Perkins Coie

Q3 | 2025

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 2025, 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.

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Regulatory Developments

New food regulatory developments emerged at the federal and state levels during the third quarter of 2025. Many of these developments are detailed below:

- **FDA details guidance agenda.** This summer, the U.S. Food and Drug Administration (FDA) published its Human Foods Program guidance agenda for 2025. The agenda indicates proposed guidance may be forthcoming on topics such as new dietary ingredient notifications, food colors derived from natural sources, and action levels for cadmium and inorganic arsenic in food for babies and young children. Read more here.

- **FDA launches new rulemakings regarding standards of identity.** On July 17, FDA announced it was revoking 52 standards of identity that the agency considered "obsolete." Standards of identity are regulations defining particular foods and their contents. FDA announced it was revoking standards of identity for 11 types of canned fruits and vegetables, 18 types of dairy products, and 23 other types of food, ranging from bakery products and macaroni and noodle products to food dressings and flavorings.

- **FDA approves use of new color additive.** On July 14, FDA announced a new color additive, gardenia (genipin) blue, was safe for its intended uses in certain beverages and candies. FDA requires the color additive to be used at levels consistent with good manufacturing practices. This color additive is produced using soy protein hydrolysate, and soy is a major food allergen. Accordingly, the agency will require an allergen disclosure when this new color additive is used at this time.

- **Federal agencies announce joint request for information regarding so-called ultra-processed foods.** On July 23, FDA, the U.S. Department of Agriculture, and the U.S. Department of Health and Human Services promulgated a request for information (RFI) seeking comment about so-called ultra-processed foods. In the RFI, the agencies acknowledged that, "there is no single, universally accepted definition of [ultra-processed foods], and the definition of such foods has varied considerably over time." The public comment period was extended to October 23, 2025. The agencies received more than 19,000 comments in response to this RFI.

- **Texas state ban on sale of cultured protein takes effect.** Earlier this year, Texas became the latest state to institute limitations on the manufacture or sale of cultured meat. With the enactment of SB 261, Texas joins other states such as Alabama, Mississippi, and Florida with laws limiting cultured meat. The Texas law prohibits the sale of cultured protein in the state from September 1, 2025, through September 1, 2027. Read more here.

- **FDA cracks down on a kratom-derivative substance.** On July 29, FDA formally recommended 7-hydroxymitragynine (7-OH) be scheduled under the Controlled Substances Act. 7-OH is a concentrated byproduct of the kratom plant, and FDA is currently not focused on natural kratom leaf products. FDA considers 7-OH a substance with a high potential for abuse due to its strong binding affinity to opioid receptors, asserting that 7-OH has potency that can exceed morphine. On July 15, FDA issued multiple warning letters regarding products containing 7-OH. Read more here.

- **FDA announces public meeting on food allergens.** In September 2025, FDA described its plans to host a three-day virtual public meeting on food allergen thresholds to benefit public health. Among other things, FDA plans to discuss allergen risk assessment and the effect of certain low level dose exposures—called thresholds—and risk assessments for individuals with food allergies. The agency noted this public meeting will focus on food allergen thresholds for the major food allergens in the United States, and the concepts and strategies developed from this event may be considered as FDA addresses other food allergies and intolerances in the future.

- **FTC issues warning letters regarding "Made in the USA" claims.** On July 8, the Federal Trade Commission (FTC) sent a total of six warning letters to companies and online marketplaces regarding "Made in the USA" claims. The warning letters cautioned these companies to discontinue claims or provide substantiation that the products at issue are in fact "all or virtually all" made in the United States. The warning letters to online marketplaces outlined the FTC's current thinking on "Made in the USA" claims and how they might apply to third-party sellers on those marketplaces.

- **California passes a law on so-called ultra-processed foods.** On September 16, the California legislature passed AB 1264. Governor Gavin Newsom signed the bill on October 8, and its provisions will take effect over time. Among other things, California legislators enacted a statutory definition of so-called "ultraprocessed food" for school-related purposes. Specifically, the legislation labels so-called UPFs in the school food context as

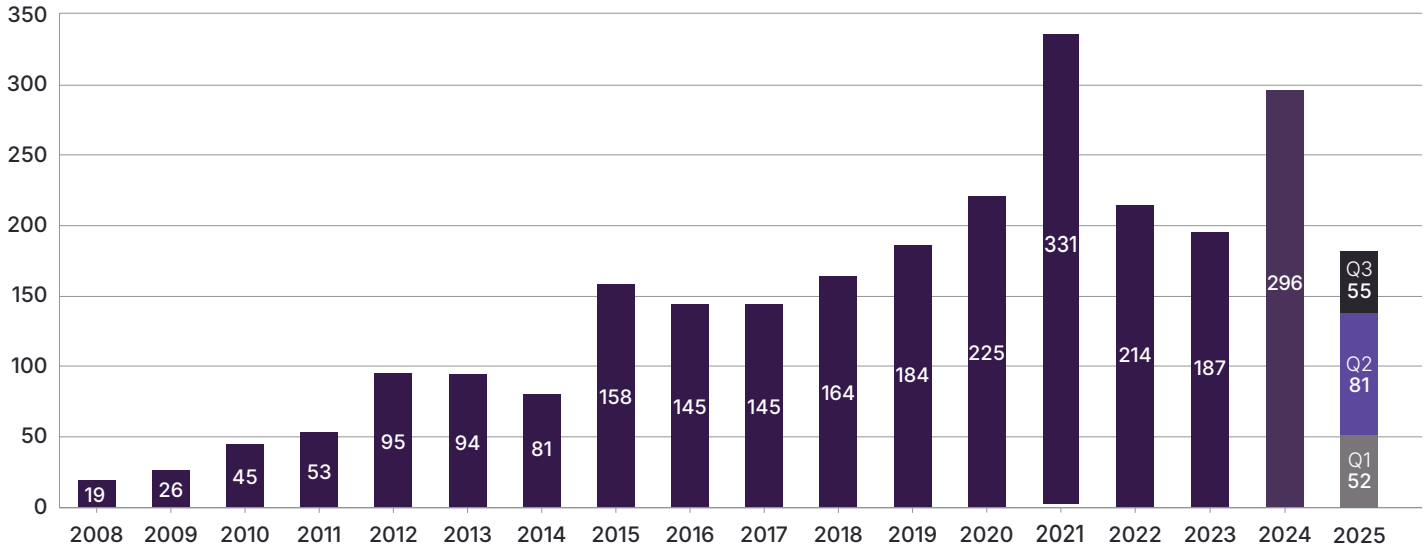
foods or beverages meeting two criteria. First, the purported UPF must contain one or more certain ingredients, such as stabilizers, thickeners, or colors. Second, the purported UPF must contain certain non-nutritive sweeteners or more than specified levels of saturated fat, sodium, or added sugar. The law also requires the regulation of as-yet undefined "ultraprocessed foods of concern" by June 2028.

- **Texas and Louisiana enact new laws on food ingredient disclosures and school nutrition.** Louisiana and Texas recently enacted new legislation imposing disclosure requirements on food and beverage manufacturers, as well as new restrictions on ingredients permitted in public school meals. Some changes took effect on September 1, 2025, with others rolling out in the next few years. Among other things, the Texas statute would require products containing any of 44 specified ingredients to be labeled with the following language: "WARNING: This product contains an ingredient that is not recommended for human consumption by the appropriate authority in Australia, Canada, the European Union, or the United Kingdom." Read more here.

Food and Beverage

In Q3, plaintiffs continued to ramp up cases related to ingredients such as citric acid, malic acid, and ascorbic acid, alleging that these substances are "artificial" and scrutinizing their roles as flavors, preservatives, or both.

Food and Beverage Class Actions (Figure 1)



In cases like *Yolanda Jean Pitre v. Oakberry Acai Inc.*, No. 2:25-cv-07231 (C.D. Cal.) and *Jansen Barron v. Aldi Inc.*, No. 034829/2025 (N.Y. Supreme Ct., Rockland Cnty.), plaintiffs allege that products labeled "no preservatives" or "no artificial flavors" contain synthetic acids that act as preservatives or artificial flavors, contrary to marketing claims. Defendants strongly maintain that these ingredients are either naturally derived or not used for the challenged function and, therefore, their inclusion does not render product labeling false or misleading. Although some of these claims survive the Rule 12 stage, plaintiffs' allegations increasingly strain the limits of reasonableness and are often based on speculation rather than fact.

Another significant area of litigation in Q3 centered on the meaning of "all natural." Plaintiffs assert that "all natural" labeling leads consumers to expect products free from synthetic or chemically processed ingredients. For example, in *Joseph Thomas v. Drink LMNT, Inc.*, No. 0:25-cv-61401 (S.D. Fla.), and *Maria Nelson v. Flowers Bakeries, LLC*, No. 5:25-cv-01801 (C.D. Cal.), plaintiffs allege that the inclusion of maltodextrin or ascorbic acid renders "all natural" claims deceptive. Courts are carefully scrutinizing whether these ingredients are synthetic and whether their inclusion is inconsistent with reasonable consumer expectations under "all natural" marketing. Importantly, courts have recognized that "all natural" does not have a strict or universally accepted meaning, and that plaintiffs' interpretations are often overly rigid or unreasonable. The ambiguity surrounding the definition of "all natural," however, has led to opportunistic plaintiffs filing suit even in questionable circumstances.

Q3 also featured an interesting and unique case addressing ingredient discrepancy, specifically related to caffeine content. In July 2025, the U.S. District Court for the Southern District of New York dismissed with prejudice a putative class action alleging that energy drinks were deceptively labeled as containing 200 milligrams of caffeine, when they contained 15-25 milligrams more. The court found the plaintiffs' allegations (based on lawyer-commissioned testing) were conclusory and lacked critical details about the testing process. Importantly, the court reasoned that a reasonable consumer seeking a high-caffeine energy drink would not be materially misled by a 7%–11% increase in caffeine content, as such consumers generally prefer more caffeine, not less. The decision underscores the principle that minor variances in ingredient content, particularly where they do not disadvantage consumers, are unlikely to support a plausible claim of deception.

We also saw a ruling related to per- and polyfluoroalkyl substances (PFAS). In *Elizabeth Castillo v. Prime Hydration LLC* (N.D. Cal., Sept. 2, 2025), the U.S. District Court for the Northern District of California trimmed a putative class action alleging that defendant's sports drink contained PFAS. The court took judicial notice of the U.S. Environmental Protection Agency's (EPA) updated PFAS regulations but found that these did not conclusively establish product safety as a matter of law. The court held that whether the PFAS levels rendered the product unfit for consumption was a factual question inappropriate for resolution at the pleading stage, allowing the consumer deception claim to proceed. This case illustrates, in Q3, the impact of the evolving regulatory landscape related to PFAS on litigation, as courts increasingly rely on updated scientific and regulatory guidance when assessing consumer protection claims.

In the first half of 2025, plaintiffs brought several lawsuits alleging that defendants overstated the amount of protein in their products.

Finally, in a Q3 decision, the U.S. District Court for the Southern District of Florida addressed packaging deception claims in *Nathan Vidal, et al. v. The Hershey Company*, Case No. 0:24-cv-60831-MD (S.D. Fla., Sept. 19, 2025). Plaintiffs alleged that Halloween-themed Reese's Peanut Butter products were deceptively packaged because the candies did not feature the jack-o'-lantern carvings depicted on the packaging. The court dismissed the case, holding that subjective disappointment does not constitute economic injury, and noting that plaintiffs failed to allege any defect, inedibility, or price premium. The court characterized the allegations as mere buyer's remorse, not a cognizable injury under the law.

Protein Litigation

In the first half of 2025, plaintiffs brought several lawsuits alleging that defendants overstated the amount of protein in their products by allegedly failing to provide the proper percent of Daily Value (%DV) on the Nutritional Facts Panel (NFP), or by requiring the addition of other food products to meet the amount of stated protein on the label. In the third quarter, the lawsuits continued to flow in, especially for plant-based protein products like protein powders. Specifically, plaintiffs allege that plant-based proteins have lower protein digestibility-corrected amino acid scores (PDCAAS) than animal-based proteins and as a result are, allegedly, inherently a "lower quality" protein, requiring a corrected %DV in the NFP. Additionally, there have been at least a few lawsuits targeting prepared foods, such as salad packs and oatmeal, which derive their protein from plant-based sources.

For example, in *Juan Vila, et al. v. Taylor Farms Retail, Inc., et al.*, 3:25-cv-06255-TSH (N.D. Cal., filed July 25, 2025), the plaintiffs allege that the defendants' chopped salad kit products make protein content claims on the front label but fail to provide the PDCAAS-corrected %DV in the NFP. Additionally, because the primary source of protein in the salad kits is nuts—which the plaintiffs allege have a PDCAAS of 0.4—the products contain less usable protein than claimed. In another case, the plaintiff targeted an overnight oat product. *Dimitra Charalampopoulou v. Mush Foods, Inc.*, 5:25-cv-07316-NC (N.D. Cal., filed Aug. 29, 2025). Specifically, the plaintiff asserted that the defendant misrepresented the protein content and quality of its products by failing to disclose the lower and more accurate amount of usable protein based on FDA regulations and the PDCAAS methodology. Again here, the plaintiff attacked the fact that the products contained plant-based proteins, arguing that such protein has lower digestibility and nutritional value.

Plant-based protein powders also continue to be the target of many lawsuits. The arguments put forth

by plaintiffs are similar to the above: namely, that the product is deceptive because it makes a protein content claim on the front label but fails to disclose the PDCAAS-corrected %DV, and that the omission is deceptive because the actual bioavailable protein content for proteins like pea protein is significantly lower than advertised, allegedly causing consumers to pay a premium. See *Armando Plascencia v. Olympian Labs, Inc.*, 2:25-cv-06841 (C.D. Cal., filed July 25, 2025) and *Rick Chavez v. EHPLabs LLC dba Blessed Protein*, CU25-08234 (Solano County, filed Sept. 9, 2025).

Protein products are also susceptible to other types of claims. For example, a plaintiff recently filed a case in California state court alleging that the marketing of a protein bar is deceptive and misleading because the product is advertised as "high protein" when it is primarily made of other nonprotein ingredients. *Sergio Perez v. Go Macro, LLC*, 25CV004722 (Monterey County, filed Sept. 16, 2025). The plaintiff further alleges that the product does not meet the FDA's requirements for stating a "high protein" claim.

Slack Fill

The first half of 2025 saw a large number of lawsuits involving slack fill–related claims, and Q3 appears to continue this trend. The common arguments put forth in complaints are that: (1) the product packaging is misleading because it prompts consumers to believe they are purchasing more product than they receive, and (2) the product contains nonfunctional slack fill.

The definition of slack fill states: "[a] container that does not allow the consumer to fully view its contents shall be considered to be filled as to be misleading if it contains nonfunctional slack fill." 21 C.F.R. § 100.100(a). "Nonfunctional slack fill" is defined as "the empty space in a package that is filled to less than its capacity for reasons" apart from those enumerated in the statute, otherwise known as the "safe harbor provisions." *Id*.

Slack fill cases have generally targeted packaged food, ranging from chips to candies to dried fruit to baking mixes. For example, a recently filed federal court case alleged that the opaque packaging of defendant's freeze-dried fruit product is deceptive because it contains nonfunctional slack fill and leads the consumer to believe they are purchasing more product than is contained in the package. The case, *Simon Oh v. Target Brands, Inc. d/b/a Good and*

Gather, No. 2:25-cv-06843 (C.D. Cal., filed July 25, 2025), was voluntarily dismissed.

But while many slack fill cases have involved food products, slack fill litigation targeting beauty products has seen an increase. At least two cases filed in federal court in California involve allegations that hair care products are deceptively packaged in oversized, opaque containers having large amounts of empty space, constituting nonfunctional slack fill. See *Silvia Garcia v. Zuru LLC*, 5:25-cv-01908 (C.D. Cal., filed July 27, 2025) and *Silvia Garcia v. Vogue International LLC*, 3:25-cv-01987-W-BLM (S.D. Cal., filed Aug. 3, 2025).

Though there is less case law on slack fill litigation involving beauty and personal care products, a fairly recent case in the Southern District of California may provide some insight into how a court may view these types of claims. In *Krause-Pettai v. Unilever United States, Inc.*, the court granted summary judgment for the defendant, thereby rejecting the plaintiff's claims that the defendant's product, a deodorant and antiperspirant, was misleading because it was sold in "oversized containers[.]" 696 F. Supp. 3d 916, 920, 929 (2023). The court specifically found compelling evidence that the defendant's product was in line with competing products in the industry, the product packaging was partially translucent, and the labeling accurately and clearly displayed the net weight. *Id*. at 928-29.

Additionally, a 2016 decision by the U.S. Court of Appeals for the Ninth Circuit sheds some light on this area. In *Ebner v. Fresh, Inc.*, the court specifically rejected plaintiff's allegation that the defendant's sugar balm lip product was deceiving because it was packaged in "vastly oversized [weighty] tubes and [cardboard] boxes," and instead held that the accurate disclosure of the net weight on the product's label, and the consumers' ability to see any remaining product inside of the tube, dispelled any questions of alleged deception. 838 F.3d 958, 962, 965-67. The Ninth Circuit further highlighted that the design and packaging were common in the cosmetics market, and consumers would not expect the "packaging to reflect directly the quantity of product contained therein." *Id*. at 967 (holding that the "elaborate packaging and weighty feel" was typical and "expected by a significant portion of [the defendant's] 'targeted customers'").

Beauty, Cosmetics, and Personal Care

Federal Updates

In the third quarter of 2025, the FDA continued to advance the implementation of the Modernization of Cosmetics Regulation Act (MoCRA), with notable progress in facility registration and product listing compliance. As of July 2, 2025, a total of 12,049 unique, active cosmetic product facilities had registered with FDA, reflecting broad industry engagement since the registration requirement took effect on July 1, 2024. Of these, 2,141 facilities are located in the United States—including 447 in California and 241 in Florida—while the remaining 9,908 facilities are registered internationally, with 5,806 in China alone.

Additionally, 784,270 unique, active cosmetic products have been listed, demonstrating substantial compliance with MoCRA's product listing mandate. These figures underscore the scale of regulatory activity and the industry's commitment to meeting new federal standards. The FDA continues to provide updated guidance and resources to support ongoing compliance, with particular attention to small businesses and high-risk product categories.

However, as noted in prior 2025 updates, the regulatory landscape has shifted this year with the arrival of a new administration in Washington, D.C. President Donald J. Trump issued a regulatory freeze pending review, which has paused several elements of MoCRA implementation. This freeze affects new or pending rules until they undergo further review by new agency leadership, resulting in delays for several important MoCRA regulations. Notably, FDA has postponed the proposed rule on fragrance allergen labeling, which would require disclosure of certain fragrance allergens in cosmetic products, as well as the development of standardized testing methods for detecting asbestos contamination in talc-based products. The agency's work on formal Good Manufacturing Practices (GMP) regulations for cosmetics has also stalled.

Despite these delays, federal legislative activity continues. In July 2025, the Safer Beauty Bill Package was reintroduced in Congress, backed by a coalition of more than 150 organizations. This suite of bills aims to build upon MoCRA by proposing stricter chemical bans, greater ingredient disclosure

requirements, and enhanced protections for salon workers. The package reflects ongoing momentum to strengthen consumer safety and transparency in the cosmetics industry.

State Action

During the third quarter of 2025, several states—including Washington, California, and Maryland—finalized new rules or continued to advance previously enacted cosmetics legislation, reflecting a growing trend toward stricter chemical controls and enhanced supply chain transparency. These state-level actions are designed to address regulatory gaps left by MoCRA, with particular focus on restricting intentionally added formaldehyde-releasing chemicals, PFAS, and improving ingredient disclosure.

In Washington, the Department of Ecology adopted a significant rule on August 28, 2025, banning intentionally added formaldehyde and 25 formaldehyde-releasing chemicals from cosmetics, effective January 1, 2027. This rule implements the state's 2023 Toxic-Free Cosmetics Act and sets a compliance deadline for retailers, allowing them until December 31, 2027, to sell existing stock. Enforcement will rely on formulation reviews and product sampling, with the department presuming that any detected formaldehyde was intentionally added. To support industry compliance, the department scheduled a webinar for October 1, 2025, to provide guidance and resources for affected businesses.

California also saw notable regulatory activity in Q3. The Department of Toxic Substances Control initiated two rulemakings under its Safer Consumer Products program. The first, which closed its public comment period on July 7, 2025, proposed amendments to clarify compliance options for importers. The second, focused on microplastics, proposed adding these substances to the Candidate Chemical List, potentially paving the way for future regulatory action; the comment period for this proposal closed on August 4. Additionally, the California Air Resources Board announced an update to the 2023 Consumer and Commercial Products Survey, extending the reporting deadline to September 22, 2025. While California's bans on intentionally added PFAS and other toxic ingredients under the Toxic-Free Cosmetics Act took effect on January 1, 2025, cosmetic companies are continuing to grapple with ongoing compliance in the state.

Cosmetic companies continue to face a surge in consumer class actions challenging product labeling, ingredient disclosures, and marketing claims.

Together, these state-level initiatives underscore a dynamic and evolving regulatory landscape for cosmetics, with states taking proactive steps to protect consumers and the environment through targeted chemical bans and increased transparency requirements.

Litigation Trends in Q3

Cosmetic companies continue to face a surge in consumer class actions challenging product labeling, ingredient disclosures, and marketing claims. Plaintiffs are increasingly targeting representations such as "natural," "mineral," "hypoallergenic," "flushable," and "biodegradable," alleging that products contain undisclosed chemicals, allergens, or synthetic ingredients that contradict these claims. Notably, lawsuits have focused on the presence of PFAS, heavy metals, and other toxic substances, as well as slack fill packaging practices that allegedly mislead consumers about product quantity. Proposition 65 actions in California remain prevalent, with numerous filings against brands for failing to warn consumers about exposure to a certain carcinogen. These cases reflect a broader trend of heightened scrutiny over ingredient transparency and environmental marketing claims, as well as increased enforcement of state consumer protection statutes and environmental laws.

Notable Rulings

Federal and state courts issued several significant rulings in Q3 that clarify the standards for class certification, settlement fairness, and the sufficiency of advertising claims:

- In *Abigail Esquibel v. Colgate-Palmolive Co.*, the U.S. District Court for the Southern District of New York allowed fraud-based and statutory consumer protection claims to proceed against "natural" labeling, while dismissing claims for constructive fraud and injunctive relief due to lack of standing. In this case, plaintiffs alleged that Colgate-Palmolive's mouthwash was deceptively labeled as "natural" despite containing PFAS chemicals. The Southern District of New York issued a mixed ruling, dismissing claims for constructive fraud and injunctive relief due to lack of standing and the absence of a fiduciary relationship between the parties. However, the court allowed fraud-based and statutory consumer protection claims to proceed, finding that plaintiffs plausibly alleged a reasonable consumer could be misled by the "natural" label. This decision underscores the court's willingness to scrutinize marketing claims and the importance of substantiating product representations, especially when they pertain to health and environmental concerns.

- The U.S. Court of Appeals for the Second Circuit's decision in *D. Joseph Kurtz v. Kimberly-Clark Corporation* vacated a class settlement over "flushable" wipes, emphasizing that courts must closely scrutinize the allocation of recovery between class members and counsel under Rule 23(e). Specifically, the Second Circuit vacated a district court-approved settlement in a class action over "flushable" bathroom wipes, which had been challenged for misleading consumers and causing plumbing damage. The appellate court found that the district court failed to properly assess the allocation of recovery between class members and class counsel, as required by Rule 23(e) after its 2018 amendment. Most of the monetary recovery went to lawyers rather than the class, raising fairness concerns. The case was remanded for further proceedings, with the Second Circuit clarifying that courts must compare the proportion of total recovery allocated to the class versus counsel, regardless of how the settlement funds are structured. (2nd Cir., July 1, 2025).
- The U.S. Court of Appeals for the Ninth Circuit affirmed class certification in *Narguess Noohi v. Johnson & Johnson Consumer Inc.*, finding that damages models and materiality can be established using objective standards, even when consumer interpretations of "oil-free" vary. The Ninth Circuit affirmed class certification in a case alleging that Neutrogena Oil-Free Face Moisturizer for Sensitive Skin was deceptively marketed as "oil-free." The court held that the plaintiff's damages model was reliable and capable of measuring damages on a classwide basis, even though it was not fully executed at the time of certification. The panel also found that materiality could be established using an objective, reasonable consumer standard, and that variations in consumer understanding of "oil-free" did not defeat predominance. (9th Cir., July 25, 2025).
- In *Allison Barton, et al. v. The Procter & Gamble Company* (S.D. Cal., Aug. 8, 2025), plaintiffs alleged that P&G failed to disclose the presence of lead in its tampon products. The U.S. District Court for the Southern District of California allowed the plaintiffs to proceed with an amended complaint after they provided more detailed information about their testing methodology and results. The court

Q3 2025 saw a notable uptick in litigation targeting sunscreen products, with plaintiffs challenging the accuracy of SPF ratings and the truthfulness of "mineral-based" marketing claims.

found that the plaintiffs had sufficiently addressed previous deficiencies, including the extrapolation of lead content across product sizes. However, the court dismissed claims under the "unfair" prong of California's Unfair Competition Law, finding the allegations lacked sufficient factual support. (S.D. Cal., Aug. 8, 2025).

- Better Business Bureau National Advertising Division (NAD) decisions—Procter & Gamble (June-August 2025). NAD issued several decisions in Q3 addressing advertising claims made by Procter & Gamble for its oral care products. In one case, NAD determined that P&G's "Gum Detoxify" claim for Crest Pro-Health toothpaste was adequately substantiated and did not mislead consumers about broader detoxification benefits. In another, NAD found that P&G's "extra strength fluoride" claim for Crest 3D White Brilliance Deep Stain Remover Toothpaste was not supported by regulatory standards and recommended discontinuation or modification of the claim. NAD also reviewed whitening claims for Crest 3D Whitestrips, concluding that P&G's clinical studies supported the product's express and implied claims, but clarified that "levels whiter" does not promise a specific number of shades. These decisions reinforce the need for robust scientific substantiation and regulatory compliance in advertising, especially for health-related product claims (NAD Case Nos. 7436, 7442, 7443).
- In *Judah Rosenwald, et al. v. Kimberly-Clark Corporation* (9th Cir., Sept. 24, 2025), the U.S. Court of Appeals for the Ninth Circuit dismissed a putative class action alleging that Kimberly-Clark's Kleenex Germ Removal Wet Wipes were falsely marketed as containing germicides. The panel found that the complaint failed to establish federal diversity jurisdiction, as it did not adequately allege the defendant's citizenship or the amount in controversy. The court also determined that a proposed amended complaint would not cure these jurisdictional defects. (9th Cir., Sept. 24, 2025).

Newly Filed Complaints

Sunscreen and SPF Claims Under Scrutiny

Q3 2025 saw a notable uptick in litigation targeting sunscreen products, with plaintiffs challenging the accuracy of SPF ratings and the truthfulness of "mineral-based" marketing claims. Cases such as *Andrea Fahey et al. v. Sun Bum LLC* allege that independent laboratory testing revealed actual SPF protection far below what was advertised. Similarly, multiple class actions—including *Jessica Augustine v. Sun Bum Suncare, LLC* and *Stuart Fogelson v. Crown Laboratories Inc.*—contend that products labeled as "100% mineral-based" or "mineral sunscreen" contain undisclosed chemical sunscreen ingredients, such as butyloctyl salicylate.

Oral Care and Personal Care Product Misrepresentations

Litigation in Q3 also focused on oral care and personal care products, particularly those marketed as "recyclable," "hypoallergenic," or "sensitive skin." In *Monique Smart v. Colgate-Palmolive Company*, plaintiffs allege that toothpaste tubes labeled as recyclable are routinely rejected by municipal recycling programs, rendering the "recyclable" claim misleading. Meanwhile, cases such as *Esther Hicks v. Beiersdorf, Inc.* challenge "hypoallergenic" and "sensitive skin" claims, asserting that products contain known allergens such as lanolin alcohol and methylisothiazolinone.

Environmental and Health-Related Litigation Expands

The quarter also saw an expansion of environmental and health-related litigation, with plaintiffs targeting benzoyl peroxide acne treatments and other products for contamination and undisclosed risks. *Moussa Kouyate v. L. Perrigo Company* alleges that benzoyl peroxide products degrade into benzene, a known carcinogen, during storage and use, exceeding FDA limits and posing significant health risks. Proposition 65 actions in California continue to proliferate, with numerous filings against brands for failing to warn consumers about exposure to diethanolamine (DEA), a chemical linked to cancer.

Proposition 65

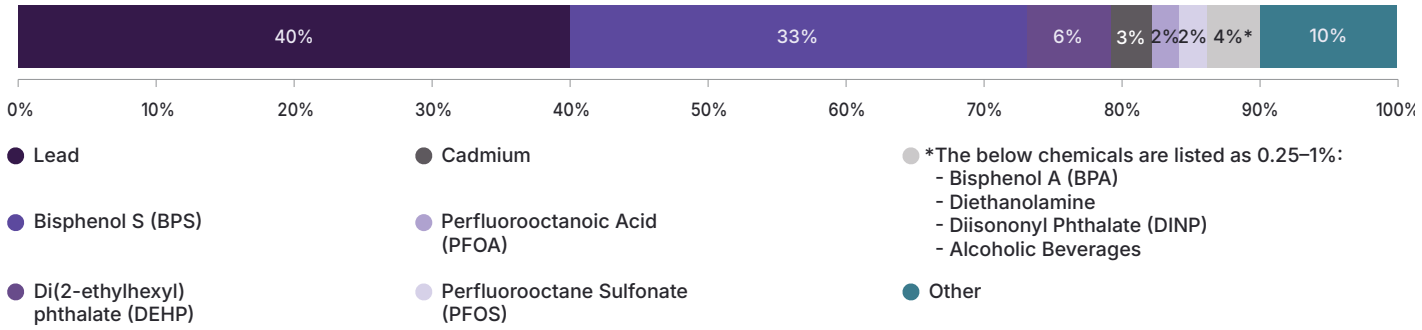
2025 by the Numbers

In Q3 2025,[1] plaintiffs filed 1,764 Proposition 65 pre-suit notices of violation. Topping the list by far are notices regarding bisphenol S and lead. Approximately 42% of the notices relate to exposures allegedly caused by foods, dietary supplements, or beverages as opposed to nonconsumable goods—a significantly higher percentage than we saw through the first half of 2025, though maintaining a trend reflected in Q1 and Q2 data. As in prior months, a large number of the notices relating to food involve seafood products such as shrimp, shellfish, sardines, and seaweed as well as dietary supplements and other dried goods. There has also been a continued trend of notices targeting canned food products for containing bisphenol A (BPA).

On that same note, we have seen an increase in notices for PFAS chemicals (like PFOA, PFOS, and PFNA) in a variety of food products, with plaintiffs CalSafe Research Center, Inc., and Environmental Research Center, Inc., sending the most notices. Given the ubiquity of PFAS chemicals in the environment, we expect to see more notices like these over the next few months.

See the chart below for a detailed breakdown of the top chemicals at issue in the third quarter.

Top Chemicals at Issue in Q3 2025 (Figure 2)



[1] Data includes July – September 30, 2025

Federal Court Enters Permanent Injunction Blocking Prop 65 Titanium Dioxide Warnings in Cosmetics

Following a similar ruling regarding Prop 65 warnings for dietary acrylamide issued in May of this year, a federal district court in Sacramento has now permanently enjoined California from enforcing Proposition 65's warning requirement for titanium dioxide in cosmetics and personal care products. In *Personal Care Products Council v. Bonta* (E.D. Cal., Aug. 12, 2025), Chief Judge Troy L. Nunley granted summary judgment to the Personal Care Products Council (PCPC), concluding that the warning mandate violates the First Amendment.

Background

Proposition 65 requires businesses to warn consumers before exposing them to chemicals that the State of California has determined cause cancer or reproductive harm. Titanium dioxide was added to the Proposition 65 list in 2011 after the International Agency for Research on Cancer classified certain airborne, unbound respirable particles of the compound as "possibly carcinogenic to humans" (Group 2B). That classification relied largely on animal studies in which rats developed lung tumors under high-exposure conditions.

Following the listing, numerous private enforcement actions were filed against manufacturers and distributors of cosmetics containing titanium dioxide. PCPC, a trade association representing companies in the personal care industry, filed suit challenging the warning requirement as unconstitutional compelled speech.

Court's Analysis

Judge Nunley applied the two primary standards for assessing compelled commercial disclosures: the *Zauderer* test and the *Central Hudson* intermediate-scrutiny test.

Under *Zauderer*, the government may require factual and uncontroversial disclosures that are reasonably related to a substantial government interest and not unduly burdensome. The court found that the Proposition 65 warning did not meet that standard because, even if literally accurate, it could mislead consumers into believing that cosmetic-grade titanium dioxide poses a confirmed cancer risk to humans. The court noted that there remains "a robust scientific debate" regarding whether the substance causes cancer in humans, and that no regulatory body has made such a determination.

Because the warning was neither "purely factual" nor "uncontroversial," the court proceeded with

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the *Central Hudson* analysis. Applying that test, the court concluded that compelling the warning did not directly advance the state's substantial interest in public health and was more extensive than necessary. The opinion observed that California could pursue alternative methods of consumer education—such as public information campaigns or web postings—without mandating a disputed warning on product labels.

Disposition and Broader Context

The court entered a permanent injunction barring the attorney general and private enforcers from bringing Proposition 65 actions related to titanium dioxide in cosmetics and personal care products.

While litigation over the titanium dioxide warning was ongoing, the Office of Environmental Health Hazard Assessment (OEHHA) finalized a safe harbor level, or "no significant risk level" (NSRL), for airborne, unbound titanium dioxide particles, which took effect on October 1, 2025. The NSRL establishes daily exposure limits of 440 micrograms for particles with diameters of 10 micrometers or less and 44 micrograms for particles with diameters of 0.8 micrometers or less. Although the court has now invalidated the warning requirement, the establishment of a safe harbor level provides regulated entities with a clear compliance benchmark should the state's listing remain in effect.

The district court's decision follows similar First Amendment challenges that invalidated Proposition 65 warning requirements for glyphosate and acrylamide. Collectively, these cases reflect increasing judicial scrutiny of compelled warnings under Proposition 65 where the underlying scientific evidence is contested or uncertain.

Link to the ruling is here.

California Appeals Court Reverses CCP § 998 Cost Award in Proposition 65 Litigation

In an unpublished decision that clarifies the limits of settlement offers under California Code of Civil Procedure section 998, the Second District Court of Appeal has reversed a lower court ruling requiring a Proposition 65 plaintiff to pay litigation costs to a defendant manufacturer. The case, *Consumer Advocacy Group v. Enchante Accessories, Inc.*, No. B337902 (Cal. Ct. App. 2d Dist., filed July 25, 2025), arose from a dispute over whether a section 998 offer containing a broad release of claims was valid and enforceable.

Background

The litigation began when Consumer Advocacy Group (CAG) filed a Proposition 65 enforcement action against Ross Stores, Inc., alleging that certain

cosmetic cases contained di(2-ethylhexyl) phthalate (DEHP) and diisononyl phthalate (DINP) without the required warnings. Enchante Accessories, Inc., the product's manufacturer, intervened in the case as a defendant.

While the case was pending, Enchante served CAG with a section 998 offer to settle. Section 998 allows any party to make a written settlement offer, with the potential consequence that a party who rejects the offer and later fails to obtain a more favorable outcome may be liable for the other side's post-offer litigation costs. CAG rejected the offer and ultimately dismissed the case the following year. Enchante then sought roughly $324,000 in costs—including $248,000 in expert witness fees—arguing that CAG's rejection of the offer triggered section 998's cost-shifting provisions.

The trial court found the offer valid and awarded Enchante approximately $232,000 in costs, reducing the requested expert fees but otherwise affirming the cost claim. CAG appealed.

The Appellate Decision

The Second District reversed, holding that Enchante's section 998 offer was invalid because it contained an overbroad release extending beyond the scope of the litigation. Writing for a unanimous panel, Los Angeles County Superior Court Judge Emily Garcia Uhrig, sitting by designation, explained that a valid section 998 offer must resolve only the claims at issue in the current action. Enchante's offer required CAG to release "all claims that have been brought or could have been brought" against the company relating to the manufacture, distribution, or sale of the products in question.

The appellate court concluded that this language "encompasses claims beyond the scope of this litigation," such as other potential Proposition 65 claims involving different chemicals or even non-Proposition 65 causes of action. As a result, the offer was not a valid basis for shifting costs.

In reaching its conclusion, the court relied on *Council for Education & Research on Toxics v. Starbucks Corp.* (2022) 84 Cal. App. 5th 879, which similarly invalidated a section 998 offer based on overbroad release language. The panel rejected Enchante's argument that the release was merely a "preamble" or nonbinding background statement, finding that courts must interpret settlement offers as a whole rather than isolating select provisions.

Because the court found the offer invalid, it declined to address CAG's remaining arguments, including whether section 998 applies to Proposition 65 actions at all or whether Enchante's offer was made in good faith.

Takeaways

The opinion underscores the importance of precision in drafting section 998 offers. Settlement proposals that purport to release claims beyond those directly at issue risk being deemed invalid, thereby forfeiting the cost-shifting benefits of section 998. The ruling may also signal a more cautious judicial approach to applying section 998 in the context of Proposition 65 litigation, where multiple potential claims often arise from similar products and chemical exposures.

Link to the ruling is here.

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