Advertising Class Actions

2021 Year in Review

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By our count, well over 500 class actions were filed this past year alleging that a product or service was deceptively advertised. While some may argue that class actions are inevitable – a cost of doing business for major advertisers – properly counseled advertisers can do a lot to avoid being targeted with false advertising class actions and protect themselves when targeted. Indeed, with the plaintiffs' bar having shown a propensity to go after claims as straightforward as "vanilla flavored," advertisers have to be aggressive in defending against such unfounded claims.

To help our clients stay ahead of recent class action advertising trends, we track all newly-filed false advertising class actions and public settlements. We are pleased to share here some of the notable trends from 2021. We encourage readers interested in receiving regular updates on class action news and settlements to get in touch.

We hope you will find this report interesting and informative. Please reach out with any questions or comments, and subscribe to our blog, Proskauer on Advertising, for updates throughout the year on all things advertising law-related.

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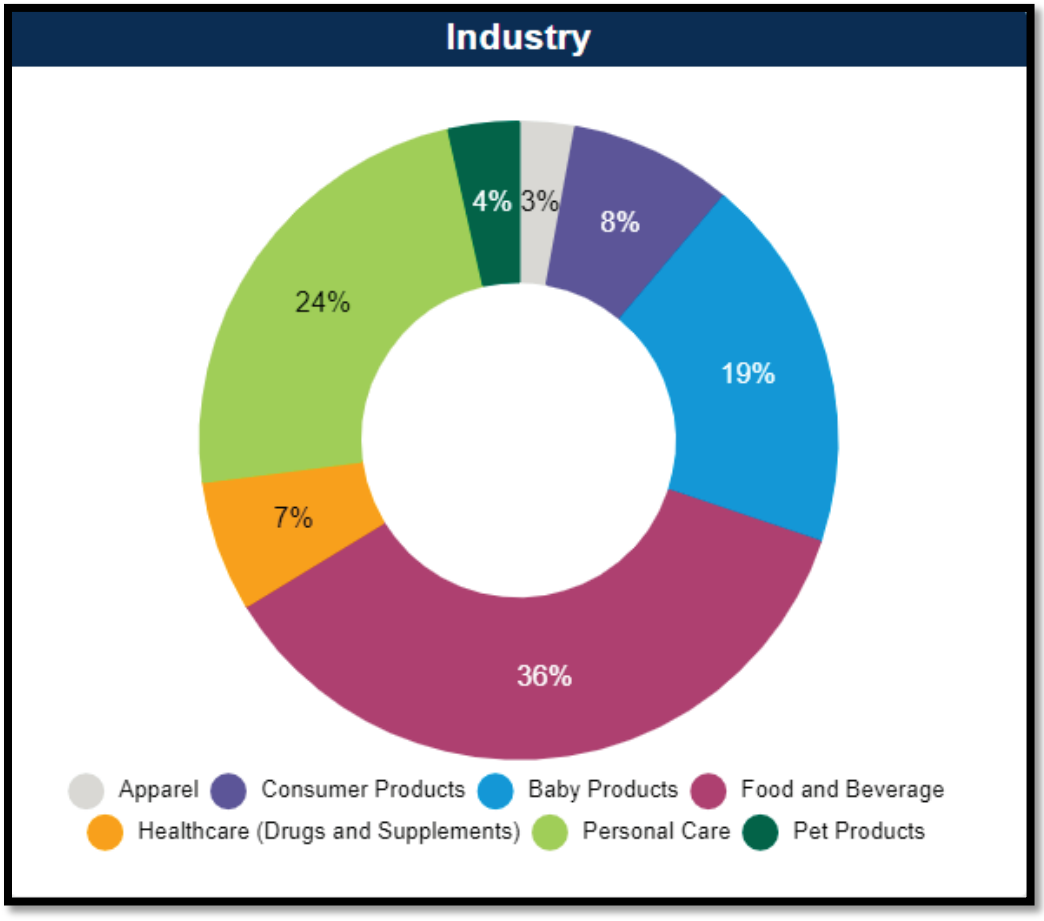
Overview

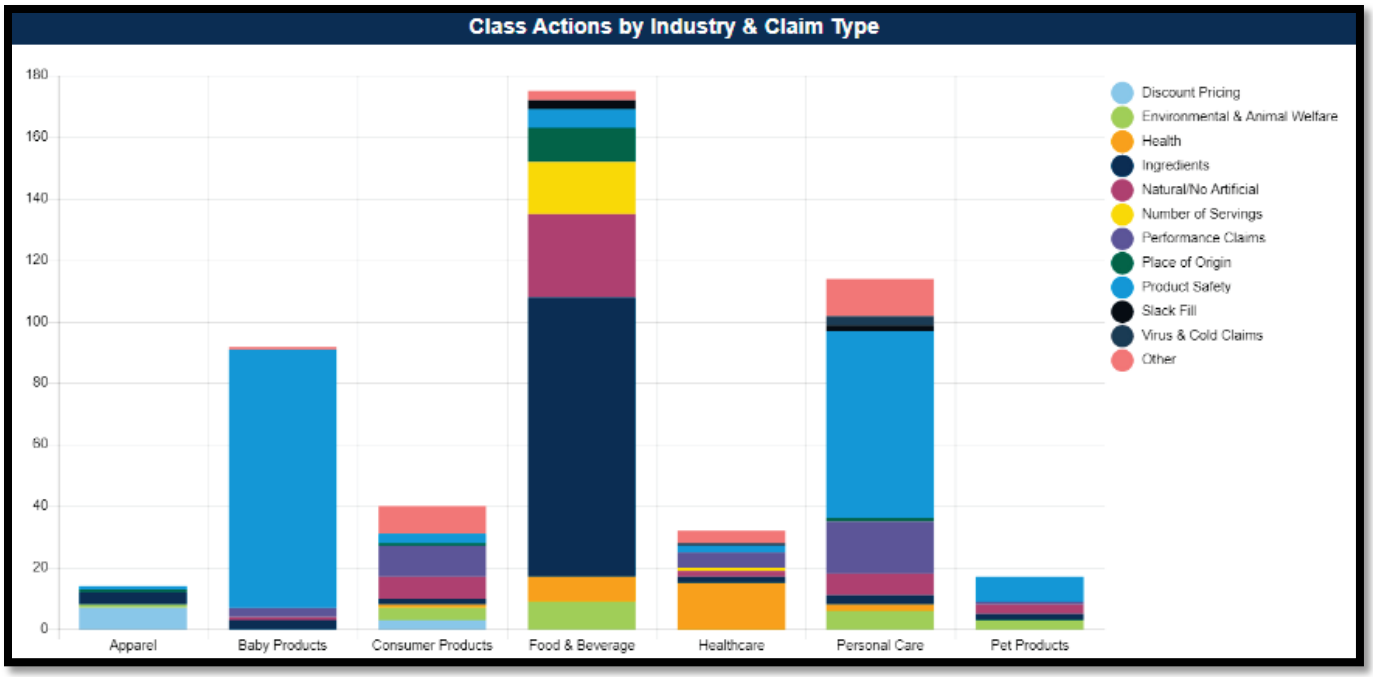
Distribution of Advertising Class Actions by Industry and Claim Type

It won't come as a surprise to companies in the food and beverage industry that they were a major target for false advertising class actions in 2021. And that does not even count the spate of lawsuits alleging that certain baby food products contain heavy metals, which on its own represented a substantial percentage of the total cases filed. Beyond food and beverage, personal care products and other types of consumer and household goods were also regular targets of the plaintiffs' bar.



With increased consumer focus on health and safety in the midst of a pandemic, there was a spike in cases challenging product safety. As noted, many of those cases involved allegations about toxins in baby food. But there were also plenty of cases in the personal care space,

including challenges alleging that certain sanitizing products do not kill germs and viruses to the extent the advertiser claimed. As in past years, challenges to food and beverage products were mainly focused on claims about their ingredients and claims that the products are natural or do not contain artificial ingredients. A new trend that has picked up steam this year, particularly in the food and beverage space, is challenges regarding the number of servings in a product's container, which to date have mostly been confined to ground coffee products.



The Plaintiffs' Bar

Speaking of the plaintiffs' bar, there are less than a dozen plaintiffs' firms that dominated the class action false advertising space, bringing more than 255 cases combined in 2021. We trust that Spencer Sheehan is a name familiar to many of our readers. In 2021, he broadened his interests from vanilla to other flavors, objecting to products that taste like chocolate, fudge, smoke, lime, strawberry, and a host of other flavors, on the grounds that the products do not contain the ingredient that characterizes their flavor or contain too little of that ingredient.

Below we rank the top nine firms who filed the most false advertising class actions in 2021. For each firm, we provide a breakdown of how each firm has historically resolved its class action cases based on publicly-available data from Westlaw. This data include all federal class actions from all years. It does not, however, include non-public data, data on threatened class actions that were never filed, either because the firm did not pursue the case or because it settled pre-suit. "Uncontested dismissal" means the plaintiff voluntarily dismissed the case, which often means the parties reached a confidential individual settlement.

1. Spencer Sheehan & Associates, P.C.
    - Uncontested dismissal: 73%
    - Class-wide settlement: 9%
    - Defendant prevails on dispositive motion: 10%
    - Other (includes pending cases): 8%
2. Bursor & Fisher, P.A.
    - Uncontested dismissal: 59%
    - Class-wide settlement: 16%
    - Defendant prevails on dispositive motion: 10%
    - Verdict: <1% (1)
    - Other (includes pending cases): 14%
3. Sultzer Law Group, P.C.
    - Uncontested dismissal: 50%
    - Class-wide settlement: 30%
    - Defendant prevails on dispositive motion: 9%
    - Other (includes pending cases): 11%
4. Shub Law Firm LLC
    - Uncontested dismissal: 47%
    - Class-wide settlement: 23%
    - Defendant prevails on dispositive motion: 12%
    - Other (includes pending cases): 18%
5. Clarkson Law Firm
    - Uncontested dismissal: 52%
    - Class-wide settlement: 26%
    - Defendant prevails on dispositive motion: 13%
    - Verdict: 2% (1)
    - Other (includes pending cases): 7%
6. Reese LLP
    - Uncontested dismissal: 48%
    - Class-wide settlement: 20%
    - Defendant prevails on dispositive motion: 12%

- Other (includes pending cases): 20%

7. Gutride Safier LLP
   - Uncontested dismissal: 44%
   - Class-wide settlement: 27%
   - Defendant prevails on dispositive motion: 11%
   - Other (includes pending cases): 18%
8. Carlson Lynch Kilpela & Carpenter
   - Uncontested dismissal: 47%
   - Class-wide settlement: 36%
   - Defendant prevails on dispositive motion: 6%
   - Verdict: <1% (1)
   - Other (includes pending cases): 11%
9. Faruqi & Faruqi LLP
   - Uncontested dismissal: 46%
   - Class-wide settlement: 26%
   - Defendant prevails on dispositive motion: 7%
   - Verdict: <1% (1)
   - Other (includes pending cases): 20%

Resolutions and Settlements

False advertising class actions rarely go to trial. When not dismissed at the pleading stage, the vast majority of these cases settle, either on an individual or class-wide basis. Indeed, some cases settle in response to a demand letter from plaintiff's counsel without a complaint ever being filed.

One of the most important decisions in the false advertising class action space from 2021 indicates that courts may be scrutinizing class-wide settlements more carefully, and is one every defendant should keep in mind when entering into a class-wide settlement. *See Briseno v. Henderson*, 998 F.3d 1014 (9th Cir. 2021).

In *Briseno,* the parties agreed to settle on a class-wide basis allegations that ConAgra misleadingly advertised Wesson vegetable oil as being "100% natural." According to the plaintiffs, the product is not 100% natural because it contains ingredients from genetically modified organisms. Under the terms of the proposed settlement, ConAgra would be prohibited from advertising the product as "natural" unless the FDA permitted that term to describe oil from GMO seeds. In addition, class members would receive $0.15 per unit purchased during the class period, and class counsel would receive $6.85 million in costs and fees. The parties argued this was a fair deal since ConAgra could potentially have to pay $67.5 million if every consumer who bought the product during the class period filed a claim. The district court approved the settlement.

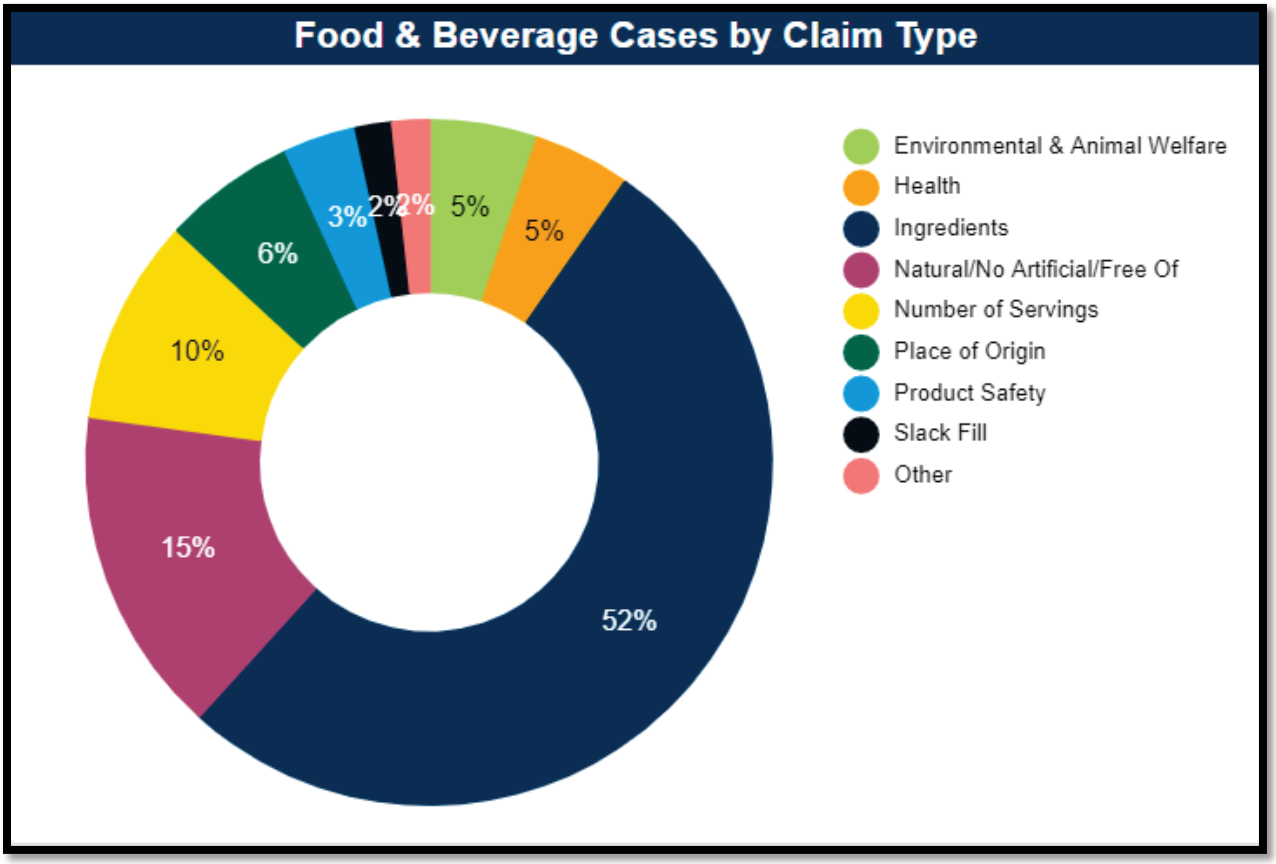
The Ninth Circuit disagreed. While ConAgra's potential exposure might have been tens of millions of dollars, in reality only 0.5% of consumers filed claims. Thus, plaintiff's counsel stood to earn about seven times the recovery of class members. On top of that, the parties had agreed to a "clear sailing agreement," which included not only the stipulation that ConAgra would not challenge counsel's fees, but also a "reverter clause" under which any reduction in counsel's fees went back to ConAgra rather than to class members. Worse yet, the injunctive relief component lacked teeth because it bound ConAgra but not the company that had bought Wesson from ConAgra during the lawsuit. The Ninth Circuit expressed concerned that, when negotiating settlement, class counsel "has the incentive to conspire with the defendant to reduce compensation for class members in exchange for a larger fee." Whether or not that is true in a given case, moving forward, companies should expect district courts in the Ninth Circuit to scrutinize class-wide settlements through the lens of *Briseno.*

While not strictly a class action, one additional trend advertisers should be aware of is the increasing number of cases being brought by nonprofits and public interest organizations under the D.C. Consumer Protection Procedures Act ("CPPA"). Many of these cases are filed by animal welfare or environmental protection nonprofits, and relate to animal welfare, environmental, or sustainability claims. But other types of claims are not immune from these suits. While these nonprofit actions typically seek only injunctive relief and attorneys' fees and costs, and no money damages, they can nonetheless be costly and burdensome to defend.

There were plenty of other important and interesting false advertising class action decisions, trends, and settlements in 2021. We review those below, focusing on several important industries.

Food & Beverage

The food and beverage industry continues to be the favorite target of the class action plaintiffs' bar, accounting for approximately half of all advertising class actions filed in 2021. This was in part driven by the U.S. Congressional Reports from the Subcommittee on Economic and Consumer Policy released beginning in February 2021 that reported heavy metals in certain baby foods. The plaintiffs' bar wasted no time, filing almost 100 class actions against baby food companies in 2021, alleging they failed to disclose the presence of heavy metals and toxins in their products.



However, it will come as no surprise to those following food and beverage advertising litigation that by far the largest driver of the huge number of class actions in this space continues to be ingredient claims, alleging that products do not actually contain certain advertised ingredients, or their flavoring does not come exclusively or primarily from the advertised flavoring ingredients. The vast majority of these cases continue to be filed by the ever-prolific Spencer Sheehan.

While 2020 was the year of "vanilla," we saw cases targeting that particular ingredient slow down toward the middle of 2021. This could have been in part because the plaintiffs' bar was running out of "vanilla" products to sue on, but it was likely also because courts have repeatedly dismissed these cases at the pleading stage, including in a pair of decisions out of the Northern District of California and Eastern District of New York that came down within a week of each other in June and July 2021. *See Garadi v. Mars Wrigley Confectionery US*, 2021 WL 2843137 (E.D.N.Y. July 6, 2021); *Fahey v. Whole Foods Market, Inc. et al.*, 2021 WL 2816919 (N.D. Cal. June 30, 2021). In those and other "vanilla" cases, courts have found that plaintiffs failed to plausibly allege that a reasonable consumer would be deceived merely by the use of the word "vanilla" on product packaging into believing that the product's vanilla flavor came exclusively or predominantly from vanilla beans, and would instead understand that the product was merely vanilla *flavored*.

This does not, however, mean that ingredient claims have slowed down. Instead, the plaintiffs' bar has shifted its focus to other flavors, including "chocolate," "smoked," "fudge," "strawberry," and "honey." Food and beverage manufacturers should keep their eyes on these cases, and be careful in their advertising to avoid communicating that their products' flavoring comes primarily from the corresponding ingredient if it does not. The "vanilla" decisions provide helpful guidance on how to do this, and how to defend against these claims if necessary.

As has been the case for many years, "natural" and "no artificial flavors" claims also continue to dominate the food and beverage class action landscape. While "natural" cases have had mixed success, "no artificial flavors" claims have regularly survived motions to dismiss and have resulted in some significant settlements, including in the seven-figure range. *See Hilsley v. Ocean Spray Cranberries, Inc.*, No. 3:17-cv-2335 (S.D. Cal.) (settled in 2020 for $5.4 million). As another example, General Mills attempted to get out of its "no artificial flavors" lawsuit earlier this year with a settlement that would provide no money to class members and somewhat limited injunctive relief. In June, a California federal judge denied preliminary approval of the settlement, finding that it fell short of a fair and adequate settlement to resolve the class claims. In September, the parties moved for preliminary approval of a revised settlement that would allow class members to retain their rights to sue General Mills for damages or personal injury, in addition to more extensive injunctive relief. That motion is currently pending. *Hilsley v. General Mills, Inc.*, No. 3:18-cv-00395 (S.D. Cal.). Food and beverage manufacturers should be mindful that these types of claims attract attention from the plaintiffs' bar, particularly as to products containing malic acid, citric acid, ascorbic acid, xylitol, and maltodextrin.

2021 also saw an explosion of cases against coffee product manufacturers, alleging that they falsely advertised the number of servings in their products, with claims like "x servings" or "makes up to x servings." In September, a Northern District of Illinois judge granted a motion to dismiss one of these cases, finding that the advertiser's "up to" claim did not promise that the coffee canister will make that amount by following the instructions for a single serving, only that it can under certain circumstances. *Brodsky v. Aldi Inc.*, 2021 WL 4439304 (N.D. Ill. Sept. 28, 2021). *Brodsky* included claims brought under California and New York law, although it remains to be seen how other courts resolve these cases, including cases where the advertising does not include an "up to" qualifier.

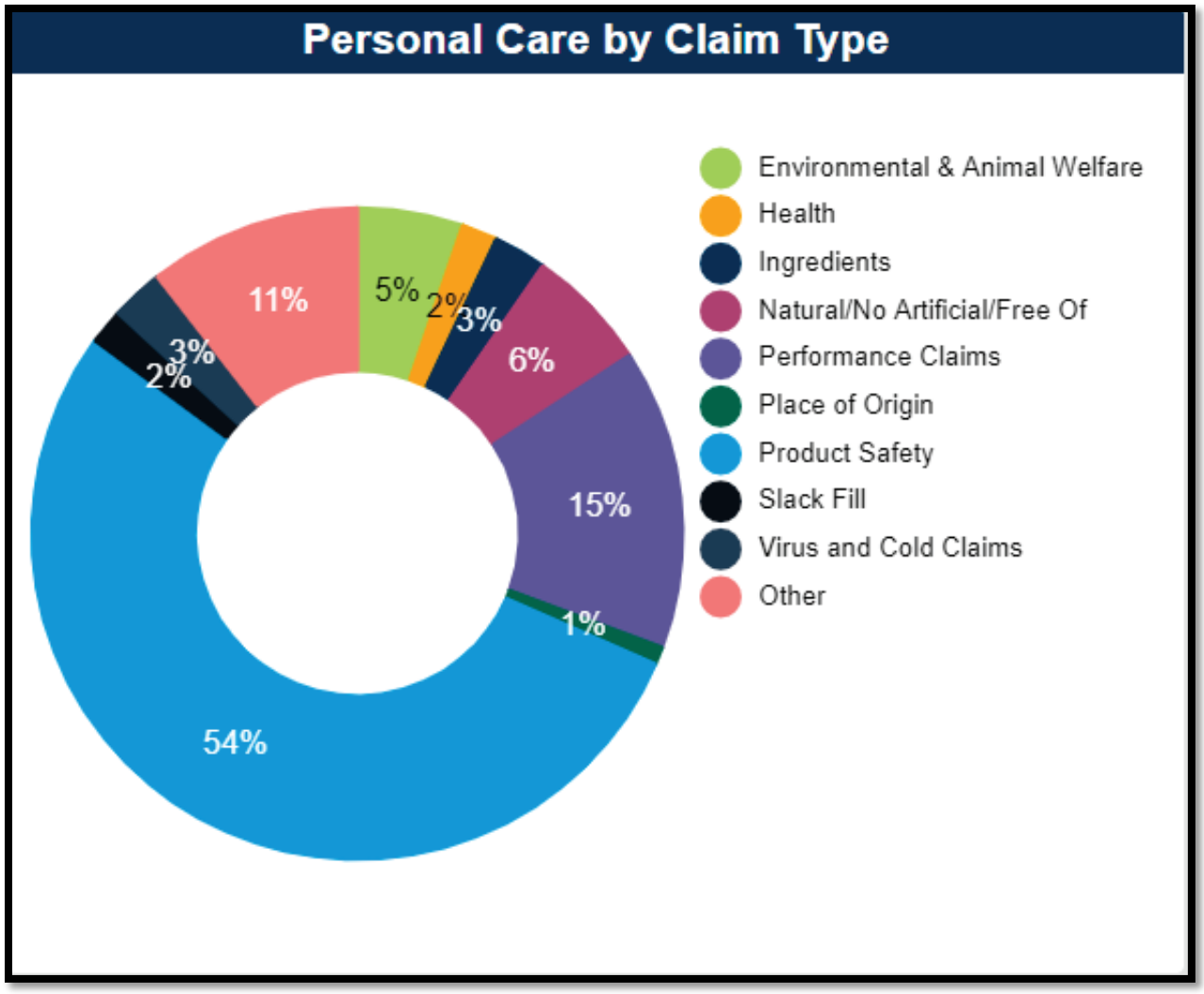
Rounding out our most commonly filed claims in the food and beverage industry in 2021 are:

- **Place of Origin** claims, such as challenges alleging King's Hawaiian Rolls are deceptively marketed as being made in Hawaii, or that Himalayan pink salt is deceptively marketed as being from the Himalayas.
- **Environmental and Animal Welfare** claims, alleging that advertisers misrepresent the sustainability or living conditions of the source of their food products, or that they deceptively market their packaging as recyclable.
- **Healthy** claims, alleging that advertisers deceptively market their products as being healthy or conferring specific health benefits. Two of these cases alleging Kellogg and Post Foods deceptively advertised cereal products as being healthy when they contained added sugar settled this year for $13 million and $15 million respectively. *Hadley v. Kellogg Sales Co.*, Case No. 16-cv-4955-LHK (N.D. Cal.); *Krommenhock v. Post Foods LLC*, Case No. 16-CV-4958-WHO (N.D. Cal.). We expect more to come in 2022.
- **Slack fill** claims, ever-present in all industries, also continue to be filed in the food and beverage industry, in particular against candy makers, alleging the packaging contains non-functional empty space that deceives consumers into thinking they are getting more product than is in the container.

While there is no guaranteed way for advertisers to insulate themselves from class action risk, especially in a space as active and attractive to the plaintiffs' bar as the food and beverage industry, staying on top of these most frequently targeted claims, tailoring your advertising accordingly, and aggressively responding to a plaintiff's unfounded legal claims will minimize that risk.

Consumer Packaged Goods

The industry attracting the most false advertising class actions in 2021, alongside Food and Beverage, was by far Consumer Packaged Goods, with more than 250 cases. These cases involved personal care, household cleaning, cosmetics, pet, baby and other consumer products. Many of these class actions challenged safety claims and failure to disclose health risks allegedly associated with the targeted product. As we predicted last year, the plaintiffs' bar also targeted recycling and other environmental claims in 2021. We expect the number of such cases to continue to rise in 2022.



Some notable cases in 2021 include:

- *Souter v. Edgewell Personal Care Co.*, 542 F.Supp.3d 1083 (S.D. Cal. June 7, 2021):
  - Increased demand for sanitizing products has also resulted in increased class actions challenging allegedly deceptive claims that such products kill a certain percentage of germs. At least three such cases were filed in 2021. For example, in Souter, the plaintiff challenged language on the label for Wet Ones antibacterial wipes stating that the product kills "99.99% of germs." According to the plaintiff, this statement is deceptive because the wipes' active ingredient is ineffective against certain viruses, bacteria, and spores that cumulatively exceed 0.01% of germs and can cause serious diseases. The court dismissed the complaint on the pleadings, holding that no reasonable consumer would believe that a hand wipe would protect against the particular germs the plaintiff claimed that Wet Ones wipes do not kill, such as polio and HPV. Subsequently, the plaintiff filed a first amended complaint that alleges the product fails to kill other more consumer-relevant germs, including the coronavirus responsible for COVID-19. Defendant moved to dismiss the FAC; stay tuned to our blog for updates on the court's decision on this motion.
- *Schulte v. Conopco*, 997 F.3d 823 No. 20-2696 (8th Cir. May 18, 2021):
  - While not a traditional "false" advertising case, *Schulte v. Conopco* is nonetheless notable for marketers of CPG products. Dove markets certain deodorants to men via its "Men + Care" line, and others to women via its "Advanced Care" line. Each line has distinct scents, packaging, and labels. However, the women's line costs $0.40 to $1.00 more per stick. Plaintiff alleged this amounted to a discriminatory "pink tax" that constituted an "unfair practice" in violation of the Missouri Merchandising Practices Act. But the district court, and ultimately the Eighth Circuit, found that advertising products to one gender does not amount to gender discrimination. To state a claim that such marketing was discriminatory, plaintiff would need to allege that the *only* difference between the product lines was their targeted gender. But the Dove men's and women's lines also differed in scents, packaging, and labels. Plus, the Court noted, nothing prevented women from using the "Men + Care" line if they liked that line's "masculine" scents.
- *Moore v. GlaxoSmithKline Consumer Healthcare Holdings (US) LLC*, 2021 U.S. Dist. LEXIS 150394 (N.D. Cal. Aug. 6, 2021):
  - "Natural" claims remained a troublesome area for advertisers in 2021, with at least around thirty cases challenging such claims, including seven cases involving CPG products. Plaintiff alleged that certain ChapStick products are falsely labeled with claims like "100% Natural" and "Naturally Sourced Ingredients" when, in reality, the products contain non-natural, synthetic, artificial, and/or highly-processed ingredients. The court denied defendant's motion to dismiss, finding that plaintiff plausibly alleged the ChapStick labels could deceive a reasonable consumer. In doing so, the court divided the current state of "natural" case law into two categories: (1) cases involving claims that

a product is “natural” or “100% natural,” where courts have often found that reasonable consumers could take away the message that the entire product is natural, and (2) cases involving claims like “made with 100% natural moisturizers” and “made with 100% natural fruit,” where courts have typically found reasonable consumers would only believe that certain components of the product are natural, not the product as a whole. Here, the court found that “naturally sourced” could be reasonably construed to mean that the ChapStick products contain no synthetic ingredients. The court rejected defendant’s argument that its ingredient list cleared up any confusion, citing Ninth Circuit case law that reasonable consumers are not expected to look beyond misleading representations on the front label to discover the truth from the ingredient list.

Looking ahead to 2022, advertisers should be aware that aerosol sunscreen, deodorant and other aerosol products have become a major target for the plaintiffs’ bar. More than forty class actions were filed in November and December alone on the theory that certain aerosol products contain dangerous levels of benzene. Some of the products at issue in these lawsuits have since been recalled.

Another trend that is continuing to gain traction is challenges to environmental and sustainability claims. As consumer demand for environmentally-friendly products increases, advertisers have increased their use of these claims. The plaintiffs’ bar has followed with class actions targeting these environmental claims, including claims that plastic products are recyclable and claims that sunscreens are reef friendly. We expect class actions targeting general and specific environmental benefit claims to continue in 2022. To avoid being on the receiving end of these suits, advertisers should closely follow the FTC’s Green Guides (which the FTC has indicated it will revise in 2022) and recent guidance from the National Advertising Division on this subject.

Drugs & Supplements

Cases concerning drugs and supplements made up approximately 6% of consumer class actions in 2021. Compared to 2020 (and perhaps as the world acclimates to the ongoing pandemic), the focus of class actions in the drugs and supplement industry this past year appears to have largely shifted away from immune and COVID-19-related claims.

Homeopathic products came under fire in a number of cases last year. Proskauer successfully represented the defendant in *Yamasaki v. Zicam, 2021 U.S. Dist. LEXIS 150394 (N.D. Cal. Oct. 25, 2021)*. Plaintiff challenged Zicam's claims that its cold remedy products are "clinically proven" to shorten colds. On Zicam's motion to dismiss, the court found that none of plaintiff's allegations supported a reasonable inference that this claim is false, as opposed to merely unsubstantiated. Merely alleging that plaintiff was unaware of any valid studies showing that Zicam's products are effective at shortening colds was not enough. Further, the court rejected as implausible plaintiff's allegation that homeopathic products can never be clinically proven to be effective. The court also disagreed that a reasonable consumer would interpret "clinically proven" to mean "scientific consensus." The court therefore dismissed the complaint in its entirety and, ultimately, with prejudice.

Some of the most prominent drug & supplement claims targeted this year include claims that a product is "natural." For instance, in *Babb v. Zarbee's, Inc.*, the plaintiff alleged that Zarbee's misrepresented its cough syrup as "natural," with claims that the product is "chemical free" and made with "handpicked natural ingredients." Plaintiff alleged these representations were false, because the cough syrup includes ingredients made through chemical processes or fermentation. The plaintiff alleged that though these ingredients can occur naturally, the forms used in the product were made synthetically. Other class actions involving "natural" claims include *Jordan v. Sanvall Enterprises* (challenging "natural" claims on colon cleanser and collagen supplements) and *Asaro v. Irwin Naturals* (alleging defendants' various supplements were misleadingly labeled as "natural" despite containing synthetic ingredients such as tocopheryl acetate, gelatin, soy lecithin, and maltodextrin).

Claims regarding mental acuity were also a major target in 2021. For example, in *Gomez v. Pure Nootropics, LLC*, plaintiff challenged claims that defendant's supplements have meaningful effects on consumers' memory, learning, focus, and energy. And in *Scarpo v. Natrol, LLC*, plaintiff challenged representations that defendant's "Cognium Memory" and "Cognium Memory Extra Strength" supplements improve memory and recall.

2021 also saw a number of lawsuits targeting claims that a supplement can help treat specific mental health conditions. For example, in *Gonzalez v. ProHealth*, plaintiff challenged claims that defendant's St. John's Wort Extract is "effective for mild to moderate depression" and "reduces anxiety," and in *Roberts v. Blossom Nature*, plaintiff challenged representations that defendant's Full Spectrum St. John's Wort Extract is a "natural treatment for mental health problems," a

“treatment for depression, anxiety and stress,” “moderates Seasonal Affective Disorder,” “relieves symptoms of depression and anxiety for 24 hours with no side effects,” and is a “natural antidepressant.” According to the plaintiff, defendant’s product is “intended for treatment of one or more diseases that are not amenable to self-diagnosis or treatment without the supervision of a licensed practitioner,” and therefore it is “impossible to write adequate directions for a layperson to use [the] product safely for its intended purposes.”

These 2021 trends in the drugs and supplement space reinforce the importance of avoiding unsubstantiated health-related claims. They also serve as a reminder that manufacturers should proceed with caution when claiming their products are “natural”; using ingredients that can be naturally-derived may not be enough to avoid a class action complaint, where the form of the ingredient used in the product is synthetically made. That said, when challenged, it is important to push back on plaintiffs claims, which are often based on unreasonable interpretations of the advertising and conjecture as to alleged falsity.

Retail & Hospitality

The retail and hospitality industries were also well-represented in advertising class actions in 2021, although on a much smaller scale than the "big player" industries previously discussed. Together, these categories represent just below 5% of class actions filed last year.

The most prominent claims in the retail space were those challenging the authenticity of advertised materials used in clothing and the authenticity of advertised discount prices. For instance, in *Carter v. Ralph Lauren Corporation*, the plaintiff brought claims against esteemed retailer Ralph Lauren alleging that its "100% Pima Cotton" V-Neck Pullover Sweater was not truly made of 100% Pima Cotton. Ralph Lauren's motion to compel arbitration, or, in the alternative, to dismiss the amended complaint is pending.

2021 also saw the reemergence of challenges to allegedly deceptive discount prices. These cases had slowed during 2020, but major retail brands like Adidas and Hugo Boss are now facing nearly identical lawsuits related to their advertising of sales or discount pricing, particularly in outlet stores. Plaintiffs in these cases allege the retailers fabricated false "original" prices, and then offered their products for sale at deep "discounts" off these false reference prices. According to plaintiffs, this practice misleads consumers into believing they are receiving a deal, and consequently induces them to make a purchase at a price that exceeds the product's true market value. Such cases have fared poorly in recent years outside the Ninth Circuit, so the Plaintiffs' bar typically files these cases in California.

The hospitality industry also faced challenges to its pricing practices in 2021. For example, in *Abdelsayred v. Marriott International, Inc.*, the plaintiff alleged that defendant engaged in a practice called "drop pricing," in which the international hotel chain baited customers into believing they were getting a bargain on hotel prices by hiding a portion of the room's daily rate in a variety of fees, such as "resort fees," "amenity fees," "destination fees," or "taxes and fees." *Abdelsayred* was consolidated with *Hall v. Marriott International, Inc.*, another class action filed in 2019 with overlapping allegations as to defendant's pricing model. A decision on plaintiff's motion for class certification in the consolidated matter is expected in the first few months of 2022. We anticipate that hidden fees will continue to draw attention from the plaintiff's bar, particularly since the FTC flagged this practice as a type of "dark pattern" in a 2021 workshop.

Retailers and hospitality groups should review their labels and pricing models to avoid being targeted for any of these trending claims in 2022.

Automotive & Electronics

Rounding out our review of 2021 class actions are the automotive and electronics industries, and "other" industries that are less frequent targets of the plaintiffs' bar. While there were certainly far fewer class actions in these spaces this past year than in other industries—making up just about 4 percent of the cases we saw filed—the legal theories track trends that we have seen across the board.

In the automotive space, performance claims were the most prevalent, alleging that a vehicle failed to perform as advertised. Notable examples include:

- *Orozco v. FCA US, LLC*, No. 21-cv-12823 (E.D. Mich. Dec. 3, 2021)
  - Plaintiffs claim that FCA misleadingly advertised that aluminum in the body of its all-new Jeep Wrangler and Gladiator vehicles improved performance and fuel efficiency, when the aluminum parts caused the exterior paint to bubble, flake, rust, and otherwise corrode over time. Plaintiffs allege that this latent defect was not discoverable at the time of purchase, and FCA failed to include notice of the defect in its marketing materials. FCA filed a motion to dismiss on February 11, 2022, arguing that plaintiffs failed to allege any actionable misrepresentations or omissions with sufficient specificity to meet the heightened pleading requirements of Rule 9(b). That motion is pending.
- *Rathmann v. Ford Motor Co.*, No. 21-cv-00610 (W.D. Tex. June 14, 2021)
  - Plaintiffs allege Ford misrepresented the towing and hauling capacity of certain 2020 Ford F-350 pickup trucks. According to plaintiffs, these vehicles did not offer "Best in Class" towing capacity. Instead, plaintiffs claim that loading the vehicles to the payload stated on the Tire and Loading Information (TREAD) label will cause the vehicles to exceed the Gross Vehicle Weight Rating (GVWR) or Gross Axle Weight Rating (GAWR)—making them unsafe to drive and increasing the risk of an accident. This lawsuit follows a recall notice issued by the National Highway Traffic Safety Administration, following a common pattern of class actions filed in the wake of administrative or regulatory action. Ford answered the complaint without moving to dismiss.
- *Tavares v. Toyota Motor Sales, USA, Inc.*, No. 21-cv-04534 (N.D. Cal. June 11, 2021)
  - According to the complaint, Toyota advertises its 2020 to 2021 Toyota Highlander hybrid vehicles as offering 17.1 gallon fuel tanks and up to 36 miles per gallon, providing a range of approximately 615 miles on a single tank. Plaintiffs allege the fuel tank cannot be filled to its advertised capacity, which limits the driving range of the vehicles. Plaintiffs claim Toyota is aware of this defect but continues to misleadingly market the vehicles. After Toyota moved to dismiss the amended complaint, plaintiffs moved to

consolidate the case with another class action, *Said v. Toyota Motor Sales, U.S.A., Inc.*, pending before the same court on similar claims. A consolidated class action complaint is expected by March 21, 2022.

The most prominent claims brought against the electronics industry likewise targeted product performance. And, while not as prevalent as in the apparel space, electronics manufacturers also faced claims of false discount pricing. Representative cases include:

- *Felter v. Dell Techs., Inc.*, No. 21-cv-04187 (N.D. Cal. June 2, 2021)
  - The complaint alleges that Dell advertised its Alienware Area 51 M R1 gaming laptops as containing a Central Processing Unit (CPU) and Graphics Processing Unit (GPU) that are fully upgradable to future Intel CPUs and NVIDIA GPUs, offering consumers "unprecedented upgradability" that was previously limited to desktop computers. Plaintiffs claim this is false, and that Dell told consumers that the Area 51M R1's core components were upgradable to induce consumers to purchase the product when Intel and NVIDIA were set to release updated components within a year. Plaintiffs filed an amended complaint in December 2021, and Dell filed a motion to compel arbitration on January 20, 2022, which is currently pending.
- *Axelrod v. Lenovo, Inc.*, No. 21-cv-06770 (N.D. Cal. Aug. 31, 2021)
  - Plaintiffs allege Lenovo displayed false "regular" prices on its website and advertised false discounts based on those false reference prices. The false discounts allegedly artificially increased demand for Lenovo's products and induced customers to pay more for the products based on a false impression of their value. Lenovo's motion to dismiss is currently fully briefed and awaiting a decision by the court.

Looking forward, the automotive and electronics industries should be particularly cautious in ensuring they can substantiate all product performance claims, and in staying up to date on discount pricing laws, to avoid falling into the crosshairs of the plaintiffs' bar for these ever more popular types of claims.

Other Class Actions

Other class actions were filed in 2021 in a variety of industries—educational products and services, large consumer goods, and subscription services, to name just a few. The most common claims, however, targeted delivery charges by restaurant companies and third-party delivery services. This is hardly surprising, as the food delivery market in the United States has more than doubled during the COVID-19 pandemic. Unlike other food and beverage class actions, which are often concentrated in just a few jurisdictions, these cases are being brought nationwide—*Ahmad v. Panera Bread Co.*, No. 21-cv-00311 (E.D. Mo. Mar. 11, 2021); *Hopkins v. Chipotle Mexican Grill, Inc.*, No. 21-cv-00646 (M.D. Fla. Mar. 18, 2021); and *Stout v. Grubhub Inc.*, No. 21-cv-04745 (N.D. Cal. May 3, 2021) are some notable examples. These cases generally allege that certain additional or "hidden" fees are added to customers' delivery orders that run contrary to defendants' representations about free or low delivery service fees. In many of these cases, plaintiffs allege that defendants implemented this "hidden" fee by secretly increasing the price of the food by 5-10% as compared to in-store prices.

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