 2025, for small businesses.
- FTC Issues Final Rule on the Use of Consumer Reviews and Testimonials. The rule is intended to combat fake reviews and testimonials and becomes effective October 21, 2024. Notably, the rule addresses (1) false consumer reviews, consumer testimonials, or celebrity testimonials, (2) buying positive or negative consumer reviews, (3) insider reviews and consumer testimonials, (4) review suppression, and (5) purchase or use of fake social media indicators. Read more here.





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AB 660 requires "food items for human consumption" in California to have specific quality date and safety date labels.

## **State Developments**

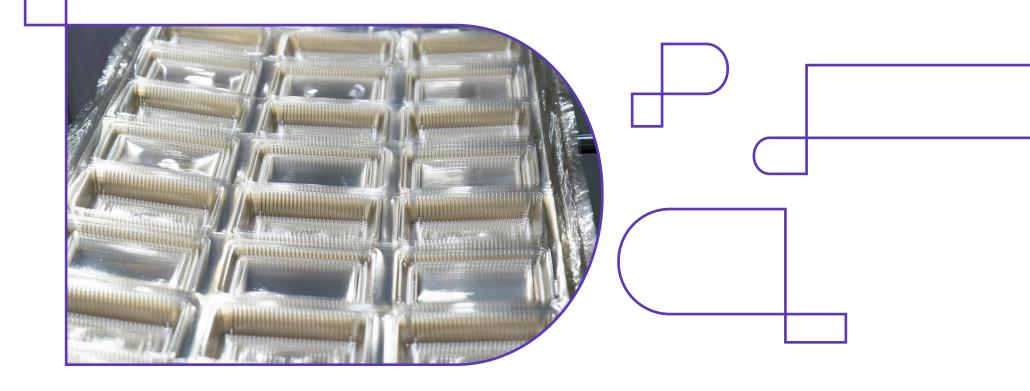
- California Enacts Food Additive Ban in Schools. Since our Midyear Report, AB 2316 has been passed by the California legislature and signe by the governor. Effective December 31, 2027, the following substances are prohibited: (1) Blue 1 (CAS 3844-45-9); (2) Blue 2 (CAS 860-22-0); (3) Green 3 (CAS 2353-45-9); (4) Red 40 (CAS 25956-17-6); (5) Yellow 5 (CAS 1934-21-0); and (6) Yellow 6 (CAS 2783-94-0). Notably, titanium dioxide (CAS 13463-67-7) was proposed to be part of the bill but was not included in the final list of prohibited substances.
- California Expands Bisphenol Ban in Children's Products. In September 2024, through SB 1266, California expanded its bisphenol A ban in bottles and cups for children three years of age or younger to all bisphenols testing above the practical quantitation limit in feeding, sucking, or teething products for children (i.e., individuals younger than 12 years of age). This amendment is effective January 1, 2026.
- California Enacts Nation's First Apparel and Textile Article EPR Program. California's Responsible Textile Recovery Act of 2024 (<u>SB 707</u>), signed into law on September 28, 2024, establishes the first apparel and textile article extended

- producer responsibility (EPR) program in the United States. Similar to other EPR laws, producers of covered products (i.e., apparel and textile articles) must form and join a producer responsibility organization (PRO), contribute to annual ecomodulation fees, and ensure their covered products achieve the performance standards established by the PRO or CalRecycle, among other requirements. Read more here.
- California Enacts Date Labeling Law. This law
   (AB 660), effective July 1, 2026, requires "food items for human consumption" in California to have specific quality date and safety date labels. The law expressly prohibits using the term "sell by" for food items for human consumption manufactured on or after July 1, 2026.
- Vermont Enacts Ban on Certain Substances in Numerous Product Categories. On May 30, 2024, Vermont's governor signed <u>S 25</u> into law. The law contains three key provisions. First, it prohibits the intentional introduction of 17 substances in cosmetic and menstrual products, including, but not limited to, PFAS, formaldehyde, and ortho-phthalates. Second, the statute also prohibits "regulated PFAS" (i.e., intentionally added PFAS or PFAS

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present at or above 100 parts per million, or after July 1, 2027, 50 parts per million in certain consumer products). Third, the law prohibits food packaging that contains intentionally added PFAS or ortho-phthalates. Intentionally added bisphenols in food packaging can only be banned after the Department of Health conducts an alternatives assessment.

New Hampshire Enacts PFAS Ban for Certain
Consumer Products. In August 2024, New
Hampshire enacted a ban on certain "PFAS-added
consumer products," including carpets and rugs,
cosmetics, textile treatments, feminine hygiene
products, food packaging and containers, juvenile
products, upholstered furniture, and textile
furnishings. The ban will become effective on
January 1, 2027.



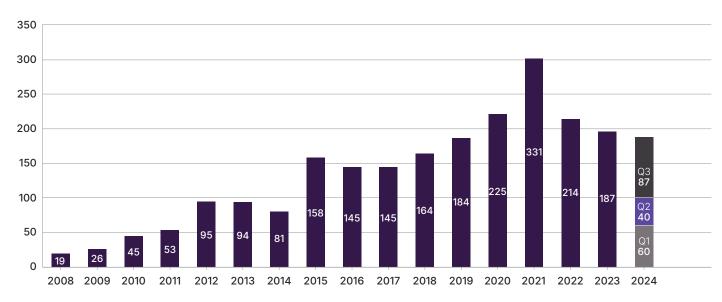
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# Food and Beverage

In the third quarter of 2024, we saw, most notably, an increase in slack fill and predominant ingredient claims for food and beverage products. Additionally, we saw continued focus from plaintiffs related to 100% representations. As usual, California continues to be the most popular state for plaintiffs to file, followed by New York, then Illinois. Interestingly, we have seen a jump in filings in state courts.

# Food and Beverage Class Actions (Figure 1)



In Q3 we observed a substantial increase in cases related to slack fill, the empty space in a package that is not filled with the product. Specifically, we have seen a rise of slack fill cases filed in California

superior court, alleging that products contain nonfunctional—for no purpose—slack fill, misleading consumers about the quantity of the product they are purchasing. Plaintiffs have targeted a wide

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range of food products (in addition to non-food products) from packaged cookies and chips to protein powder supplements.

Another popular theory of deception in Q3 has to do with representations regarding predominant ingredients, largely, representations that theoretically imply that whole grains are the predominant grain ingredient. In these cases, plaintiffs target products that highlight the presence of whole grain on the front label but are primarily made from enriched flour. Plaintiffs allege that even though the whole grain representation is not false, the relative amount, compared to refined grain content, is significantly less than a consumer would expect. In addition to whole grain representations, we saw similar predominant ingredient claims expand to representations related to butter and cheese. For example, we saw several cases where plaintiffs alleged that a butter representation, such as "Made with Real Butter," implied that butter was the predominant and/or exclusive fat ingredient and cases where plaintiffs alleged that a cheese representation, such as "Made with Real Cheese," implied the cheese flavor was exclusively from cheese. See e.g., Natasha Jones v. Schwan's Consumer Brands Inc., Case No. 523357/2024 (Kings CSupCt 2nd JD filed Aug. 29, 2024); Alex Garcia v. Herr Foods Incorporated, 717693/2024 (Queens Cty Sup Ct 11th JD. Aug. 27 2024).

These cases have been mainly filed in New York. See e.g., Deborah Lanzi v. Dollar General Corporation, Case No. 518296/2024 (Kings CSupCt 2nd JD, filed July 5, 2024) (alleging claim "8g of whole grain per serving" is misleading due to the relative amount of enriched flour); Britney Murgolo, et al. v. The Price Chopper Inc., Case No. tc240711-or901 (Orange CSupCt 9th JD, filed July 11, 2024) (same). As there is favorable precedent from the U.S. Court of Appeals for the Second Circuit—Mantikas v. Kellogg—holding that "reasonable consumers are likely to understand that [the product is] typically made predominantly ...[of] whole grain" based on the label statement "made with whole grain," it is unsurprising that these predominant ingredient claims have been, for the most part, filed in New York. See id., 910 F.3d 633, 638 (2d Cir. 2018). In Q3 courts have continued to rely on *Mantikas* to deny Rule 12 motions in cases with similar facts. See e.g., Frias v. Mars Wrigley Confectionery US LLC, No. 23 CIV. 4422 (AT), 2024 WL 3988667, at \*5 (S.D.N.Y. Aug. 28, 2024) (denying motion to dismiss in part, finding phrase "made with real cheese" deceptive relying on Mantikas).

Claims related to the use of "100%" in a label statement (e.g., 100% juice) continued to be a prime target for plaintiffs in Q3. In these cases, plaintiffs alleged that the 100% statements are false because the products contain other ingredients, including

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water and preservatives. See Rauchelle Leyman, et al. v. The Kroger Company, 3:24-cv-01001-W-VET (S.D. Cal.filed June 7, 2024) (targeting 100% juice claim); Cindy Pappert, et al. v. Conagra Brands Inc., 1:24-cv-04835 (N.D. III. filed June 11, 2024) (targeting "100% Whole Fish" claim). Notably, however, in Q3 it became clear that there is a limit to 100% claims—they are not a guarantee of chemical purity. For example, the U.S. District Court for the Northern

District of Illinois recently dismissed a putative class action alleging labeling of spring water with "100% Natural Spring Water" was false or misleading because the water contained microplastics. *Christine Slowinski, et al. v. BlueTriton Brands, Inc.*, No. 1:24-cv-00513 (N.D. III. – August 9, 2024). The court concluded that no reasonable consumer would expect "100% Natural Spring Water" to be free of microscopic particles like microplastics.



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# Beauty, Cosmetics, and Personal Care

# **Federal Regulations**

The Modernization of Cosmetics Regulation Act (MoCRA), signed into law in December 2022, represents a significant advancement in the regulation of cosmetics in the United States. This legislation aims to enhance consumer safety, increase transparency, and modernize the regulatory framework for the cosmetics industry. As of the third quarter of 2024, MoCRA's implementation is ongoing, with substantial implications for both manufacturers and consumers.

By July 1, 2024, owners and operators of cosmetic manufacturing facilities that engage in the manufacturing or processing of cosmetic products for distribution in the United States were required to register their facilities with the FDA. For new facilities, registration must occur within 60 days of beginning manufacturing or processing activities. Additionally, all facility registrations must be renewed every two years.

Also by July 1, 2024, all cosmetic companies were required to submit a cosmetic product listing for each product to the FDA. New cosmetic products must be listed with the FDA within 120 days of introduction into interstate commerce. Cosmetic companies

are also required to provide annual updates to their product listings, including notifications of discontinued products.

Under MoCRA, cosmetic companies must identify each fragrance allergen on the product label. As for which substances are considered fragrance allergens for the purposes of MoCRA, that's up to the FDA. The agency was required to issue a notice of proposed rulemaking for this regulation by June 29, 2024. However, as of September 2024, the draft rulemaking has not been published. The Office of Information and Regulatory Affairs indicated in its Spring 2024 Unified Agenda that it is targeting October 2024 for the draft rulemaking on fragrance allergens. The industry continues to await these draft rules.

Coming up, the FDA is also set to implement several new regulations aimed at improving the safety and quality of cosmetic products. These regulations include:

Proposed Good Manufacturing Practices (GMP)
 Rules: The FDA will publish proposed GMP rules
 to establish standards for the manufacturing,
 processing, packing, and holding of cosmetic

products. These rules will help ensure that cosmetics are produced in a safe and sanitary manner.

- Standardized Testing Methods for Asbestos: The FDA will promulgate proposed regulations to require the use of standardized testing methods for detecting and identifying asbestos in talc-containing cosmetic products. This will help to protect consumers from exposure to asbestos fibers.
- Assessment of PFAS Substances: The FDA
  will assess the use of per- and polyfluoroalkyl
  substances (PFAS) in cosmetic products and
  evaluate the scientific evidence regarding their
  safety. This assessment will inform potential
  regulatory actions to address any concerns related
  to PFAS exposure.

# States' Regulations

# California's Laws Require Reporting Fragrance Allergens

While the federal government hasn't yet mandated fragrance allergen labeling, California has taken proactive steps. Under state law, cosmetic companies must disclose the presence of certain hazardous ingredients, including fragrance allergens, to the California Department of Public Health (CDPH).

The <u>California Safe Cosmetics Act of 2005 (CSCA)</u> and the <u>Cosmetics Fragrance & Flavor Ingredient Right to Know Act of 2020 (CFFIRKA)</u> outline these reporting requirements. The <u>Reportable Ingredient List (Excel)</u>, compiled by CDPH, specifies which ingredients must be disclosed.

For fragrance allergens, the reporting threshold is higher for leave-on products (0.001%) than for rinse-off products (0.01%). Common fragrances such as menthol, vanillin, camphor, peppermint, lavender, and rose flower oil are included in the list of reportable allergens. Recent updates align California's fragrance allergen requirements with those of the European Union (EU). Manufacturers must now report any fragrance allergen included in Annex III of the EU Cosmetics Regulation No. 1223/2009, as required to be reported pursuant to the EU Detergents Regulation No. 21 648/2004. These reports are due by the same deadlines set by the EU: either 2026 or 2028, respectively, depending on whether the cosmetic product is new or existing.

#### Litigation Review (July 2024-September 2024)

In the third quarter of 2024, litigation trends involving "clean" beauty claims continued to evolve, with a particular focus on the presence of microcontaminants in products. While Sephora successfully defended its "Clean at Sephora"







Marketers should exercise caution and ensure transparency in their product labeling to avoid potential legal challenges.

program earlier this year, Target's "Target Clean" program faced a setback as a class action against it advanced beyond the motion to dismiss phase.

In Boyd v. Target Corp., plaintiffs alleged that Target's marketing and labeling for its "Target Clean" products were deceptive, claiming that the products contained ingredients they were purportedly free from, as well as other harmful substances. The District of Minnesota denied Target's motion to dismiss, finding that factual disputes remained regarding whether a reasonable consumer could be misled by the "clean" claims. The court concluded that "[t]he reasonableness of Plaintiffs' expectations remains up for strenuous debate." Pearlie Boyd, et al. v. Target Corp., No. 0:23-cv-02668-KMM-DJF (D. Minn. September 25, 2024).

The Ninth Circuit partially vacated the district court's dismissal of a class action against Kimberly-Clark that alleged deceptive labeling of "plant-based wipes" containing synthetic ingredients. The appellate panel found that products without an asterisk and qualifying statements on the label could mislead a reasonable consumer, reversing the dismissal for these products. However, the panel upheld the dismissal for products with qualifying statements, as they were not deemed misleading in context. Whiteside v. Kimberly Clark Corp., 108 F.4th 771, 2024 WL 3435308 (9th Cir. July 17, 2024).

Additionally, the Northern District of Illinois dismissed a class action against John Paul Mitchell Systems that claimed the marketing of the defendant's dry shampoo failed to disclose the presence of benzene. The court ruled that the plaintiffs did not establish an injury-in-fact, as they did not allege that the product they purchased contained benzene, only that there was a risk.

Furthermore, the plaintiffs lacked standing for injunctive relief since they were now aware of the alleged benzene presence and unlikely to purchase the product again. Nelson et al. v. John Paul Mitchell Systems, No. 1:22-cv-06364 (N.D. III. September 23, 2024).

The mixed outcomes in these cases highlight the complexities surrounding "clean" beauty claims. Marketers should exercise caution and ensure transparency in their product labeling to avoid potential legal challenges.



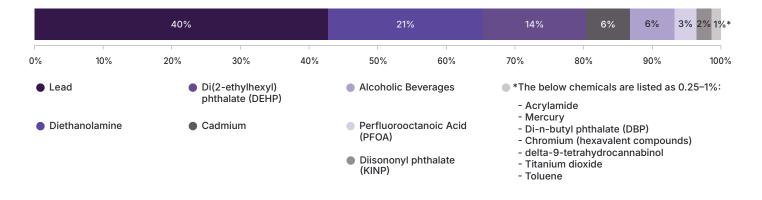
# Proposition 65

## 2024 by the Numbers

In Q3 2024, plaintiffs filed 978 Proposition 65 pre-suit notices of violation. Of those, approximately 34% of the notices relate to exposures allegedly caused by foods, dietary supplements, or beverages. A significant number of the notices relating to food involve seafood products that allegedly contain lead, such as shrimp, shellfish, sardines, and seaweed. One enforcer in particular, Environmental Health Advocates, has started issuing notices of violation for acrylamide in food—issuing about 30 notices this year, even though the *CalChamber* injunction against enforcement of dietary acrylamide actions remains in place.

Diethanolamine remains the number one chemical of concern for non-food consumer goods, with lead coming in a close second, and Di(2-ethylhexyl) phthalate (DEHP) rounding out the top three. See the chart below for a detailed breakdown.

# Top Chemicals at Issue in Q3 2024 (Figure 2)



# **Litigation Updates**

Attorney General Announces \$2 Million Settlement with Mead Johnson Regarding Lead in Infant Formula (Alameda County Superior Court Case No. RG18912553)

On August 27, 2024, California Attorney General Rob Bonta announced a settlement with Mead Johnson Nutrition Co. and Mead Johnson & Co., LLC (together "Mead Johnson"), regarding allegations that Mead Johnson sold certain infant and toddler formulas without a Proposition 65 warning for lead exposures. The California attorney general had originally filed the action in July 2018, alleging that Mead Johnson had violated Proposition 65 as well as the California Unfair Competition Law, Business and Professions Code Section 17200 et seq. Under the settlement, Mead Johnson will pay nearly \$2 million, including \$850,000 toward a supplemental environmental project aimed at reducing levels of lead in Californians' home drinking water.

Under the terms of the settlement, Mead Johnson must maintain lead levels at or below five parts per billion ("ppb") for milk-based formulas, seven ppb for soy-based formulas, and seven ppb for its Nutramigen products. The settlement also set "Naturally Occurring Lead Levels" of three ppb for milk-based products or five ppb for soy-based products.

# California Chamber of Commerce Files Motion for Summary Judgment in First Amendment Acrylamide Litigation

On October 15, 2024, the California Chamber of Commerce (CalChamber) filed a motion for summary judgment against the enforcement of Proposition 65's cancer warning requirement for acrylamide in food. Acrylamide, a chemical that forms naturally in many foods during cooking processes like frying, roasting, and baking, was added to the Proposition 65 list based on findings by the International Agency for Research on Cancer (IARC) and the U.S. Environmental Protection Agency (EPA). However, in connection with this long-running litigation, CalChamber has argued that the warning is misleading and unconstitutional, as it misinforms consumers about the actual cancer risks associated with dietary acrylamide.

CalChamber's motion for summary judgment makes three primary arguments:

 Misleading and Controversial Nature of the Warning: The warning implies that consuming products containing acrylamide increases the risk of cancer in humans, a claim unsupported by scientific consensus. CalChamber notes that no regulatory or scientific body has concluded



OEHHA amended
Title 27 to provide an additional safe harbor warning option for businesses that cause significant exposures to acrylamide from food products.

that dietary acrylamide increases cancer risk in humans. Agencies such as the U.S. Food and Drug Administration (FDA) and the National Cancer Institute (NCI) have found no consistent evidence linking dietary acrylamide to cancer. The U.S. Court of Appeals for the Ninth Circuit previously upheld an injunction against enforcement of the warning, noting the lack of a "strong scientific consensus" and the misleading nature of the warning to ordinary consumers.

2. Unjustified and Unduly Burdensome
Requirement: CalChamber highlights that
the alleged harm from dietary acrylamide is
purely hypothetical and unproven. The warning
requirement imposes significant litigation burdens
on businesses, including potential penalties of up
to \$2,500 per day for noncompliance and the high
costs of defending against private enforcement
actions. The requirement also leads to "warning
fatigue," where consumers become desensitized
to warnings, diluting the effectiveness of legitimate
health warnings.

#### 3. Failure to Meet Constitutional Standards:

CalChamber asserts that the warning requirement fails to meet the constitutional standards for compelled commercial speech. Under the *Zauderer* standard, compelled disclosures must

be purely factual, noncontroversial, and not unduly burdensome. The Proposition 65 warning for acrylamide fails all three criteria.

Defendant Attorney General Rob Bonta and Defendant-Intervenor Council for Education and Research on Toxics must file their responses to the motion for summary judgment by November 18, 2024. A hearing on the motion has been set for January 23, 2025.

### **Regulatory Updates**

On October 15, 2024, the Office of Environmental Health Hazard Assessment (OEHHA) amended Title 27, California Code of Regulations Section 25607.2(b), to provide an additional safe harbor warning option for businesses that cause significant exposures to acrylamide from food products. The Office of Administrative Law (OAL) previously approved the rulemaking on October 4, 2024. The effective date for the regulation is January 1, 2025.

The new acrylamide warning options are as follows:

 The words "WARNING:" or "CA WARNING:" or "CALIFORNIA WARNING:" in all capital letters and bold print, followed by the words "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 <a href="https://www.P65Warnings.ca.gov/acrylamide">www.P65Warnings.ca.gov/acrylamide</a>.
- The words "WARNING:" or "CA WARNING:" or "CALIFORNIA WARNING:" in all capital letters and bold print, followed by the language in subsections (A) and (B). Optional language in subsection (C) may be added.
  - A. "Consuming this product can expose you to acrylamide," or the words "Consuming this product can expose you to acrylamide, a chemical formed in some foods during cooking or processing at high temperatures."
  - B. At least one of the following sentences:
    - i. "The International Agency for Research on Cancer has found that acrylamide is probably carcinogenic to humans."

- ii. "The United States Environmental Protection Agency has found that acrylamide is likely to be carcinogenic to humans."
- iii. "The United States National Toxicology Program has found that acrylamide is reasonably anticipated to cause cancer in humans."
- C. The content in subsections (A) and (B) may be followed by one or more of the following sentences:
  - i. "Acrylamide has been found to cause cancer in laboratory animals."
  - ii. "Many factors affect your cancer risk, including the frequency and amount of the chemical consumed."
  - iii. "For more information including ways to reduce your exposure, see <u>www.</u> <u>P65Warnings.ca.gov/acrylamide."</u>





**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**

DBiderman@Perkinscoie.com +1.310.788.3220

## Charles C. Sipos

#### **PARTNER**

CSipos@Perkinscoie.com +1.206.359.3983

## Contributors

#### Brian P. Sylvester

#### PARTNER

BSylvester@Perkinscoie.com +1.202.434.1669

#### **Jasmine Wetherell**

#### **PARTNER**

JWetherell@Perkinscoie.com +1.310.788.3294

#### **Kristine Kruger**

#### **SENIOR COUNSEL**

KKruger@Perkinscoie.com +1.206.359.3111

#### **Thomas Tobin**

#### COUNSEL

TTobin@Perkinscoie.com +1.206.359.3157

#### **Cathie Chen**

#### **ASSOCIATE**

SChen@Perkinscoie.com +1.206.654.6200

#### **Natalie Sanders**

#### **ASSOCIATE**

NSanders@Perkinscoie.com +1.650.838.4840