

# Top 5 Challenged Advertising Claims in 2024 and How to Defend Them

**Shahin O. Rothermel**

Partner | 202.344.4550 | [SORothermel@Venable.com](mailto:SORothermel@Venable.com)

**Ari N. Rothman**

Partner | 310.229.9909 | [ANRothman@Venable.com](mailto:ANRothman@Venable.com)

**Claudia A. Lewis**

Partner | 202.344.4359 | [CALewis@Venable.com](mailto:CALewis@Venable.com)

**VENABLE** LLP

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# Agenda

- Customer Reviews and Social Media Advertising
- Pricing and “Free” Claims
- Alleged Violations of Food and Drug Administration Regulations
- Environmental Advertising Claims
- “PFAS”– Related Claims (Express and Implied)



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# **Customer Reviews and Social Media Advertising**

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# Social Media Influencer Marketing

- *FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising* (16 C.F.R. Part 255):
  - Any material connection between advertiser and endorser must be **clearly and conspicuously** disclosed.
- FTC issued updates in 2009 and continues to update, issue new guidance, and bring new enforcement actions since then.
- In 2022, the FTC released proposed changes to the Endorsement Guides and asked for public comments.
- The FTC finalized and adopted a formal rule in July 2023, which would allow for larger monetary penalties for violations.



# FTC Final Rule Banning Fake Reviews and Testimonials

- On August 14, 2024, the rule went into effect, prohibiting businesses from:
  - Creating or selling fake reviews, including AI-generated reviews or reviews that misrepresent the reviewer's experience.
  - Buying reviews or obtaining them from company insiders.
  - Offering incentives for positive reviews or for reviews expressing a specific sentiment, whether positive or negative.
  - Failing to disclose insider reviews.
    - Advertisers must clearly disclose reviews or testimonials written by company insiders.

# FTC's Guidance on Consumer Reviews

- In January 2022, the FTC released two guides related to consumer online reviews:
- **Soliciting and Paying for Online Reviews: A Guide for Marketers**
  - Marketers should ensure employees, friends, and family disclose any material relationships.
  - Marketers should request reviews from customers who have used the product or service, and not only ask those who might give good reviews.
  - The guide offers tips for working with comparison websites, review platforms, and reputation management companies.
- **Featuring Online Customer Reviews: A Guide for Platforms**
  - Focuses on collection, moderation, and publication of customer reviews.
  - Platforms should treat, scrutinize, and display both “genuine” positive and negative reviews equally.
  - Platforms should use reasonable processes/procedures to detect fake, manipulated, or deceptive reviews.
  - Platforms should clearly and conspicuously disclose connections with incentivized reviewers.
  - Platforms should clearly and conspicuously disclose how their overall ratings work and how they collect, process, and display reviews.

# Reviews and Disclosures: *LegalZoom.com Inc. v. ZenBusiness Inc. (2023)*

- **NAD Challenged claims:**

- ZenBusiness is the “The #1 Rated Service” by Forbes, Investopedia, MarketWatch, NerdWallet”
- “ZenBusiness is “#1 Rated Service.”

- **Allegations:**

- LegalZoom argued that ZenBusiness’s advertising practices misleads consumers to believe that the rankings webpages are unbiased and objective, and the reviews appearing thereon are honest, unbiased, genuine, and independent.
- Asserted that ZenBusiness’ rankings and reviews are controlled by ZenBusiness and advertise for ZenBusiness’ LLC formation services.

- **Advertiser’s position:** During the proceedings, ZenBusiness added a disclosure to the website “Best Service Providers (Top 4 Reviewed)” stating, *“This site is owned by ZenBusiness Inc. ZenBusiness reviews its own products and services and compares them to others in the industry.”*



# ***LegalZoom.com Inc. v. ZenBusiness Inc. (2023) (cont.)***

## ■ **NAD's holding:**

- The disclosure stating that an independent and impartial source did not cure the presence of ZenBusiness branding.
- Consumers are unlikely to notice the reference to ZenBusiness from the ZenBusiness URL in the address bar.
- The ZenBusiness references on the page were in smaller gray font coupled with the brand logo “zb” at the top of the page were insufficient in comparison to the large headline and rankings format.
- The NAD stated that, “consumers using these search terms can reasonably be expected to be seeking independent, third-party rankings and reviews of LLC services, and the top results from such searches are indeed primarily editorial rankings and review sites.”
- The NAD concluded that despite the ZenBusiness adding the disclosure to the top of its rankings page during the proceedings it did not prevent a misleading message from being conveyed.



# Reviews and Disclosures:

## *Bath & Body Works, LLC v. Goose Creek Candles, LLC (2023)*

- **NAD challenged Claims:** The 4- and 5- star reviews were selectively published and incentivized.
- **Allegations:** The challenger argued that the incentivized reviews should include a material connection disclosure.
  - The challenger emphasized that after a purchase, Goose Creek emails customers “Free gift when you review your recent purchase,” offering a gift in exchange for a review including a star rating and their experience.
- **Advertiser’s position:**
  - Goose Creek clarified that all reviewers, regardless of their review (positive or negative), receive the free product (a room spray).
  - Goose Creek also explained that negative reviews are not discouraged or suppressed.
  - Goose Creek also described its software review process of consumer submissions, stating that it removes or excludes reviews containing incorrect information or irrelevant content.

# ***Bath & Body Works, LLC v. Goose Creek Candles, LLC*** **(2023) (cont.)**

- **NAD's holding:** NAD found no evidence that Goose Creek's review collection process encourages only positive reviews.
  - NAD determined that Goose Creek's email offer incentivizes both positive and negative reviews.
  - NAD found it unclear how the software accurately determines whether a review is misleading or irrelevant.
    - NAD cautioned to carefully vet the software's review process to ensure that it disposes only of irrelevant reviews that have nothing to do with the product and does not inadvertently scrutinize and dispose of negative reviews more than positive reviews.
  - NAD noted best practices suggest Goose Creek should clearly and conspicuously disclose how it collects, processes and displays its consumer reviews to avoid misleading consumers.
    - It is well settled that incentivized reviews may affect the weight a consumer gives a review.
  - NAD recommended that all consumer reviews posted or re-posted by Goose Creek be modified to include a clear and conspicuous disclosure that the review was incentivized.

# Ways to Defend Lawsuits Challenging Customer Reviews and Related Claims

**Create policies and procedures to ensure that your customer reviews are valid reviews from bona fide customers.**

**If you incentivize customer reviews, require those customers to clearly and conspicuously disclose their connection with you.**

**Maintain documents demonstrating that customer testimonials used in advertising reflect actual customers of the advertised products.**

**Document all compliance steps taken.**

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# Pricing and “Free” Claims

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# Challenged Pricing

## Strikethrough Pricing / Former Price Comparison / Perpetual Sales

- Inflate comparison reference prices to deceive customers into believing that the sale price is a discounted bargain price.
- Any comparative price must not appreciably exceed the price at which substantial sales of identical or substantially similar products or services have occurred in the relevant trade area over a reasonable period, in the normal course of business.

## Junk Fees

- Fees that are unnecessary, unavoidable, or surprise charges inflating prices but adding little to no value.

## Drip Pricing

- Advertising only a part of a product's price and revealing other charges later when purchasing the product.

# Savings Claim:

## *Vizcarra v. Michaels Stores, Inc. (2023)*

- ***NY AG v. Michaels (2011)***: Retailer and New York’s Attorney General agreed to a \$1.8 million settlement over Retailer’s advertising of 50% off framing coupons as a sale product for at least 104 consecutive weeks.
- **Applicable laws**: California’s False Advertising Law (FAL), Unfair Competition Law (UCL), and Consumer Legal Remedies Act (CLRA).
- **Allegations**:
  - Michaels Stores’ advertisements for its arts, crafts, and other decor products are false.
  - For over two years, the store’s entire inventory was allegedly always 20% off the “regular” listed prices on their website.
  - The wording of the 20% off sale was allegedly changed from month to month, but the sale remained.
- **Advertiser’s position**: Michaels argued, among other defenses, that the alleged advertisements could not be misleading because, while discounts may have been available, not all consumers were aware or took advantage of them.
- **Case status**: Court denied Michaels’ Motion to Dismiss; litigation ongoing.





# Strikethrough Pricing: *Broomes v. FullBeauty Brands Operations, LLC (2024)*

- **Applicable laws:** California's False Advertising Law (FAL), Unfair Competition Law (UCL), and Consumer Legal Remedies Act (CLRA).
- **Allegations:** Plaintiff alleged the prices were false and misleading, claiming FullBeauty inflated the comparison reference prices to deceive customers into believing the sale prices represented genuine discounts.
  - Defendant's in-house branded clothing products on the website were offered at sale prices that were discounted from higher reference prices.
  - Plaintiff argued that FullBeauty rarely, if ever, listed or sold items at those inflated prices, therefore consumers were misled into believing that they were receiving significant markdowns or discounts.
- **Case status:** Plaintiff filed an amended complaint; Litigation ongoing.



# Disclosures and Savings Claims

- **DO**: Clearly and conspicuously disclose any price comparison, material terms, and offer restrictions.
- **DO**: Prominently disclose the lowest and highest saving when using a savings claim (i.e., “save up to 40%”) for a group of items
- **DO**: Ensure that the number of items available at the highest savings represents a significant percentage—typically 10%—of all items offered.
- **DO**: Disclose offer limitations (i.e., time and eligibility).
- **DO**: Ensure that “list prices” or “original prices” are accurate.
- **DO NOT**: List comparative prices that “appreciably” exceed the price of identical or substantially similar products for a substantial period in the regular course of business,.
- **DO NOT**: Use “perpetual sales prices” that could undermine the validity of a “former price.”

# State Laws

- **Georgia:**

- Ga. Attorney General's Consumer Protection Division (O.C.G.A. §§10-1-390 *et seq.*) - "Unlawful activities that are prohibited by the Fair Business Practices Act include..." advertising an item for sale when that item "has been offered at that price **for the past month.**"

- **Connecticut:**

- Co. Regulation of Agencies (§ 42-110b-12a) - It is unfair or deceptive to make "any price comparison based upon a price...unless: (1) the price is a price at which such property or services were actually sold by the seller **in the last ninety days** immediately preceding the date on which the price comparison is stated in the advertisement" or advertisement discloses the time when such sales were made.

- **Missouri:**

- Mo. Code of State Regulations (tit. 15 § 60-7.060(2)(B)(1)) – "A seller shall not make a price comparison to a former price, unless it is actual, bona fide, and not illusory, and is a price at which reasonably substantial sales were made to the public by the seller in the regular course of business and on a regular basis in the immediate, recent period preceding the advertisement. **There shall be a rebuttable presumption that the seller has not complied unless it can show sales of ten percent (10%) or more of the total sales of the product not less than thirty days nor more than twelve months.**"

# “Prevailing Market Price”

- **Cal. Bus. & Prof. Code § 17501:**

- “For the purpose of this article the worth or value of any thing advertised is the prevailing market price, wholesale if the offer is at wholesale, retail if the offer is at retail, at the time of publication of such advertisement in the locality wherein the advertisement is published.”
- “No price shall be advertised as a former price of any advertised thing, unless the alleged former price was the prevailing market price as above defined within three months next immediately preceding the publication of the advertisement or unless the date when the alleged former price did prevail is clearly, exactly and conspicuously stated in the advertisement.”

- The “original price” referenced must be the “prevailing market price” within the three months prior to the publication of the advertised price or some other disclosed period.

# Comparative Pricing: *Chester et al. v. The TJX Companies, Inc. (2015)*

- **Applicable laws:** California's False Advertising Law (FAL), Unfair Competition Law (UCL), and Consumer Legal Remedies Act (CLRA).
- **Allegations:** TJ Maxx's advertising of comparative prices (TJ Maxx price v. "Compare At" price) allegedly deceived customers to mistakenly believe they are saving substantial amounts on name brand items.
  - T.J. Maxx's website clarified: "The 'compare at' price is our buying staff's estimate of the regular, retail price at which a comparable item in finer catalogs, specialty or department stores may have been sold."
  - Plaintiffs argued that like other reasonable consumers, they did not interpret a "compare at" price to mean a mere estimate, instead they believed it was the original retail price of the product.
- **Outcome:** T.J. Maxx settled for \$8.5 million



# “Junk” Fees and Drip Pricing

- **“Junk” fees** are unnecessary, unavoidable, or surprise charges that inflate prices and add little to no value.
  - “Not all fees that consumers are charged are junk fees; some are legitimate fees for additional products or services that consumers value.” – White House, *How Junk Fees Distort Competition* (2022)
- **Drip pricing** is a business practice of advertising only part of a product’s price and then later revealing additional charges throughout the customer’s purchase.
  - Additional charges can be mandatory charges: Hotel resort fees, fees for optional upgrades, or add-ons.
  - A study found that consumers are likely to spend 14 percent more when drip pricing is utilized rather than all-inclusive pricing.



# FTC Rule on Unfair or Deceptive Fees

- In November 2023, the FTC released its Proposed Rule targeting so-called unfair and deceptive fees.
  - Applies to any business selling in physical locations and online.
  - *Exception:* Motor vehicle dealers (addressed in the CARS Rule).
- Applies to businesses regardless of whether they are providing the goods or services themselves (e.g., an online travel agent advertising for a hotel chain).
- The FTC broadly identified two practices that it intends to regulate:
  - (1) omitting mandatory charges and fees from advertised prices; and
  - (2) misrepresenting the nature and purpose of the charges or fees.

# Two Prongs: Hidden and Misleading Fees

## ■ Hidden Fees Prohibited

- (a) It is an unfair and deceptive practice for any business to offer, display, or advertise an amount a consumer may pay without clearly and conspicuously disclosing the Total Price.
- (b) In any offer, display, or advertisement that contains an amount a consumer may pay, a Business must display the Total Price more prominently than any other Pricing Information.

## ■ Misleading Fees Prohibited

- (a) It is an unfair and deceptive practice for any business to misrepresent the nature and purpose of any amount a consumer may pay, including the refundability of such fees and the identity of any good or service for which fees are charged.
- (b) A business must disclose clearly and conspicuously before the consumer consents to pay the nature and purpose of any amount a consumer may pay that is excluded from the Total Price, including the refundability of such fees and the identity of any good or service for which fees are charged.



# Disclosing the “Total Price” for Goods and Services

- Under the Proposed Rule, businesses would be required to disclose the “**Total Price**” Clearly and Conspicuously in any offer, display, or advertisement.
  - It must be difficult to miss and easily noticeable.
- The Total Price must be disclosed *more prominently* than any other pricing information.
- The “Total Price” is the **maximum total** of all fees or charges a consumer must pay for a good or service and any **mandatory Ancillary Good or Service**.
  - Exception: **Shipping Charges** and **Government Charges** may be excluded.

# Disclosing the “Total Price” for Goods and Services (cont.)

## Included in the Total Price

- **“Mandatory Ancillary Goods or Services”**
  - Additional good(s) or service(s) offered that a consumer **cannot avoid paying** at the completion of the transaction.
- **“Maximum Total”**
  - Allows businesses to apply discounts and rebates after disclosing the Total Price.

## Excluded from the Total Price

- **“Optional Ancillary Goods or Services”**
  - Additional good(s) or service(s) that is **optional to purchase** at the completion of the transaction.
- **Shipping Charges**
  - Fees or charges to send physical goods to a consumer.
- **Government Charges**
  - Fees or charges imposed on consumers by a federal, state, or local government agency, unit, or department.

# Optional vs. Mandatory Ancillary Goods & Services

## ■ Optional

- If a hotel offers a consumer the option to purchase or decline trip insurance with a room reservation.
- A car rental service offers the option to add baby seats, satellite radio, or navigation systems.
- Tipping or gratuity.

## ■ Mandatory

- A housing rental agreement includes a fee that the consumer cannot reasonably avoid for a trash valet service.
- A “processing” or “service” fee charged by a concert venue to complete the transaction.
- A telecommunications company charging mandatory licensing fees.

# Disclosing the “Nature and Purpose” of Charges and Fees

- When listing any charges or fees, a business would be prohibited from categorizing different charges or fees under the same label **if they serve distinctly different purposes.**
- Relatedly, the FTC addressed several comments that complained of the use of labels such as “convenience fees,” “improvement fees,” and “economic impact fees,” which are often used as **catchall terms for multiple fees.**
- Example: A meal delivery application could not charge both a fee to compensate its drivers and a fee to run the service under the same label or line item and instead must list the two fees separately.
  - The same business must also disclose the allocation of fees, for example, if a portion of an additional gratuity is used to offset the driver’s wages or benefits.
  - If any charges or fees are refundable, that information must also be disclosed.

# Ways to Defend Lawsuits Challenging Pricing Claims

**Track the prices at which you offer products and services over time.**

**Track the number of sales you make at specific price points over time.**

**Avoid claims that overstate the discount off of regular prices paid by actual customers in recent history.**

**Clearly and conspicuously disclose the full price of the product or service at the outset.**

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# **Alleged Violations of FDA Regulations**

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# FDA-Regulated Products

## Calorie, Sugar, and Carbs Claims, Alleging:

- Companies understate the number of calories in their products, including dietary supplements.

## Protein Content Claims, Alleging:

- Protein content claims are misleading because they assume the addition of milk, which contains protein.
- The products are made with low quality proteins, so the human body can only use 40–50% of the protein in the product.
- The products have a low Protein Digestibility Corrected Amino Acid Score (PDCAAS), so the advertised protein amount is incorrect.

## “Clean” and “Simple” Claims



# Sugars and Carbs Claims: *Olé Mexican Foods, Inc. v. Gruma Corp. (2024)*

- **NAD challenged claims:**
  - “1.5G Total Fat Per Serving”
  - “Zero Net Carbs”
  - “oG Sugars”
  - “Zero Sugar”
  - “Absolutely ZERO Net Carbs”
- **Allegations:** The advertiser’s tortilla products used “a deceptively small serving size that is inconsistent with Food and Drug Administration (‘FDA’) regulations and industry practice and is misleading to consumers.”
- **Advertiser’s position:** The advertiser challenged the accuracy of nutrition claims regarding fat, sugars and net carbohydrates found on the Challenged Product’s labels.

# ***Olé Mexican Foods, Inc. v. Gruma Corp. (2024) (cont.)***

## ■ **NAD's holding:**

- NAD found the claims misleading based on a one tortilla serving size in a marketplace with FDA regulations specifying “per serving” calculation of net carbs, fat and sugar.
- NAD recommended that the Advertiser:
  - Discontinue the “1.5G Total Fat Per Serving,” for all Challenged Products;
  - Modify the Challenged Products’ net carb calculation to use total carbohydrates for the 54-gram serving size minus dietary fiber for the 54-gram serving size; and
  - Discontinue the “oG Sugars” and “Zero Sugar” claims for the Mission Zero Net Carb Sundried Tomato Basil Tortilla because it did not meet the FDA standard discussed below.
    - The FDA regulations state that a zero declaration of sugars can be made if there is less than 0.5 grams of total sugars.
    - Accordingly, the Mission and Guerrero Zero Net Carbs Original tortillas and the Guerrero Zero Net Carbs Chipotle tortillas were supported by the testing results demonstrating that they both have less than 0.5 grams of sugars for the three-tortilla serving size.

## Clean and Simple Claims: *Bath & Body Works, LLC v. Goose Creek Candles, LLC (2023)*

### ■ NAD requested information about express and implied claims:

- “Avoid the harmful chemicals found in other body care products.”
- “Many of today’s popular candle brands make their products with inferior, and potentially unsafe ingredients.”
- “When you buy any product from the Goose Creek candle company, you’ll get a safe, clean product for your home with ingredients that far exceed comparable brands.”
- “You’ll never have to deal with smoky air or black residue left on your walls and ceilings.”
- “The candles of B&BW and other Goose Creek competitors are made with harmful chemicals.”
- “The candles of B&BW and other Goose Creek competitors are not made with high quality ingredients.”
- “The candles of B&BW and other Goose Creek competitors are not safe or clean.”

# ***Bath & Body Works, LLC v. Goose Creek Candles, LLC (2023)***

## **(cont.)**

- **Advertiser's position:** Goose Creek supported its advertising claims with a New York Times article discussing federal and state bans on certain ingredients and chemicals in U.S. cosmetic products.
  - Goose Creek linked those banned substances to ingredients in B&BW's body products and claimed that B&BW items contain Methylisothiazolinone and Octinoxate.
- **NAD's holding:** NAD found that Goose Creek's statements reasonably conveyed that B&BW and other competitor's products contain harmful chemicals.
  - NAD applied the reasonable consumer standard to evaluate whether Goose Creek's claims implied competitor products contain harmful chemicals or unsafe ingredients.
  - NAD concluded there was no evidence confirming that B&BW's products contained the chemicals mentioned in the New York Times article.
  - NAD also recommended they discontinue all claims suggesting competitor products contain harmful or unsafe ingredients.
- Goose Creek voluntarily agreed to permanently discontinue some claims, as well.

# Ways to Defend Lawsuits Challenging FDA-Regulated Claims

**Review your label carefully and confirm that testing validates the label claims.**

**Review the ingredients in your product to ensure that they meet the relevant standards, including those for protein claims.**

**Analyze any “clean” or “simple” claims that you use to ensure that they do not convey a message that goes beyond what you intend.**

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# Environmental Advertising Claims

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# Trending Litigation

- **Aspirational Claims**

- Plaintiffs are challenging “aspirational” claims, including claims that a company will reduce carbon emissions and water waste and increase use of recycled content in products.

- **“Biodegradable,” “Compostable,” “Recyclable” Claims**

- States are passing new laws restricting “biodegradable,” “compostable,” and “recyclable” claims *unless* companies pass stringent standards (i.e., specific ASTM tests).
- California’s Greenwashing Taskforce is investigating these claims.
- Washington state has begun sending “educational” letters to companies it believes are “greenwashing.”



# Aspirational and Sustainable Claims: *Earth Island Institute v. The Coca-Cola Co. (2024)*

- **Applicable laws:** D.C.'s Consumer Protection Procedures Act (CPPA)
- **Allegations:** Coca-Cola's marketing is false and deceptive because it portrays itself as "sustainable" and committed to reducing plastic pollution, cultivating an environmentally friendly image but in practice allegedly pollutes more than any other beverage company.
- **Advertiser's position:** Coca-Cola took the position that some of its statements were mere puffery, stating "[B]usinesses cannot insulate themselves from suit simply by avoiding concrete claims. Vague and ambiguous statements, incapable of being strictly true or false, may yet be actionable as misrepresentations."
- **Court's holding:**
  - Some advertised statements were "fairly specific goals [Coca-Cola] has set for itself." For example: "Make 100% of our packaging recyclable globally by 2025. Use at least 50% recycled material in our packaging by 2030." (website, retrieved June 2021)
  - Other advertised statements were considered "more vague." For example: Coca-Cola is "committed to creating a World Without Waste by taking responsibility for the packaging we introduce to markets and working to reduce ocean pollution." (website, retrieved Oct. 2018)
  - Coca-Cola's Motion to Dismiss was successful at the trial court level, but was reversed by the Appellate court: "The law does not require that misleading representations be contained in a single statement in order to be actionable; a series of statements can in combination be misleading even when, taken individually, they fall short of that."

# “Greenwashing” Class Action: *Gyani v. Lululemon Athletica Inc. (2024)*

- Lululemon’s alleged “greenwashing” campaign, “Be Planet,” is misleading consumers to pay premium prices by advertising express and implied claims.

Our Impact Agenda is organized into three interconnected pillars, each with a vision for success, goals, and commitments and strategies:

**Be human.** Our people succeed because we create an environment that is equitable, inclusive, and fosters growth.

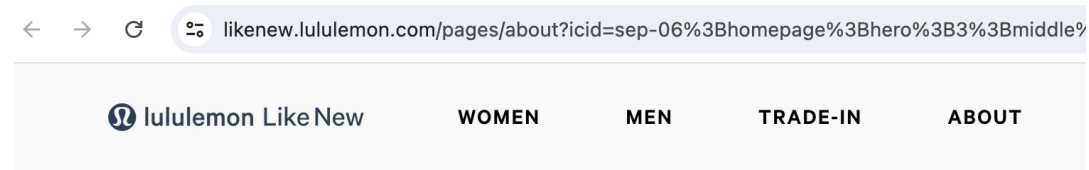
**Be well.** Our communities thrive because we contribute to conditions that support mental, physical, and social wellbeing.

**Be planet.** Our products and actions avoid environmental harm and contribute to restoring a healthy planet.

# Be Planet

Our lives are one with the health of the planet.

Our products and actions avoid environmental harm and contribute to restoring a healthy planet. Our goals:



## Getting after our goals.

Like New is part of lululemon's commitment to support a circular ecosystem. By lengthening the lifecycle of gear that's built to be reused and recycled, we're moving toward our goal of having an end-of-use solution for 100% of our products by 2030. We're also reducing greenhouse gas emissions within our supply chain and have been sourcing only renewable electricity for our owned and operated facilities since 2021.

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# “Greenwashing” Class Action: *Gyani v. Lululemon Athletica Inc. (2024) (cont.)*

- **Applicable laws:** Florida Deceptive and Unfair Trade Practices Act (FDUTPA); Misleading Advertising law; and Unjust enrichment claim.
- **Allegations:** Plaintiff argued that Lululemon’s advertising claims were false and deceptive: Lululemon’s “business practices, actions, and products positively contribute to the environment and a healthier planet,” when “[i]nstead of sustaining and positively improving the planet, Lululemon is increasingly causing negative impact and harm.”
  - Plaintiff emphasized the FTC’s Green Guides arguing the “Be Planet” campaign claims were false and misleading because “the manufacture, transport, and use of Lululemon’s products continues to create significant environmental harm.”
  - Example: According to the plaintiff “Lululemon’s greenhouse gas emissions have more than doubled since the start of the Be Planet campaign in 2020” contrary to the company’s commitments to reduce carbon emissions.
- **Case status:** Ongoing litigation

# “All Natural” and Microplastics: *Daly v. The Wonderful Company LLC (2024)*

- **Applicable laws:** Illinois Consumer Fraud and Deceptive Business Practices Act (ILCFA); common law fraud; and unjust enrichment.
- **Allegations:** Plaintiffs assert that The Wonderful Company (makers of Fiji water bottles) falsely markets its “Natural Artisan Water” despite allegedly containing microplastics.
  - Plaintiffs argue that microplastics are “not naturally occurring” and “leach into the water from the bottle,” ultimately exposing consumers to “additives, processing aid, and unreacted monomers.”
  - The plaintiff supported their position with several studies finding that exposure to microplastics through ingestion may lead to: “gastrointestinal problems such as irritable bowel syndrome; endocrine disruption such as adverse effects on hormonal balance and reproductive function; and cardiovascular problems.”
- **Case status:** Ongoing litigation



# “Plant-Based”: *Whiteside v. Kimberly Clark Corp. (2024)*

- **Applicable laws:** California’s Unfair Competition Law (UCL); False Advertising Law (FAL); and Consumer Legal Remedies Act (CLRA).
- **Allegations:** Plaintiffs argued that Huggies’ use of “plant-based wipes/ingredients” and “natural care” claims coupled with nature themed imagery packaging suggests that the wipes only used natural ingredients and were not subject to chemical modification or processing.
- **Court’s holding:**
  - The district court rejected the plaintiff’s argument: “Defendant’s use of the term ‘plant-based’ ... is not misleading because it is truthful,” since the wipes “contain at least 70% plant-based ingredients by weight.”
  - The Ninth Circuit disagreed and reversed the district court’s decision holding: “Plant-based” could be interpreted in different ways, it plausibly conveys a concrete and unambiguous meaning to a reasonable customer: that the product is entirely plant-based and exclusively contains “natural” materials.





# Ways to Defend Lawsuits Challenging Environmental Claims

**Review your advertising in its entirety and consider the potential implied claims.**

**Stay current on developing laws, particularly those requiring specific testing for specific types of claims.**

**Consider the language used to promote their eco/social benefits and efforts, as plaintiffs are now distinguishing between language that touts a company's ability to avoid a negative outcome and language touting that the company is creating a positive outcome.**

**If you make aspirational claims that discuss a specific benefit within a specific period, document all your efforts demonstrating that you will reach that goal.**

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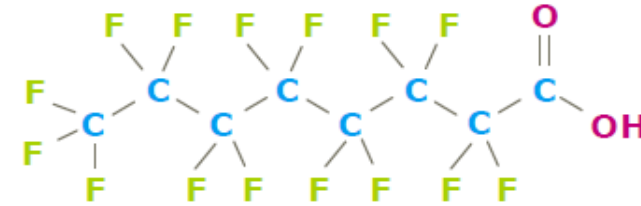
# **“PFAS”– Related Claims (Express and Implied)**

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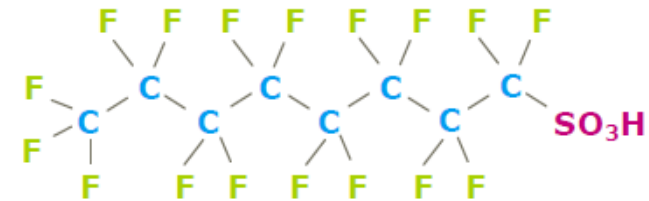


# Understanding PFAS | The Basics

- Per- and polyfluoroalkyl substances
- Man-made fluorinated chemicals
- Superior heat and stain resistance; oil- and water-repellent
- Exceptionally stable, non-reactive, resistant to degradation
- Used in industrial and consumer products since the 1940s (e.g., Teflon, Scotchgard, fire-fighting foams)
- Certain PFAS phased out in early 2000s
- PFAS widely used : Found in food containers, recycled paper and machines that make packaging, surface coatings, carpeting; can show up in products unintentionally.
- PFOA and PFOS are two of the most well-known and most thoroughly studied/understood PFAS chemicals
- EPA's current inventory lists nearly 15,000 PFAS chemicals – number is growing



**PFOA** – perfluorooctanoic acid



**PFOS** – perfluorooctanesulfonic acid

# Trending Litigation: PFAS (per- and polyfluoroalkyl substances)

- Implied “PFAS Free” claims:
  - Plaintiffs are arguing that *any* claims relating to environmental benefits imply “free of” claims.
  - More frequently, “free of claims” are translating to “PFAS-Free” claims.
  - Plaintiffs are arguing that generally environmentally friendly claims are false or deceptive if a product contains organic fluorine.

# Where Plaintiffs Allege PFAS Might be Present:



Adhesives and Sealants



Chemicals



Fertilizers, Pesticides, Biocides



Machinery



Packaging



Printing



Aerosol Propellants



Cleaning Agents



Firefighting Foam



Medical Products



Paper Products



Optical Devices



Aerospace and Aviation



Coatings



Floor Polish



Mining



Toys



Soil Remediation



Ammunition



Construction



Furniture



Musical Instruments



Personal Care Products



Sporting Equipment



Automotive



Cookware



Glass



Nuclear Energy



Pharma



Textiles



Biotech



Electronics



Leather Products



Refrigerants



Pipes and Fittings



Utilities



Carpeting and Textiles



Energy



Lubricants



Oil and Gas

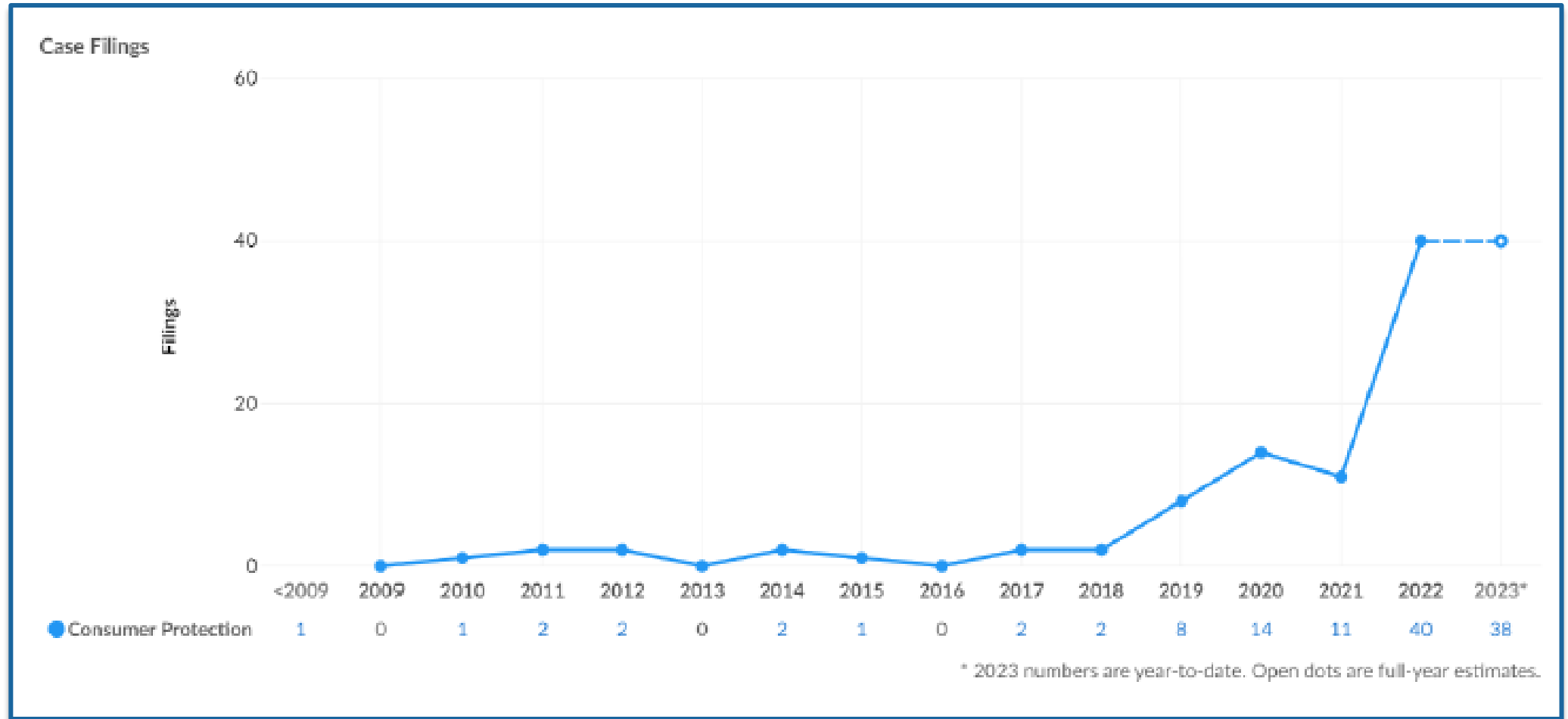


Plastics Resins, Polymers



Water/ Effluent Treatment

# PFAS Litigation (Last Updated Dec. 2023)



# Advertising Targeted

- Juice:
  - “All Natural, Simple Ingredients”
  - “Simple Ingredients and the Great Taste of Nature”
- Baby wipes:
  - “Made with Naturally Derived Ingredients”
  - “Specially Formulated to be Extra Gentle on your Baby’s Skin”
- Diapers:
  - “PFAS-Free”
  - “Free from Harmful Chemicals”
  - “Pure Cotton”
- Feminine Care Products:
  - “100% Organic Cotton Core”
- Outdoor Gear and Apparel:
  - “REI has eliminated long-chain PFAS DWR treatments from the REI Co-op brand”
  - “Fair Trade Certified”
- Makeup:
  - “Rigorously Safety Tested”
  - “Pure” and “Clean, conscious beauty that’s good to your skin, good for the community, and good for the planet”
- Toothpaste:
  - “Safe to Swallow”
- Mattresses:
  - “Eco-Friendly”
  - “Chemical-Free”

# PFAS Class Action: *Bullard et al. v. Costco Wholesale Corp. (2024)*

- **Applicable laws:** California's Unfair Competition Law (UCL); False Advertising Law (FAL); Consumer Legal Remedies Act (CLRA); New York's General Business Law; and common law claims.
- **Allegations:** Plaintiff alleged the claims, "No Chlorine, Alcohol\*, Dyes, Parabens or Phthalates" and "Naturally Derived Ingredients" were false claims because the wipes contained PFAS at the time the claims were made.
  - Plaintiffs did not offer any test results or concrete evidence despite claiming that the "testing demonstrate[d] that the Product actually contains significant levels of unsafe, toxic PFAS chemicals."





# “Clean” Claims Class Action: *Boyd et al. v. Target Corp. (2023)*

- **Applicable laws:** Numerous state consumer fraud and protection statutes, including Alabama, Arizona, California, Colorado, Florida, Illinois, Indiana, Michigan, New Hampshire, New York, Oklahoma, and Washington
- **Allegations:** Plaintiffs alleged that Target Clean has listed at least 13 “banned” ingredients but advertises that its products are “free from ‘commonly unwanted’ chemicals or ingredients” and “formulated without ingredients [consumers] may not want.”
- **Advertiser’s position:** Target argued in its Motion to Dismiss that “clean” lacks any “accepted meaning [and] is too subjective and vague and wholly dependent on an individual’s interpretation and lacks an empirical benchmark to provide any indicia of measurability to create a basis for a lawsuit . . . based on reasonable consumer confusion.”
- **Court’s holding:** The court denied Target’s motion, finding that plaintiffs’ citation to the FTC Green Guides could support an inference that a reasonable consumer could be deceived.





# Ways to Defend Lawsuits Challenging “PFAS” Related Claims

**Consider the potential implied claims of general environmentally friendly claims.**

**Remove or mitigate the amount and types of PFAS included in their processes and products.**

**Importers of PFAS-containing products should also assess whether reporting requirements apply to them.  
If they do apply, consider what information may be needed from international business partners.**

# Additional Claims (Not Discussed Today)

- **Automatic Renewal Programs** that fail to provide the necessary disclosures, obtain consent, and provide a simple cancellation mechanism.
- **Alleged Violations of Wiretapping Laws** through the Collection of Data via Cookies, Scraping, and chat bots.
- **Email Marketing lawsuits** challenging “from” names that do not identify the legal name of the email sender, emails sent using proxy or privately registered domains, and subject lines that mislead recipients concerning the subject matter or content of the body.



**Claudia A. Lewis**

Partner | 202.344.4359  
CALewis@Venable.com



**Ari N. Rothman**

Partner | 310.229.9909  
ANRothman@Venable.com



**Shahin O. Rothermel**

Partner | 202.344.4550  
SORothermel@Venable.com

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