



Consumer Class Action Litigation Update

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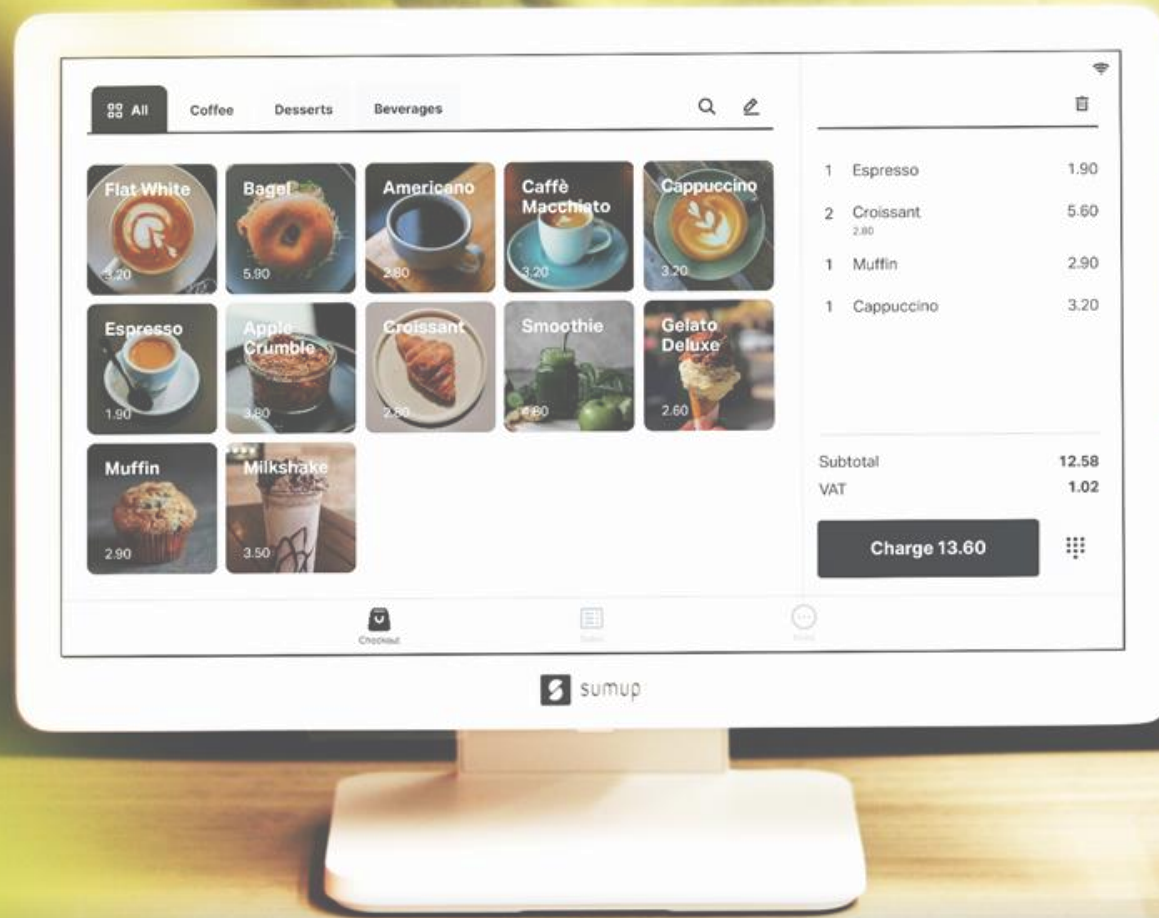


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Agenda

01 Consumer Privacy Class Actions

02 Consumer Fraud Class Actions



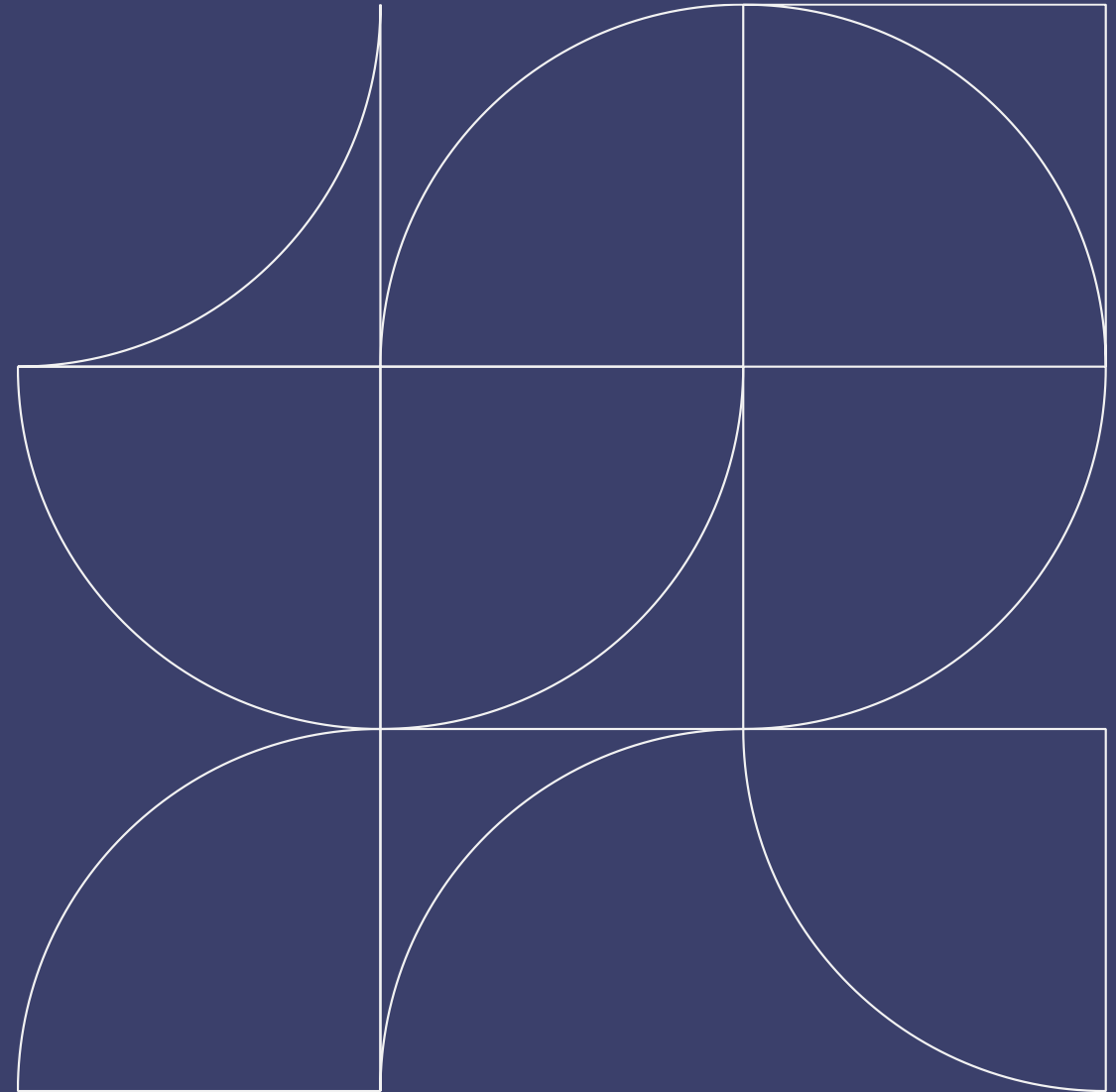
Consumer Privacy Class Actions



Class Action Trends Affecting Marketing and Advertising Efficiencies

- Generative AI
- Use of tracking technologies for marketing
- Advanced website features
- SMS Marketing
- Internet security measures and consumer data collection
- Deceptive practices through cookie banners
- Transparency through website privacy policies

Data Collection and Website Privacy Claims





Privacy and Data Collection Class Actions

Tracking Technology/Wiretap Claims Update

- *Vita v. New England Baptist Hospital*, Mass. Supreme Judicial Court (Oct. 24, 2024) (finding that capture of browsing activity is not a wiretap violation)
- *Griffith v. TikTok, Inc.*, Central District of California (Sept. 9, 2024) (denial of class certification)

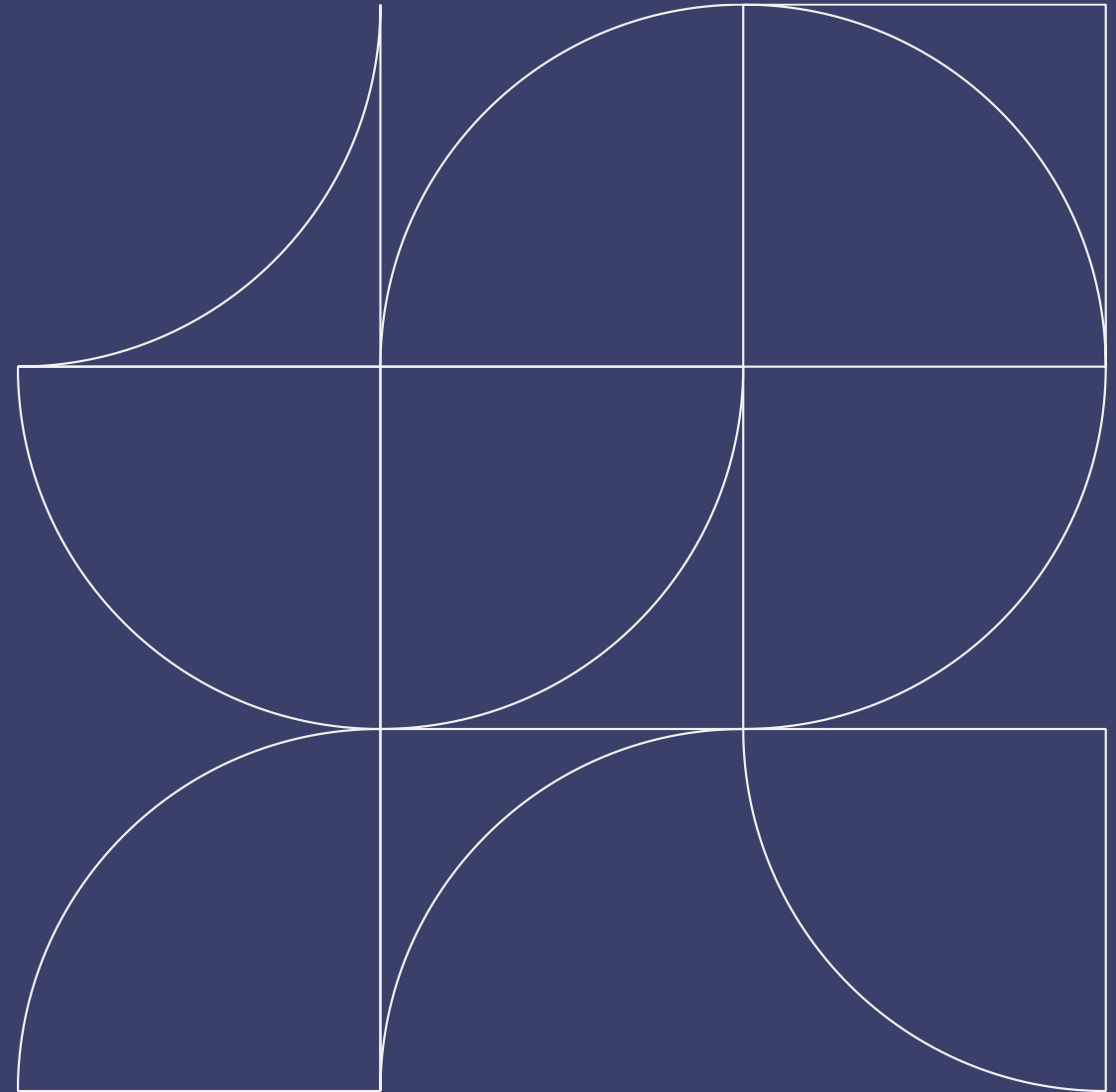
Video Privacy Protection Act Update

- *Salazar v. National Basketball Assoc.*, Second Circuit (Oct. 15, 2024)
- *Martinez v. Univision NOW*, Southern District of Florida (Oct. 1, 2024) (denial of class certification)

Illinois Genetic Information Privacy Act Update

Illinois Biometric Privacy Act Update

TCPA





TCPA

New FCC Rules

- Consent revocation by any reasonable means
- Text revocation requests cannot be limited to STOP
- Honor opt-out within 10 days
- Post-revocation confirmation texts

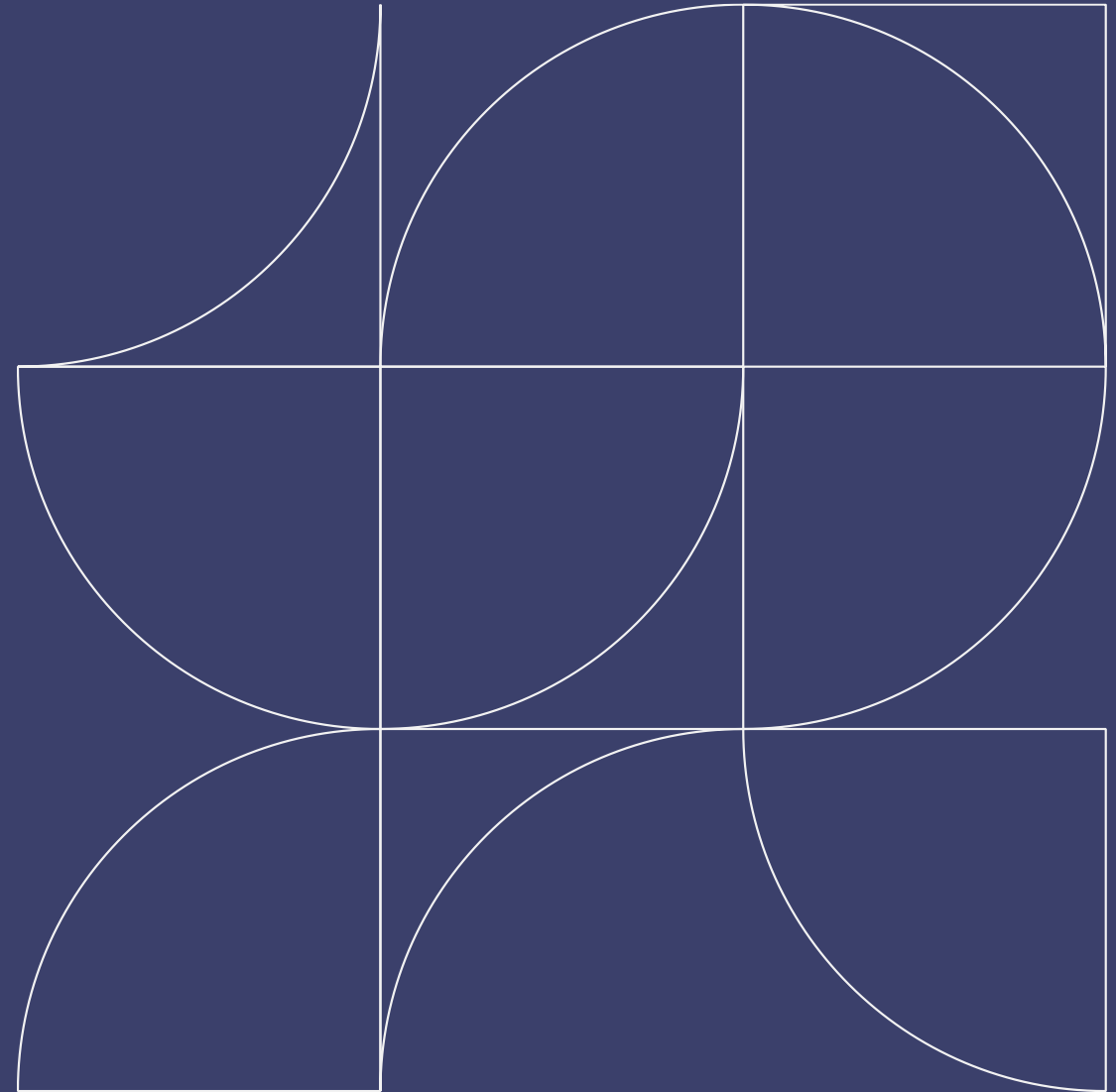
Solicitations versus Opportunities

- *Anderson v. Nexa Mortg. LLC*, 2024 WL 3762098 (C.D. Cal. Aug. 12, 2024)
- *Cacho v. McCarthy & Kelly LLC*, 2024 WL 3293628 (S.D.N.Y. July 3, 2024)

DNC Claims

- Prior Express Consent: *Harrell v. Aquion, Inc.*, 2024 WL 4188389 (M.D. Fla. Sept. 13, 2024).
- Answered Calls: *Weingrad v. Top Healthcare Options*, 2024 WL 4228149 (E.D. Pa Sept. 17, 2024)

Data Breaches





Data Breaches

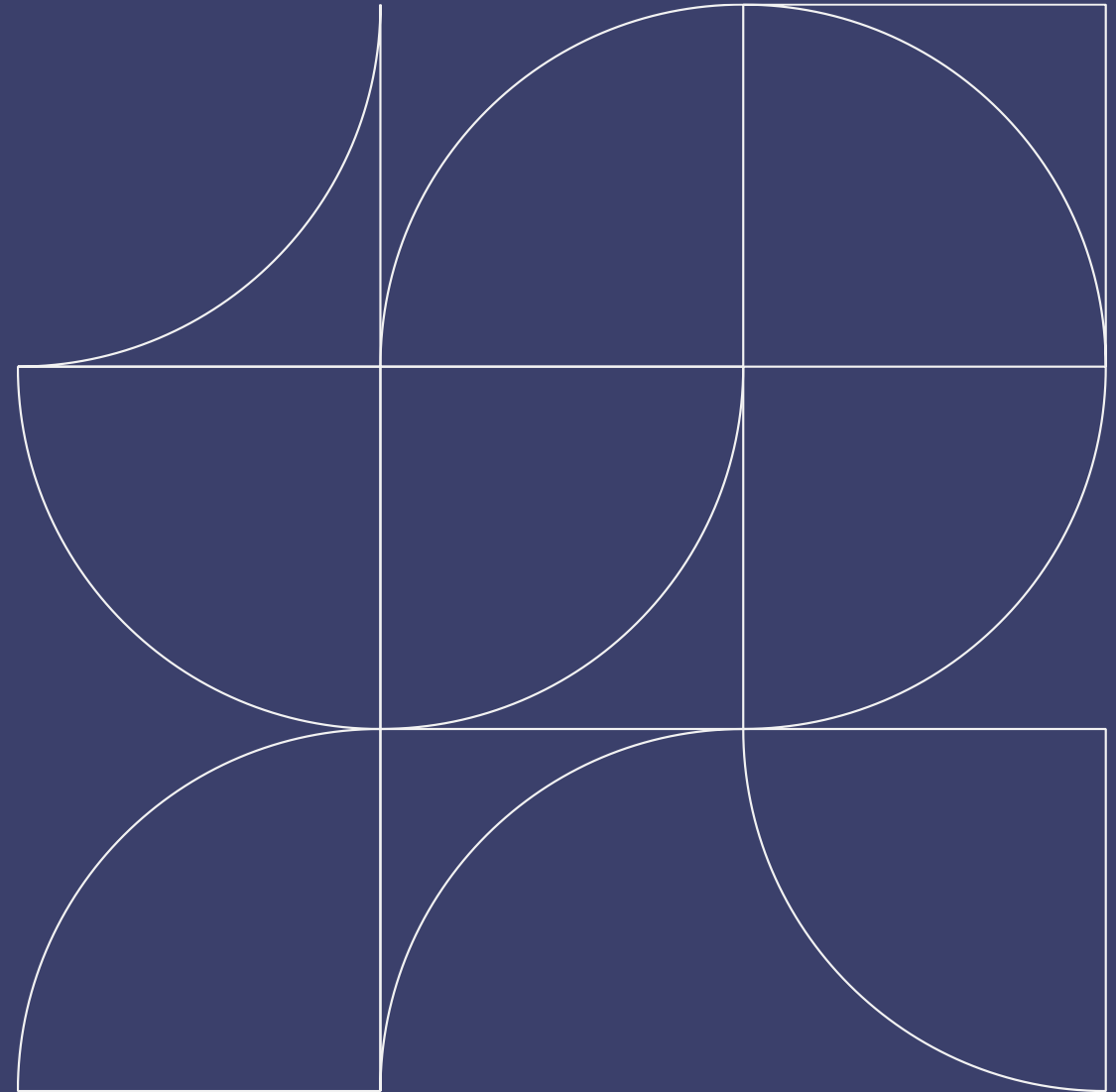
Data Breach Filings on the Rise: 1,320 cases filed in 2023 over 604 cases filed in 2022

Lack of Standing/No Injuries

- Courts are mixed on what constitutes sufficient injury in data breach cases to assert standing
 - *Henderson v. Reventics, LLC*, Case No. 23-cv-00586 (D. Colo. Sept. 30, 2024) (finding disclosure of private information without misuse, increased spam calls and emails, and alleged loss in value of private information insufficient for standing)
 - *In re: Fortra File Transfer Software Data Security Breach Litigation*, Case No. 24-MD-3090 (S.D. Fla. Sept. 18, 2024) (finding that the fact that some plaintiffs claim misuse, helps establish “substantial risk” of future harm)

Increase in CCPA claims: Is a data breach required for a failure in reasonable security measures?

Arbitration Provisions and Risk of Mass Arbitration





Arbitration Provisions and Risk of Mass Arbitration

Arbitration provisions remain an effective way to reduce class action risk

- Enforceability depends on whether the consumer has expressly or impliedly consented to the terms
- Links to Terms and Conditions in the footer of the website are likely unenforceable

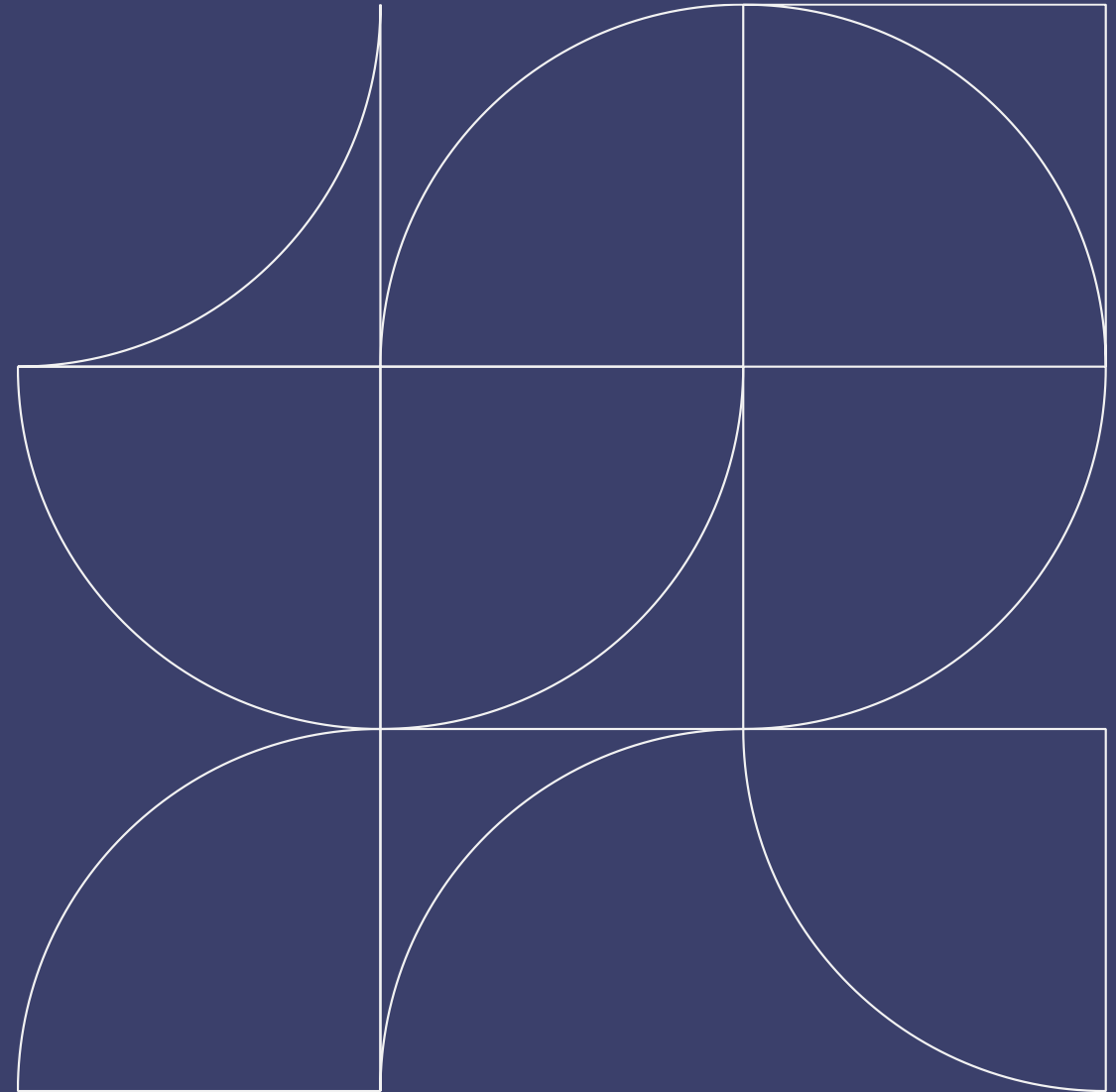
Downsides to Arbitration

- Companies are forced to litigate the same issues with different arbitrators leading to inconsistent results
- Rulings are not public

Risks of Mass Arbitration

- Trend towards filing hundreds of single claims in arbitration
- Defendant owed arbitration fees alone can drive significant settlements
- Arbitration companies implementing new rules given the rise in mass arbitrations

Settlements





**Class Action
Settlement Number
Increasing
Substantially**

Data Breach: \$350 Million – *In Re Alphabet Inc. Securities Litigation*, Case No. 18-cv-6245 (ND. Cal. April 2024)

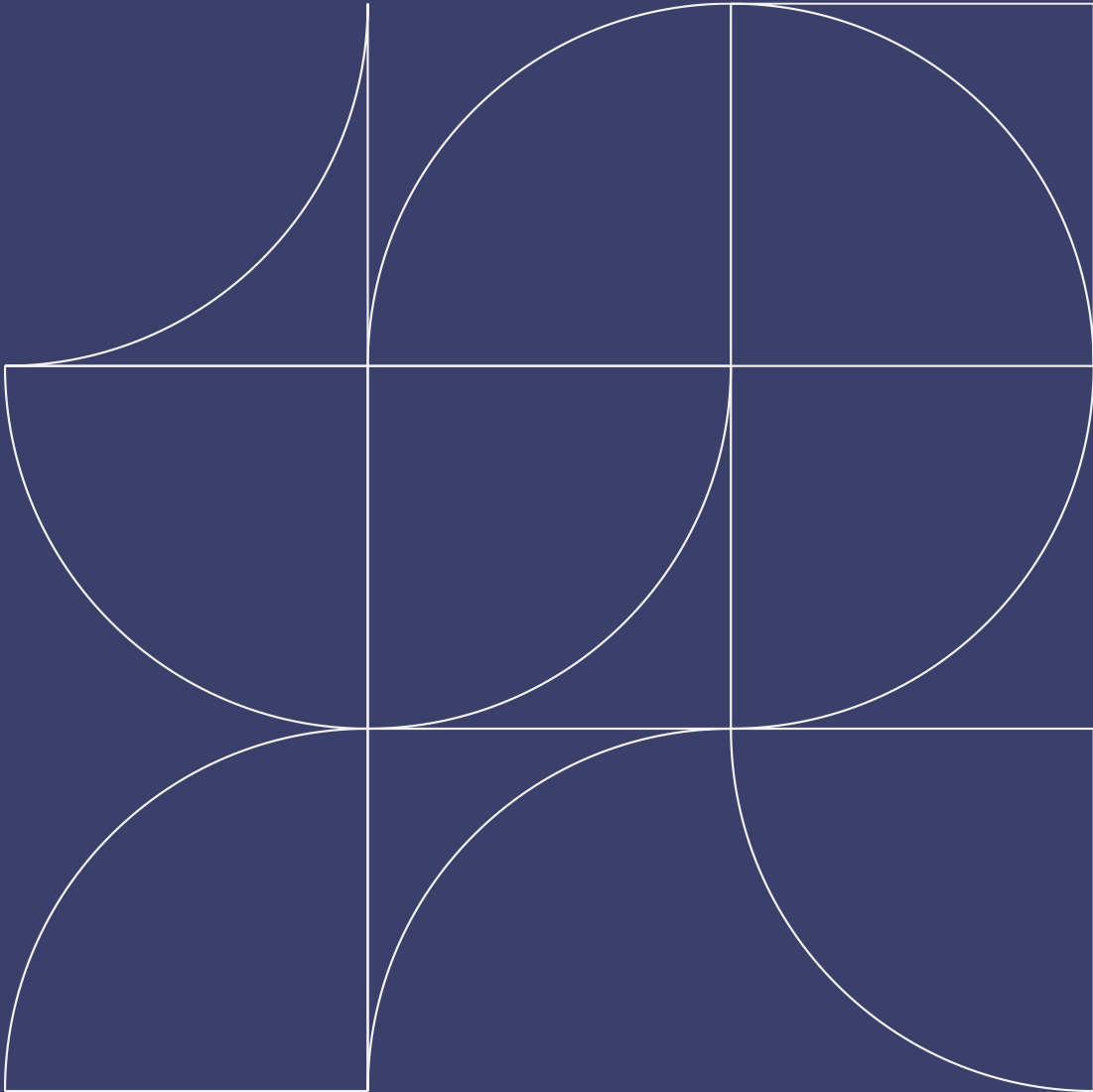
Misuse of Internet User Data: \$115 Million – *Katz-Lacabe v. Oracle America*, Case No. 22-cv-04792 (N.D. Cal. Aug. 2024)

Internet Tracking Technology: \$90 Million – *In re Facebook Internet Tracking Technology*, Case No. 22-cv-16903 (9th Cir. Feb. 2024)

Sharing Subscriber Information: \$52.5 Million – *Schreiber v. May Foundation For Medical Information and Research*, Case no. 22-CV-188 (W.D. Mich. May 2024)

TCPA: \$21.88 Million – *Smith v. Assurance IQ LLC*, Case No. 2023-CH-09225 (Illinois Sept. 2024)

Discussion





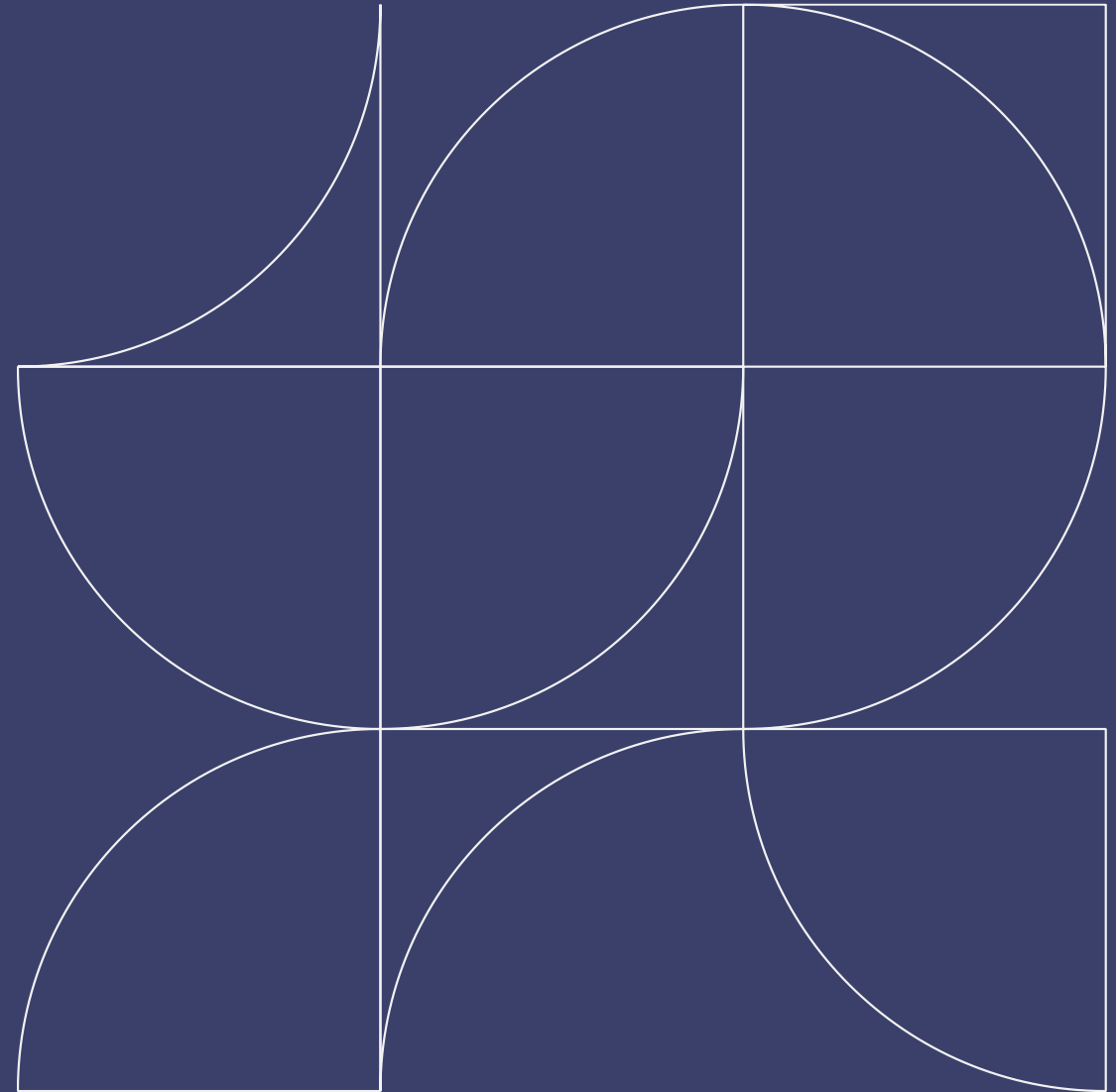
Consumer Fraud Class Actions

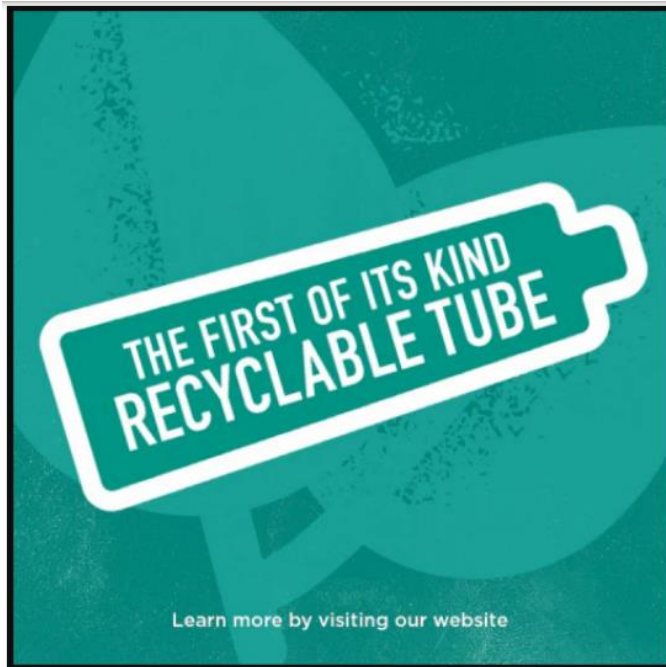
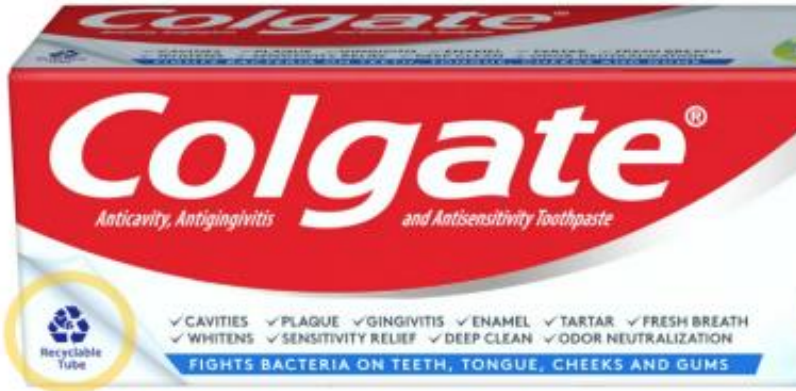


Consumer Fraud Class Actions

- ESG Claims
- Ingredient and Health Claims
- Chemicals/Contaminants

ESG Claims





ESG Claims

Della v. Colgate-Palmolive Company, No. 23-cv-04086-JCS (N.D. Cal. Feb. 6, 2024)

- Plaintiffs' Theory
 - Involved Colgate and Tom's of Maine toothpaste packaging with:
 - "Recyclable Tube";
 - "First of Its Kind Recyclable Tube"; and/or
 - the recycling symbol.
 - Believed tubes would be accepted by their curbside recycling program.
 - Tubes made entirely with plastic, unlike traditional tubes which are universally banned or rejected from recycling facilities.
 - But virtually all recycling programs reject the tubes.
 - Facilities cannot distinguish types of tubes.
 - Tubes cannot be fully emptied.
- Motion to Dismiss Denied
 - Not enough that tubes are capable of being recycled.
 - A reasonable consumer would not expect a "recyclable" product to not be accepted for recycling by any existing recycling facilities.
 - Unable to rely on information on website referenced on packaging.



ESG Claims

Swartz v. Coca-Cola, No. 21-cv-04643-JD (N.D. Cal. April 8, 2024)

- Plaintiffs' Theory
 - Involved water bottles with “100% Recyclable” claim.
 - Consumers believed that the entire water bottle, including cap and labels, is recyclable through established recycling programs.
 - Product labels are disposed of as refuse, *i.e.*, not recycled, by more than 40% of recycling facilities in California.
- Motion to Dismiss Denied
 - “Recyclable” claim would have been acceptable.
 - Plaintiffs plausibly alleges that “100% recyclable” means something different than “recyclable,” *i.e.*, that the entire bottle, including cap and label, is recyclable.



ESG Claims

Bohen v. ConAgra Brands, No. 23-cv-01298-VMK (N.D. Ill. March 25, 2024)

- Plaintiffs’ Theory
 - Marine Stewardship Counsel seal with the phrase “Certified Sustainable Seafood MSC,” “Certified Sustainably Sourced,” “Good for the Environment,” and “we have full traceability of our fish.”
 - Mised consumers to believe the fish is sustainably sourced.
 - MSC-certified fisheries use harmful fishing techniques that injure marine wildlife and the marine ecosystem.
 - Use large nets that capture everything in its path, including endangered species and juvenile pollock which prevents healthy pollock populations.

- Motion to Dismiss Denied in Part
 - Found one claim problematic – “Good For The Environment.”
 - General environmental benefit claim.
 - Featured prominently and unconnected to the MSC-certification seal.
 - Thus, went beyond referring to compliance with MSC-certification standards.
 - Most other claims advertised the products as certified as sustainable by MSC, not that the products comport with any different understanding of sustainable.
 - Plaintiffs did not allege that Defendant violated MSC standards or were not certified.



ESG Claims

Dorris v. Danone Waters of America, No. 22-cv-8717-NSR
(S.D.N.Y. Jan. 10, 2024)

- Plaintiffs' Theory
 - Use of “Carbon Trust Carbon Neutral” seal misled consumers to believe the products were produced without emitting any carbon.
 - Carbon Trust standards use offsets.
- Motion to Dismiss Granted in Part
 - The term “carbon neutral” is unfamiliar to and easily misunderstood by consumers.
 - Consumers often mistake “carbon neutral” for “carbon zero” or “carbon free,” even if such products do not exist.
 - A reasonable consumer may plausibly understand “carbon neutral” to mean “zero carbon emissions.”
 - Rejected argument “carbon neutral” conveyed only that the product was certified carbon neutral.
 - Refused to consider website provided on back label.

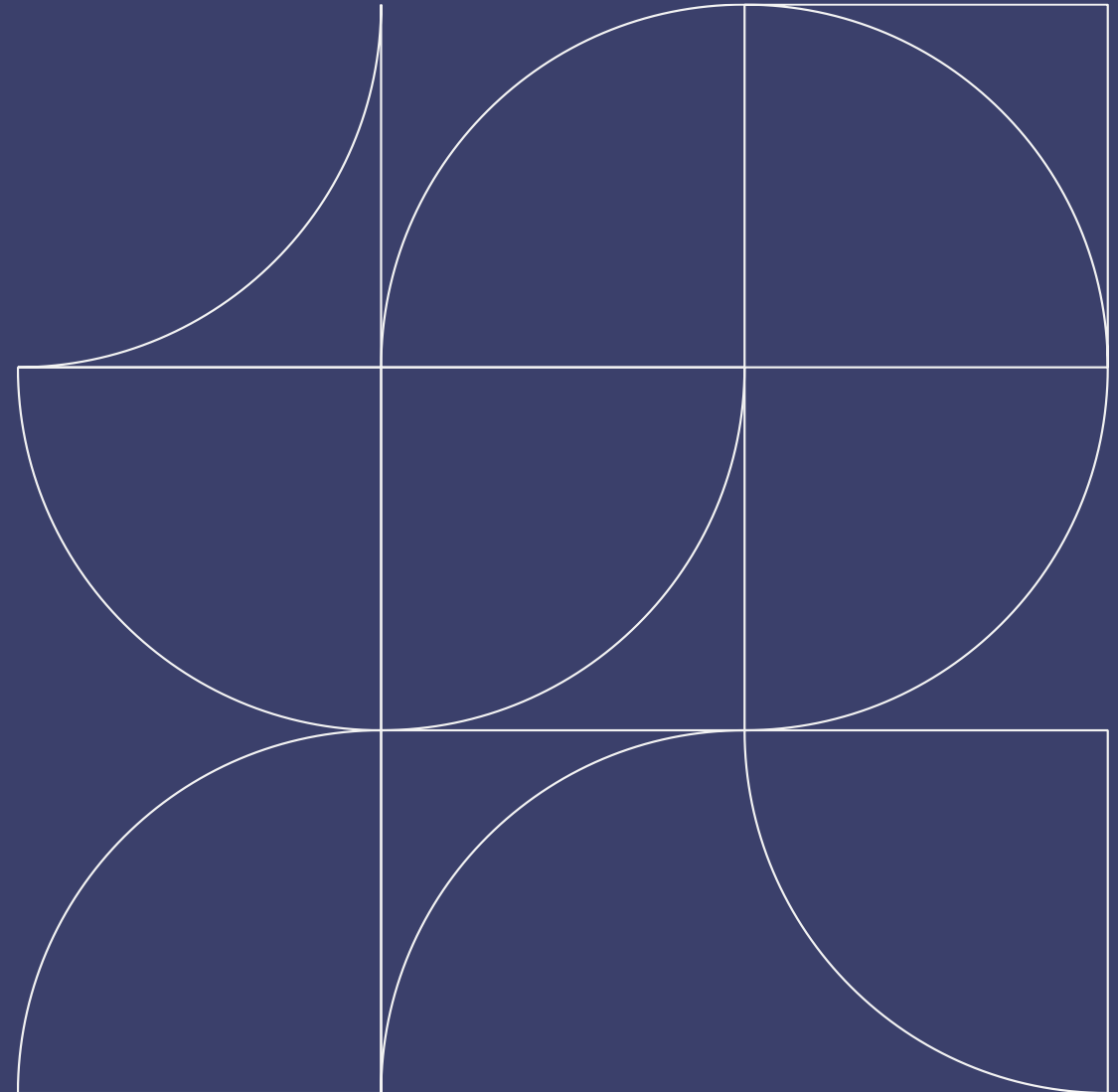
ESG Claims

Sorkin v. The Kroger Co., No. 23-cv-14916-CPK (N.D. Ill. Aug. 6, 2024)

- Plaintiff's Theory
 - Involved private-label Roundy's brand eggs sold in Mariano's Fresh Market stores.
 - "Farm Fresh Eggs" misled consumers to believe the eggs were from cage-free hens.
 - Eggs were produced by hens in cages in industrial confinement.
- Motion to Dismiss Granted
 - The term "farm fresh" does not say or suggest anything about whether the eggs came from a hen that was caged or not.
 - Simply means fresh from a farm.
 - Noted consumers have a "dizzying array" of choice of eggs in a grocery store: "cage free," "free-range," and "pasture-raised."



Ingredient and Health Claims





Ingredient and Health Claims

Whiteside v. Kimberly Clark Corp., No. 23-55581 (9th Cir. July 17, 2024)

- Plaintiff’s Theory
 - Company labeled baby wipes as “**plant-based wipes**” and “**natural care®**” on front label, with nature-themed imagery.
 - Disclose “natural and synthetic ingredients” on the back label.
 - Disclose full list of ingredients on back label.
 - Moistened “with 99% purified water” on front label.
 - Some front labels qualified “plant-based wipes” with “70%+ by weight.”
 - Suggested baby wipes contain only water, natural ingredients, and/or ingredients derived from plants.
 - The baby wipes contain synthetic ingredients, like malic acid and sodium benzoate, that are not plant-based.
- District Court - Motion to Dismiss Granted.
 - Reasonable consumers know that baby wipes are not naturally occurring and are preserved to remain shelf stable for months.
 - Disclosures dispel whatever misrepresentation allegedly exists.

Plant-based wipes,



natural care®



Ingredient and Health Claims

Whiteside v. Kimberly Clark Corp., No. 23-55581 (9th Cir. July 17, 2024)

- Appeal - Affirmed dismissal of claims as to products with asterisk. Reversed dismissal of claims as to other products.
- **McGinity**: “the front label must be unambiguously deceptive for a defendant to be precluded from insisting that the back label be considered together with the front label.”
- A front label can be unambiguous even if it may have two possible meanings, if Plaintiff plausibly alleges that a reasonable consumer would view the label as having one unambiguous (and deceptive) meaning.
- A front label is ambiguous if “reasonable consumers would necessarily require more information before they could reasonably conclude” that the front label was making a specific representation.
- Plaintiff plausibly alleged that a reasonable consumer could interpret the front label as unambiguously representing that the Products do not contain synthetic ingredients.



Ingredient and Health Claims

Ward v. Pepperidge Farm, Inc., No. 24-cv-00078-ALC (S.D.N.Y. Jan. 5, 2024)

- Plaintiff's Theory
 - Company falsely advertises Goldfish crackers as containing “No Artificial Flavors or Preservatives.”
 - Products contain citric acid, an alleged artificial preservative.
 - Intended to induce health-conscious consumers to purchase.
- Motion to Dismiss Fully Briefed and Pending
 - Have not alleged citric acid used in the products as a preservative (asserted used to enhance flavor of “Flavor Blasted” line of crackers).
 - Have not alleged citric acid used in the products is artificial.

and even common dandruff.

- Contains maximum strength 3% Salicylic Acid.
- Breaks down crusty, flaky scalp build-up.
- Keeps working long after the shampoo is rinsed off.
- Gentle enough for everyday use.
- Alcohol-free. Fragrance-free. Color-free. Preservative-free.

Drug Facts

Other information

Store at room temperature.

Inactive ingredients Water, Sodium C14-16 Olefin Sulfonate, Cocamidopropyl Betaine, Sodium Chloride, Polyquaternium-22, Sodium Citrate, Hexylene Glycol, Sodium Lauroyl Sarcosinate, Linoleamidopropyl PG-Dimonium Chloride Phosphate, Sodium Hydroxide, Citric Acid

Questions? 877-256-4247; Outside US, dial collect 215-273-8755 www.neutrogena.com

Ingredient and Health Claims

Gonick v. Johnson & Johnson Consumer Inc., No. 24-cv-00312-VMS (E.D.N.Y. Jan. 16, 2024)

- Plaintiff's Theory
 - Company falsely advertises Neutrogena T/Sal Therapeutic Shampoo as “Preservative-free.”
 - Products contain citric acid, an alleged preservative.
 - Intended to induce health-conscious consumers to purchase the products.
- Pre-Motion Conference Letter
 - Have not alleged citric acid used in the products as a preservatives.
 - Reasonable consumers were not deceived (pointing to proximity of claim to ingredient list on back label).
- Reached an Informal Resolution
 - Voluntarily dismissed with prejudice.

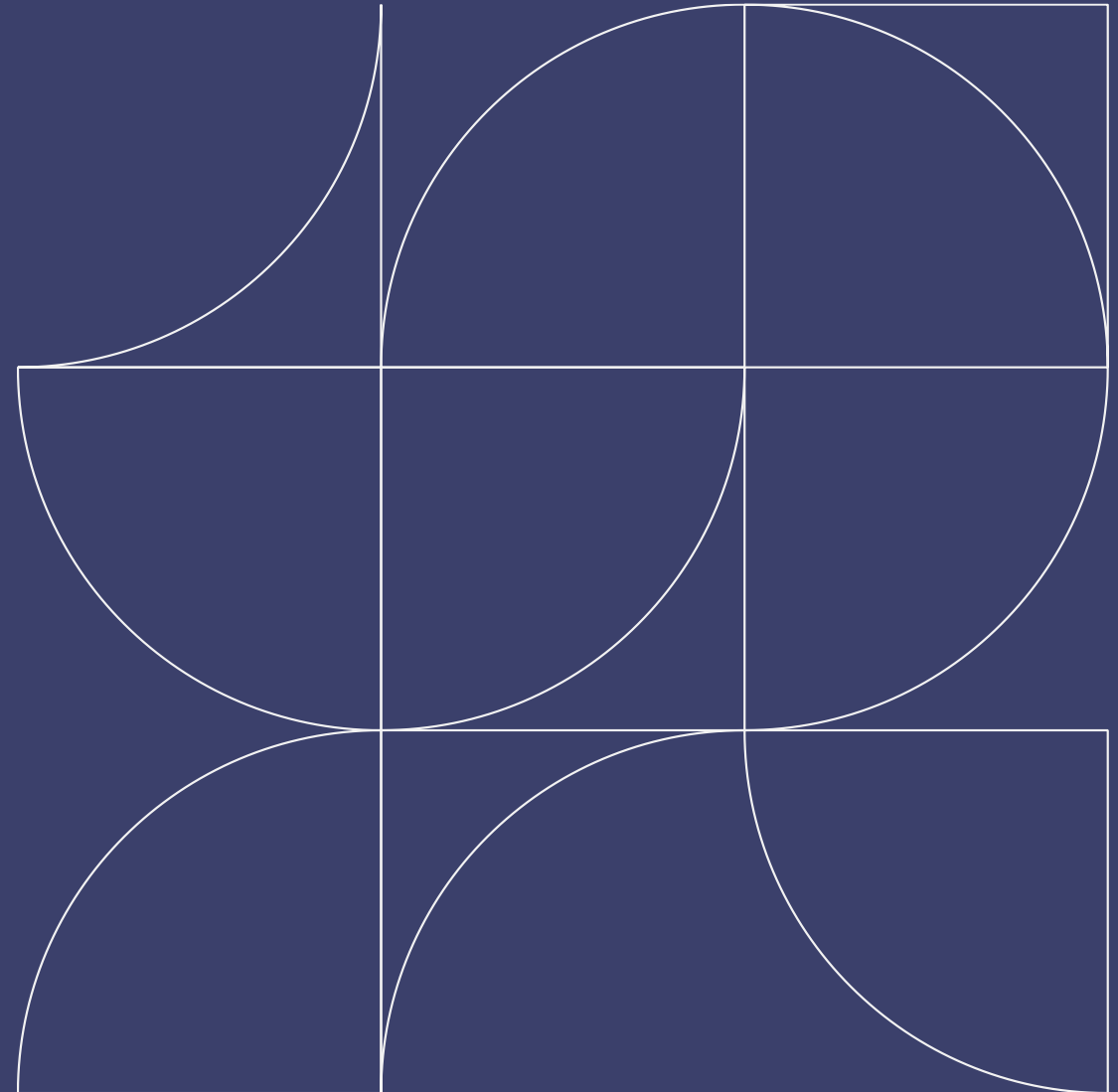


Ingredient and Health Claims

Broussard v. Dole Packaged Foods, LLC No. 23-cv-03320-HSG (N.D. Cal. Apr. 8, 2024)

- Plaintiff’s Theory
 - Labels mislead consumers that the products are healthy, when they derive between 29% and 96% of their calories from sugar.
 - “It’s our promise to provide everyone, everywhere with good nutrition!”
 - “Dole Fruit Bowls® seal in goodness and nutrition.”
 - “Vitamin C is an antioxidant that helps support a healthy immune system.”
 - “Vitamin C to support a healthy immune system.”
- Motion to Dismiss Granted
 - Statements invoking “a promise to provide everyone, everywhere good nutrition” and referencing “seal[ing] in goodness and nutrition” are puffery.
 - In isolation “good nutrition” and “goodness and nutrition” might not be puffery, but in each instance the challenged phrases are followed by language that likens the products to sunshine, a fanciful analogy.
 - Noted type of product and proximity and fact that challenged claims are adjacent to the Nutrition Facts panel.
 - Vitamin C claims are preempted.

Chemical / Contaminant Claims





The Stanley Adventure Quencher: ⋮
Now in 4 sizes
98K views • 1 year ago

Fig. 1. A thumbnail for a PMI advertisement showing a child drinking from a Stanley cup while her mother watches happily.

Chemical / Contaminant Claims

In Re Pacific Market International, LLC, Stanley Tumbler Litig., Case No. 24-cv-00191-TL (W.D. Wash. Feb. 12, 2024)

- Plaintiffs' Theory
 - Company failed to disclose lead in Stanley cups.
 - Claim no personal injury, only economic damages.
 - Is material because a health and safety-related concern.
- Motion to Dismiss
 - Used lead pellet to vacuum seal insulation at product's base.
 - Covered with a durable stainless steel layer.
 - Lead does not contact consumer or contents.
 - Fail to allege facts demonstrating a material omission.
 - Devoid of allegation that the lead in Stanley cups, exposed or not, causes physical harm to consumers.



Chemical / Contaminant Claims

In Re Plum Baby Food Litigation, Case No. 21-cv-00913-YGR (N.D. Cal. March 28, 2024)

- Plaintiffs' Theory
 - Baby food contains detectable levels of arsenic, cadmium, lead, mercury and/or perchlorate.
 - Pose health risks to humans, particularly to infants and children.
 - Plum failed to disclose.
- Summary Judgment Granted
 - Plum had no duty to disclose the risk of presence of heavy metals or perchlorate in the baby food.
 - Plaintiffs did not establish that the amount of heavy metals and perchlorate in defendant's baby food poses an unreasonable safety hazard.
 - Additionally:
 - Did not have exclusive knowledge because was disclosed on website and covered in the media.
 - Did not conceal or cover up risk of the contaminants in the baby food.
 - No reasonable jury could determine that the presence of heavy metals and perchlorate renders the product incapable of nourishment.



Chemical / Contaminant Claims

In Re Trader Joe's Company Dark Chocolate Litig., Case No. 23-cv-0061-RBM (S.D. Cal. March 27, 2024)

- Plaintiffs' Theory
 - Defendant makes claims like “quality ingredients” and “colors derived only from naturally available products” and “nothing is more important than the health and safety of [its] customers.”
 - Despite these claims, the dark chocolate products contain detectable levels of heavy metals known to pose human health risks.
 - Failed to disclose the products contain, or have a material risk of containing, heavy metals.
- Motion to Dismiss Granted in Part
 - California consumer protection claims cannot proceed based on an alleged omission theory because no duty to disclose.
 - Plaintiffs failed to allege that the amount of heavy metals in the products posed an unreasonable safety hazard or made the products unfit for human consumption.
 - General allegations that there can be health issues with the heavy metals at low levels of exposure is not enough.
 - Must provide some connection between the general harms possible from heavy metals and the levels of heavy metals in the products.

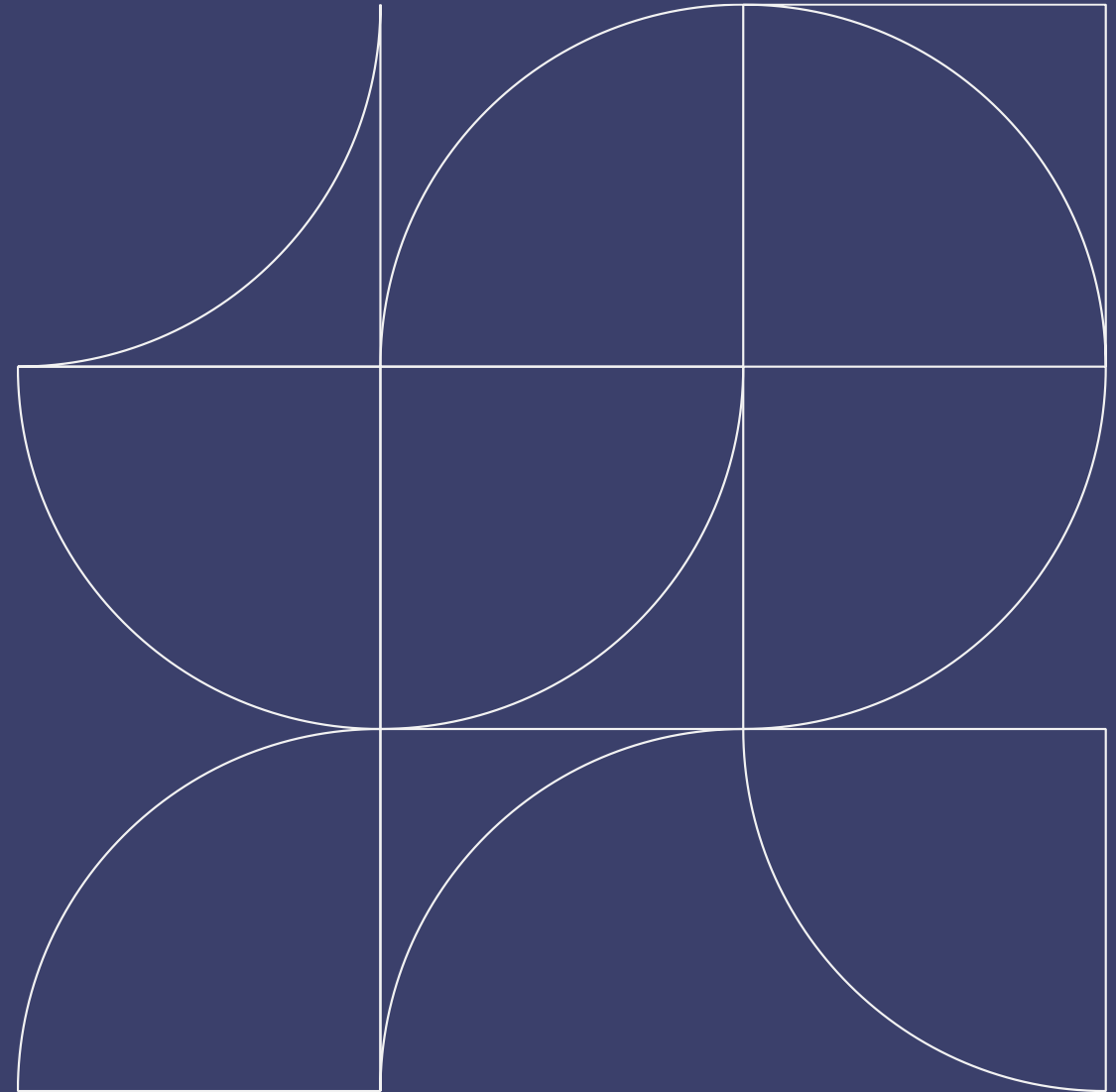


Chemical / Contaminant Claims

Kraukauer v. Recreational Equipment Inc., Case No. 22-cv-05830-BHS (W.D. Wash. March 29, 2024)

- Plaintiff's Theory
 - REI advertised products as Fair Trade Certified™ and bluesign® certified.
 - Also touted membership in the Sustainable Apparel Coalition.
 - REI made statements about PFAS on its “Product Impact” webpage.
 - Eliminated long-chain PFAS durable water repellent treatments from REI Co-op brand.
 - Use short-chain PFAS treatments where viable alternatives do not yet exist, and continues to expand the use of non-fluorinated options.
 - Failed to disclose to consumers that REI-brand rain gear contain heightened levels organic fluorine indicative of PFAS.
- Motion to Dismiss Granted
 - Lacked standing because did not adequately allege the jacket he purchased contained long-chain or dangerous short chain PFAS.
 - Did not test Plaintiff's own jacket or even the same model, and failed to establish his jacket was made from the same or substantially similar material as the products tested.
 - Conducted organic fluorine testing on same model jacket he owns. But REI disclosed that it sometimes uses short chain PFAS which could account for the fluorine levels.
 - To the extent alleges all PFAS are dangerous at any level, the allegation is conclusory and contradicted by sources cited in Complaint.

Discussion



**thank
you**

contact information

For more information, please contact our presenters, listed below.

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