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ASSOCIATION OF CORPORATE COUNSEL: 20TH ANNUAL NUTRITION LAW SYMPOSIUM

**Litigation Roundup: Legal Threats Facing the Food,
Beverage, Supplement and Botanical Industries**

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California Invasion of Privacy Act



- California Invasion of Privacy Act (CIPA)
 - CIPA was designed to prohibit the unauthorized recording or eavesdropping on confidential communications (like phone calls) without consent.
 - Over 1,500 companies have been sued since 2022 for allegedly violating CIPA.
 - Common web technologies, from session replay software and chatbots to cookies and pixels have been accused of violating CIPA on the theory that collected data shared with third-party service providers equals an unlawful interception, or that routine collection of data constitutes a “trap and trace” or “pen register” device.
 - Thousands of nuisance settlements.

California SB 690



- **June 2025**, passed unanimously in CA Senate.
 - **“Commercial business purpose” exemption:** Permit companies to use cookies, pixels, session replay scripts, chatbots and similar tools to collect and analyze user data without incurring CIPA liability.
 - **No CIPA private lawsuits for business purposes:** Plaintiffs could no longer file CIPA lawsuits over commonplace website tracking activities, so long as those activities meet the bill’s definition of a business purpose.
 - **Pen registers and trap/trace devices excluded:** Amend CIPA’s definitions of “pen register” and “trap and trace” devices, to exclude any device or process used in a way consistent with a commercial business purpose.
 - **No Retroactive Application.** Would take effect in 2026.

TCPA 'QUIET HOURS'



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- Telephone Consumer Protection Act (Do Not Call List)
 - TCPA is entirely silent on rules for marketing *other than* marketing efforts made to numbers on the DNC list and marketing calls made using regulated technology.
 - FCC was delegated authority. Enacted rule mandating “telephone solicitations” cannot be sent before 8 am or after 9 pm.
 - “telephone solicitations” is defined to exclude calls made with consent— so the vast majority of claims are outside the scope of the statute anyway.
 - *McLaughlin Chiropractic v. McKesson*: Ends district court deference to FCC agency action under the Hobbs Act. District courts have much more power to set aside or refuse to apply FCC rules than ever before.



Intermission: Implied Preemption



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- **Davidson v. Sprouts Foods, Inc.**, 106 F.4th 842 (9th Cir. 2024)
 - Plaintiffs alleged that Sprout's pouched toddler foods bearing nutrient content claims such as "3g of Protein," "5g of Fiber" and "300mg Omega-3 from Chia ALA" were unlawfully labeled under the Sherman Law because the labels violate FDA regulations.
 - In holding that the "unlawful" claim was not preempted, the court distinguished a line of cases involving other products regulated under the FDCA – i.e., medical devices and drugs – in which state-common-law claims that relied on alleged violations of the FDCA were held to be impliedly preempted.
 - "Because the Sherman Law incorporates federal standards, the state requirements at issue are identical to their federal counterparts, and thus permitted[.] . . . Because the FDCA places no limitations on enforcement of these state parallels, plaintiffs' Sherman Law claim is not preempted."





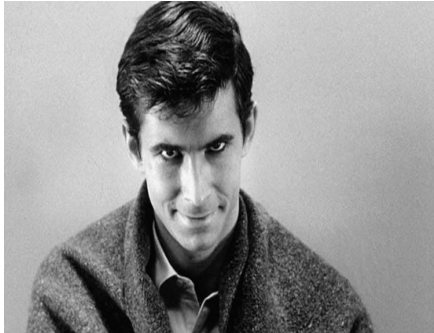
- FDA allows claims that describe the role of a nutrient intended to affect the structure or function of the human body, but labels must carry a prominent DSHEA disclaimer ***on each panel*** bearing the claim.
- ***Li v. Amazon*** (Western District of Washington)
 - “None of the materials introduced by Amazon refute Plaintiffs’ contention that the products omit disclaimers on the primary panels that carry the structure function claim. For example, no image submitted shows a product that includes the required disclaimer on the same panels that carry the structure function claims.”
 - “The alleged conduct is sufficiently similar as to the purchased and unpurchased dietary supplements — e.g., they allege, Amazon systemic[ally] fail[s] to provide the mandated disclaimers on products with any health-related claims.”

* These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease.

PROTEIN // %DV



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21 CFR §101.9(c)(7)(i)

“A statement of the corrected amount of protein per serving, as determined in paragraph (c)(7)(ii) of this section, calculated as a percentage of the RDI or DRV for protein, as appropriate, and expressed as a Percent of Daily Value . . . Shall be given if a protein claim is made for the product . . .”

Swartz v. Dave’s Killer Bread Inc.

- Court certified single narrow claim for restitution under the UCL unlawful prong.
- Plaintiff contends payment of a price premium based on the front-label protein claim in conjunction with omission of percent daily value from the NFP.
- The Court cautioned that to have statutory standing, Plaintiff must establish that he actually read and relied upon that alleged omission of the %DV and suffered injury as a result.
- Trial is scheduled for ***March 2, 2026***.



Made In USA



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- CA B&P 17533.7
 - No more than 5% of the product's **wholesale value** comes from foreign-made components—or up to 10% if those components aren't available domestically.
- FTC
 - All or virtually all significant parts and processing must be of U.S. origin.

McCoy v. McCormick & Company 2025 WL 2315457 (E.D. California August 12, 2025) (“By focusing on “value” instead of “cost” the California safe harbor provision allows for consideration of how important a consumer might perceive the foreign input (e.g., the imported watch “movement” offered as an example by the FTC) is to the overall value of the product.”)

QUIZ



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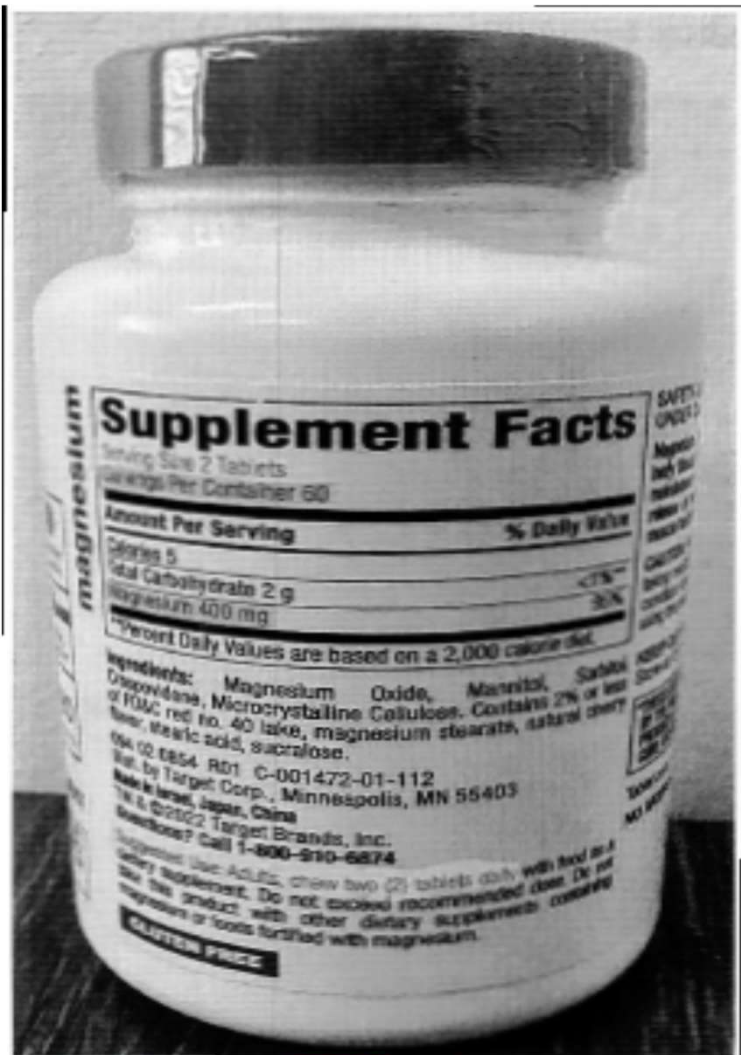
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Bonus Round



- Microcontamination
 - Heavy Metals
 - Microplastics
 - PFAS
- Prop. 65
 - PFAS Foods/Supplements
 - Heavy Metals Foods
 - DEA Cosmetics
 - Phthalates Foods and Products
 - BPA Thermal Receipt Paper
- Auto-Renewal
- Shipping/Delivery Insurance
- Mass Arbitration Risk
- Pricing Claims
 - Phantom Discounts
 - Strikethrough Pricing
- ADA Website Claims
 - Widget Overlays Alone Insufficient



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QUESTIONS?

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