

Top 10 Legal Issues for 2024 For the Consumer Products Industry

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With the 2024 underway, ArentFox Schiff highlights 10 of the most pressing legal issues facing the consumer products industry this year.

1. CPSC Updates

On August 16, 2022, US Congress enacted Reese's Law, which aims to protect children from ingestion hazards associated with certain lithium batteries found in consumer electronics. The law stems from the death of 18-month-old Reese Hamsmith in December 2020 after she swallowed a lithium coin cell battery. Such batteries pose a particular hazard because they can become lodged in the throat and cause chemical burns due to their unique design. While not all round, flat batteries pose the same type of hazard, particularly if they are non-replaceable and inaccessible. Reese's Law was drafted to include largely any battery posing an ingestion hazard regardless of the likelihood they will be removed from a product.

On September 11, 2023, the US Consumer Product Safety Commission (CPSC) adopted the ANSI/UL 4200A-2023 Standard for Products Incorporating Button Batteries or Coin Cell Batteries under 16 C.F.R. § 1263, promulgated pursuant to Reese's Law. The new standard imposes strict requirements on manufactures and importers of coin or button cell batteries and products that contain or require such batteries in product design, packaging, and labeling. Domestic manufacturers and importers are required to self-certify that their products meet this standard in all respects. After an initial period of enforcement discretion, the rule takes effect March 19.

A potential wrinkle for importers grappling with the requirements of Reese’s Law is a proposed revision to the rule governing certificates of compliance, codified at 16 CFR part 1110. The revision would require importers to upload certificates of compliance to the US Customs and Border Protection (and the CPSC) via an online e-filing with the US Customs and Border Protection’s Automated Commercial Environment very soon after importation. This may turn out to be more of a logistical hurdle than anything else, particularly for companies importing large volumes and varieties of products. Regardless, it is something companies will want to keep an eye on and start preparing to address sooner rather than later.

2. California Issues

New Recycling Labeling Rule

California’s Truth in Labeling for Recyclable Materials law, S.B. 343, passed in 2021 and coming into effect in 2025, provides stricter regulations for what products or materials can display the “chasing arrows” recyclable symbol. The law prohibits the use of the chasing arrows symbol, also known as the Möbius loop, or any other indicator of recyclability on products and packaging unless certain criteria are met. The purported goal of the law is to prevent misleading recyclability claims and keep unrecyclable materials out of the blue bin.

The law will be enforceable by local jurisdictions and the California attorney general, which are authorized to file civil suits and seek monetary penalties against companies that mislabel their products. Entities may also face civil liability under California’s False Advertising Law and the California Consumers Legal Remedies Act (CLRA), both of which prohibit misleading and deceptive advertising. The CLRA also provides a private right of action that allows consumers to file class actions.

Though some exceptions apply, the new requirements are likely to significantly limit the use of recyclability symbols and claims on products or materials that cannot be recycled through at least 60% of curbside municipal recycling programs in the state.

Brands seeking to use recyclability claims on their products, including the chasing arrows symbol, will need to scrutinize their products and packaging to comply with California’s recyclability standards after the requirements go into effect.

Class Actions

We expect class action lawsuits against consumer product manufacturers, distributors, and retailers to continue to be on the rise in California in 2024, particularly in the area of false labeling, wiretapping/privacy, and wage and hour claims.

CLRA/False Advertising

In 2023, plaintiffs’ lawyers continued to weaponize the CLRA by filing false advertising cases against a broad array of consumer products companies, including cosmetics, personal care products, wellness and nutrition products, and electronics, just to name a few.

The CLRA prohibits false or deceptive advertising, broadly applies to any “consumer” transaction involving the “sale or lease of goods or services,” and authorizes recovery of actual, statutory, and punitive damages. Most plaintiffs file CLRA claims as class actions, hoping to cash in on substantial

settlements. What's more, the recoverability of attorneys' fees under the CLRA provides a compelling financial incentive for plaintiffs' attorneys to file CLRA class action lawsuits.

At least 30 days before a plaintiff may file an action for damages under the CLRA, the plaintiff must notify the prospective defendant(s) in writing of the alleged violations in sufficient detail and demand that they be corrected. Courts have dismissed CLRA claims for failure to strictly comply with these requirements.

As we head into 2024, consumer product companies should be vigilant that all advertising they use on product packaging and online is truthful, substantiated, and conspicuous to consumers. Any missteps in this area can produce vulnerability to CLRA claims, and even worse, class action lawsuits.

California Invasion of Privacy Act

In 2024, consumer product companies that sell goods online can expect to see a continued proliferation of class action lawsuits filed by consumer watchdog plaintiffs under state wiretapping laws, particularly the California Invasion of Privacy Act (CIPA) against website operators that use standard online technologies, such as chat boxes to communicate with customers.

In these cases, a "litigation tester" hired by the plaintiff will visit a website and allegedly use the ubiquitous chat feature on the retailer's website to voluntarily communicate with a customer service representative. In some cases, the repeat plaintiff simply clicks or types "return," and then immediately leaves the chat session, frequently without even purchasing goods from the retailer. Because a third-party technology company is providing the underlying chat service, the lawsuit is based on unexplained "eavesdropping" by the service provider. That is, the website operators are not accused of being the *primary* violators of the state wiretapping law, but instead of "aiding and abetting" eavesdropping on their own websites because they use a technology vendor.

In 2023, judges in the state and federal courts around California had mixed reactions to such claims, with some courts dismissing them (without leave to amend) and others allowing them to proceed in part or in whole on the merits.

Wage and Hour Claims

Class and representative actions under the California Labor Code continue to cause problems for California companies. Claims for delayed payment of wages, unpaid overtime and minimum wages, unreimbursed business expenses, and failure to provide meal and rest periods have been brought as class actions representing all employees in California. Companies should take preventive measures to evade the resulting pressure to settle even the least meritorious claims. Options include instituting employee arbitration programs and conducting wage and hour audits.

3. New State Data Privacy Laws in 2024

Consumer product companies will want to be aware of comprehensive data privacy laws taking effect in 2024 as more states aim to protect consumers' personal data. Utah already implemented its new data privacy law as of December 31, 2023, and other states will follow suit in 2024, with the new data privacy laws coming into effect on March 31 in Washington, July 1 in Oregon, Texas, and Florida, and October 1 in Montana.

To prevent the misuse of consumer's personal information, these laws mandate specific privacy notices, limit certain data collection, and grant individuals more control over their personal information.

Companies should consult the data privacy laws of each state in which they operate and review and update their data privacy policies and processes to ensure compliance with the new laws.

4. So-Called “Greenwashing” Claims

The Green Guides were issued by the Federal Trade Commission (FTC) to help marketers avoid making environmental and sustainability claims that could mislead consumers. Before dissemination of environmental benefit claims, companies should confirm that the claims made by their product marketing and product labels are supported by competent and reliable substantiation.

Regulators and class action attorneys are specifically looking for false and misleading claims that overstate, directly or by implication, an environmental attribute or benefit, environmental benefits if the benefits are negligible, and imply a general, rather than specific, environmental benefit.

5. Proposition 65

Claims under California's [Proposition 65](#) (Prop. 65) continued to increase in 2023 across all facets of the consumer products industry, including cosmetics, personal care products, fashion and retail goods, chocolates and baked goods, nutritional supplements, automotive products, and the like. Consumer product companies can expect more of the same in 2024 with increased enforcement by Prop. 65 plaintiffs known as consumer “watchdog” organizations.

Prop. 65 is a consumer protection statute requiring companies that make or sell consumer products in California to provide clear and reasonable warnings on products containing one or more chemicals purported to cause cancer or reproductive harm. In 2023, Prop. 65 enforcers continued to focus on consumer products containing lead, cadmium, and plasticizers or “phthalates,” particularly di(2-ethylhexyl) (DEHP) and diisononyl (DINP).

One of the most significant Prop. 65 issues facing the consumer products company going into 2024 is whether the agency responsible for implementing Prop. 65's regulations, the Office of Environmental Health Hazard Assessment (OEHHA) will implement proposed amendments to the [short-form warnings](#) used by most consumer products companies on product packaging and for online sales. Public comments to the proposed warning amendments were originally due by December 20, 2023, but OEHHA extended the comment deadline to January 3, 2024, at the request of stakeholders. We expect OEHHA to decide on whether to implement the proposed amendments in 2024. If the proposed amendments are implemented, companies will likely have two years to comply with the new warning requirements.

6. AI Revolution

2023 was a transformative year for artificial intelligence (AI) in the consumer products industry. Companies adopted the use of AI in customer interface, sales forecasting, supply chain and logistics, marketing, and customer engagement. These developments promise to change the consumer products industry, allowing companies to tailor consumer goods and services to customer preference and to improve efficiency at all stages.

But these developments will surely face hurdles in 2024. [Several ongoing lawsuits](#) are challenging a core assumption of generative AI (GenAI) developers: the use of third-party copyrighted works to train GenAI tools constitutes “fair use” under the US Copyright Act. If this assumption is incorrect, developers could face copyright infringement damages and be forced to either rebuild their models from scratch or pay licensing fees to copyright holders.

Executives of consumer products companies incorporating AI into their businesses should consider the following questions:

1. Whether works created by GenAI are protectable under US copyright laws.
2. Whether existing contracts need to be updated to reflect AI-related uses and services.
3. Whether AI tools could expose them to liability under fair wage and hour laws.
4. Whether certain AI tools may require pre-clearance and safety testing by federal regulators.

7. Made In The USA

The FTC’s Made in USA Labeling Rule, which went into effect in August 2021, regulates (as the name suggests) claims that products are made in the United States. The law permits the FTC to levy civil penalties for violations and provides a private right of action. Early this year, the FTC levied a \$2 million dollar fine on Kubota North America Corporation for falsely labeling 1000s of products manufactured overseas as being “made in the USA,” and for failing to update the “made in the USA” disclosures when manufacturing for those items was moved overseas. This was the largest fine ever for a false “made in the USA” claim and demonstrates that the FTC is not only closely monitoring but is also willing to levy hefty fines for violations of the rule. To be sure, class action attorneys are watching for violations as well.

Competitors are also keeping watch on country-of-origin claims. Milwaukee Electric Tool Corporation recently challenged Stihl Incorporated USA’s advertising that both used images of the American flag and language implying that its product lines were made in America. The National Advertising Division of the Better Business Bureau arbitrated the competitor complaint and recommended that Stihl discontinue the advertising and make clear and conspicuous disclosures to consumers that not all of its products are made in the USA.

8. What Else Is the FTC Up To?

The FTC has changes on the horizon that will impact how consumer products companies market and sell their products to consumers.

- *Hidden Fees* - The FTC has proposed a new rule aimed at eliminating certain "hidden" and "junk" fee practices. The FTC said that these fees, which may be undisclosed until late in the transaction process, are estimated to cost consumers 10s of billions of dollars annually.
- *Recurring Subscriptions* – The FTC is proposing to revise its rule that regulates how companies can offer auto-renewing goods/services. The FTC has acknowledged that subscriptions, memberships, and other recurring-payment programs have benefits for both companies and consumers, but they are often abused. The proposed rule would seek to simplify cancellation mechanisms for consumers and regulate when and how reminders are sent when it is time for renewal.
- *Consumer Endorsements and Testimonials* – The FTC is continuing to revise its guidelines regulating the use reviews and testimonials in advertising. While the guides were significantly revised in 2023 to address new issues related to disclosures in social media, videos, and

other online platforms, the FTC is proposing a new rule that will specifically regulate a number of issues. These include negative review suppression, the ability of a company to offer compensation for reviews, and reviews of a company's own products by its employees.

9. Reporting Requirements under the New CTA

The [Corporate Transparency Act](#) (CTA), effective January 1, 2024, requires entities organized or doing business in the United States that don't qualify for a specific exemption to disclose their "beneficial owners" and provide certain other information to the US Department of the Treasury.

Consumer products companies, especially those with complicated organizational structures involving multiple tiers of entities, should start to evaluate their reporting obligations early to avoid an end-of-year rush to file. Operators with more than 20 employees and \$5 million in revenue will be exempt, along with their *wholly owned* or *wholly controlled* subsidiaries. Companies with minority equity holders or joint venture partners at multiple levels may not be able to rely on the subsidiary exemption.

10. PFAS Regulations

In 2024, we anticipate increased focus on regulation of consumer products containing per- and polyfluoroalkyl substances (PFAS) as many states plan for legislation banning these chemicals where intentionally added to consumer products. There are more than 12,000 known PFAS, of which several hundred are (or have been) in some type of commercial use. PFAS tend to be very stable and chemically inert over a wide range of temperatures, which makes them both very useful in a wide range of applications but very persistent in the environment and even in the human body, hence their popular label as "forever chemicals."

At least 11 states have introduced bans or limits on intentionally added PFAS in food packaging, and at least five will ban them in cosmetics as of January 2025. New York has banned intentionally added PFAS in clothing, while California will ban PFAS in both clothing and other textiles. Maine intends to ban them in any type of new product by 2030, and Minnesota will ban them in multiple categories of consumer products (including carpets, other textiles, cleaning products, cookware, and juvenile products) by 2025, and in all products by 2032.

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