Food Litigation 2017 Year in Review

A LOOK AT KEY ISSUES FACING OUR INDUSTRY

PERKINSCOIE

INTRODUCTION

PERKINS COIE IS PLEASED TO PRESENT ITS SECOND ANNUAL FOOD LITIGATION YEAR IN REVIEW, an overview of filings, key court decisions and regulatory developments in litigation affecting the food and beverage industry.

Based on data collected from filings in courts nationwide, there was continued and significant class action litigation against the food and beverage industry in 2017. Nearly 150 such lawsuits were filed last year, representing an increase this year over an already active pace in 2016. These filings ran the gamut from lawsuits directed at product origins, ingredient purity or preservative claims; alleged slack fill in the packaging of candies, cookies and other snacks; and continued litigation disputing the use of the term "natural," including attempts to attack the presence of purported non-natural substances down to the molecular or feed level. These numbers confirm that the plaintiffs' bar continues to see the food and beverage industry as a favored target.

Yet, despite the persistence of these filings, there were signs of growing skepticism by courts in 2017. The "reasonable consumer" standard produced dismissals in cases where the truth and accuracy of the defendant's label could not reasonably be contested, and in "natural" cases where plaintiffs proposed implausible and idiosyncratic definitions for that term. Likewise, some cases foundered at the class certification stage, with courts denying certification based on an inability to prove classwide damage—often because there was no evidence to support any price premium associated with the challenged labeling claim. Despite these successes, however, enough uncertainty remains at the appellate level to make continued litigation likely as we head into 2018.

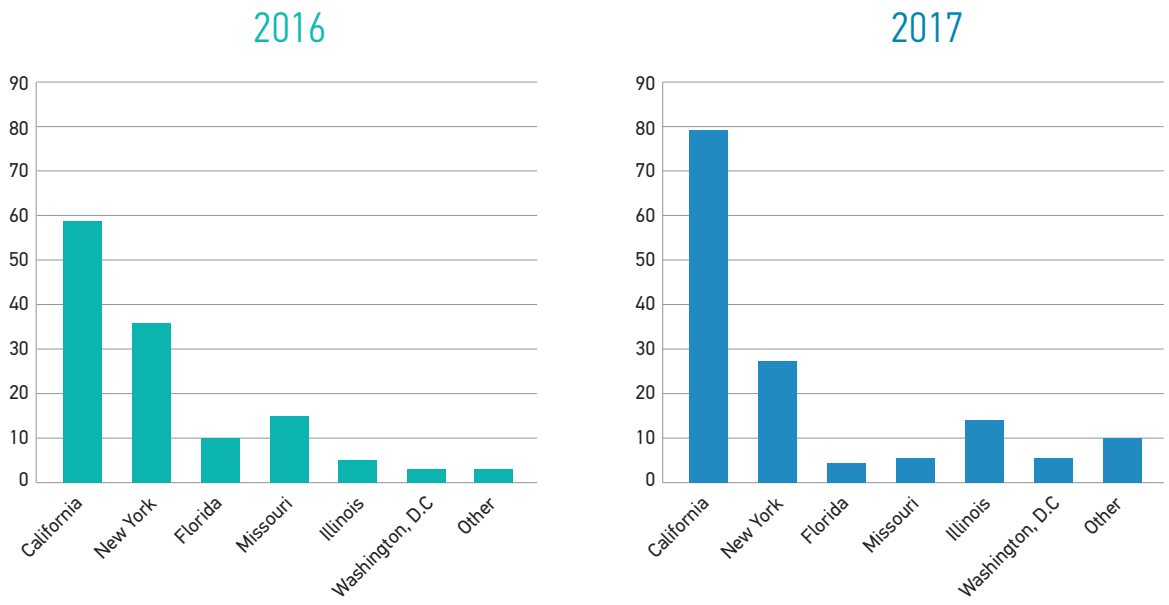
In Proposition 65 actions this year, lead and acrylamide, a chemical compound created by applying high levels of heat to starchy foods, were the most cited chemicals by a significant margin. While lead has been the most cited chemical for several years running, the occurrence of acrylamide cases increased dramatically, and one of the largest Proposition 65 cases ever involves the presence of that chemical in coffee. The volume of warning letters pursuant to the law's 60-day notice provision continues its upward trend, and as new chemicals are added to the list that trend is likely to continue.

CLASS ACTION FILING TRENDS

Food class action filings increased to 145 last year, from 130 in 2016. Still, the number of cases filed per year has been generally increasing since 2008—and the 2017 filings were about 53 percent higher than the filings five years ago. California remains the favored jurisdiction for food and beverage cases, as the gap between the Golden State and the Empire State (ranked second in both 2016 and 2017) increased last year, with 79 class actions filed in California and 27 filed in New York. Missouri, Florida and Illinois remain other popular jurisdictions in which to litigate, as seen in Figure 1. One trend of note is a slight uptick in filings in Washington, D.C. Most of this rise is explained by increased activity of non-profits and activist groups (e.g., the Center for Science in the Public Interest (CSPI), the Organic Consumers Association and the Praxis Project) initiating litigation there with claims based on the Washington, D.C. consumer protection statute.

FOOD AND BEVERAGE CLASS ACTIONS:
FILINGS BY JURISDICTION

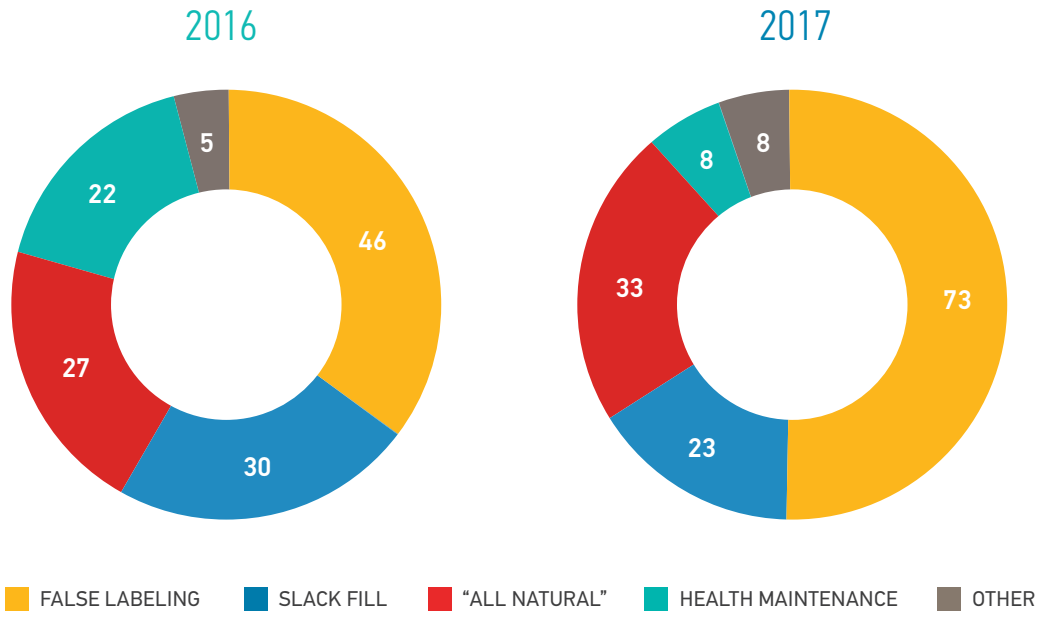
FIGURE 1



Data compiled by Perkins Coie based on a review of dockets from courts nationwide.

INDUSTRY FILINGS AND TRENDS: CATEGORIES

FIGURE 2



Data compiled by Perkins Coie based on a review of dockets from courts nationwide.

As Figure 2 indicates, plaintiffs most commonly attacked labels with claims alleging false statements of fact and "all natural claims." Claims in both of these categories grew significantly in 2017 while health misrepresentation claims declined.

FALSE LABELING

False labeling claims rose significantly in 2017, up almost 60 percent from the 46 filed in 2016, with plaintiffs challenging a range of representations including a product's country of origin (such as "imported from Italy"), claims that a product contains "no preservatives," the opposite claim—that a product contains an ingredient that is not in fact in it (such as truffle oil), and novel challenges based on inquiries into a product's supply chain (for example, the GMO corn fed to milk-producing cows).

SLACK FILL

Slack fill filings were down 23 percent from last year, likely owing to class certification denials and infrequent wins in this area. Still, plaintiffs continued to target alleged nonfunctional empty space in candy packages, cereal boxes, and even sandwich wraps. Notably this year, a global coffee retailer won summary judgment in a case alleging that it under-filled its hot beverages.

"ALL NATURAL"

If 2016 saw a drop in new filings challenging "natural" or "all natural" labels, then 2017 witnessed a small resurgence, with an increase of about 22 percent. In their next-generation "natural" suits, plaintiffs have continued to test new and innovative theories, many of which courts have been hesitant to accept. Despite some important dismissals of similar actions, trace amounts of glyphosate remain a focus of plaintiffs. As in the general False Labeling category, plaintiffs honed in on the use of GMO ingredients, as well as artificial flavors and common ingredients such as xanthan gum that are permitted even in products designated organic.

HEALTH MAINTENANCE

There were fewer than half as many health misrepresentation claims in 2017, from 22 in 2016 to 8 in 2017. A product's sugar content remained a target of these claims, as were products such as coconut oil, which is frequently marketed as a healthy alternative to butter.

SIGNIFICANT LEGAL DEVELOPMENTS

DISMISSALS UNDER THE REASONABLE CONSUMER STANDARD

2017 saw a renewed judicial interest in the "reasonable consumer" standard as a basis for early dismissal—particularly in cases where the plaintiff had challenged food labeling that contained no false or misleading statements. These cases suggest that courts are increasingly unwilling to allow food and beverage lawsuits that attack truthful labels to proceed into discovery.

For example, in *Mantikas v. Kellogg Company*, No. 16-cv-2552 (SJF)(AYS), 2017 WL 2371183 (E.D.N.Y. May 31, 2017), the Eastern District of New York granted a motion to dismiss on reasonable consumer grounds, in a lawsuit challenging the whole grain content of Cheez-It crackers. In *Mantikas*, the plaintiff alleged that the labeling of Cheez-It Whole Grain crackers misled consumers as to the product's healthfulness and whole grain content. The court rejected the plaintiff's contention, relying significantly on the accuracy of the product's labels: "As the Product's packaging truthfully states that the Crackers are made with whole grain, and specifies the exact amount of whole grain per serving, the Crackers' packaging would neither deceive nor mislead a reasonable consumer."

Similarly, in a case challenging the labeling of Mott's Fruit Flavored Snacks, the court likewise relied on the "reasonable consumer" standard to dismiss the action outright. In *Chuang v. Dr. Pepper Snapple Group*, the U.S. District Court for the Central District of California dismissed on Rule 12(b) plaintiff's allegations challenging the "Made with Real FRUIT!" and "Made with Real FRUIT & VEGETABLE [or 'VEGGIE'] Juice" claims carried on Mott's Fruit Flavored Snacks. 2017 WL 4286577, at *1 (C.D. Cal. Sept. 20, 2017). The plaintiff in *Chuang* alleged that these claims, when coupled with images of fruit on the packaging and other statements from the Mott's website describing the fruit snacks as "a tasty treat you can feel good about!" and the "perfect after-school snack that's a win for you and your kids" deceived consumers into believing the products contained a "significant" amount of fruit and were "nutritious and healthful."

On defendants' motion, U.S. District Judge Michael W. Fitzgerald dismissed plaintiff's claims on reasonable consumer grounds. The court reasoned that because the plaintiff could not identify any false statement carried on the product packaging, a reasonable consumer could not be misled by that packaging. It held: "even taken as a whole, the labels could not mislead a reasonable consumer because each variety of fruit snack contains the fruits depicted in images on the box, the ingredients lists clearly demonstrate that the products contains more sugar than real fruit and vegetable juice, and the boxes contain statements that the fruit snacks are 'not intended to replace fruit in the diet.'" *Defendants in the* Chuang *litigation were represented by the Perkins Coie food litigation team.*

PRIMARY JURISDICTION DOCTRINE IN INCREASED JUDICIAL RESISTANCE TO "NATURAL" CLAIMS

Another important development in 2017 is judicial resistance to "natural" claims—evidenced both through reasonable consumer dismissals and with the continued application of the primary jurisdiction doctrine to stay litigation in favor of FDA regulatory proceedings.

On the "reasonable consumer" standard, several decisions in 2017 rejected claims challenging some variation on the term "natural," often reasoning that the plaintiff's alleged deception over the use of that term was inconsistent with how a "reasonable consumer" would understand it.

For example, in March 2017 in *Organic Consumer Associations v. Sioux Honey Association*, the D.C. Superior Court dismissed a complaint alleging that consumers might be misled by a "natural" claim in honey alleged to contain miniscule amounts of glyphosate (a commonly used pesticide). The court concluded that no reasonable consumer would be misled by use of the term "natural" given the "trace amounts" of glyphosate present. Also in 2017, in *Lee v. Conagra Brands*, No. 1:17-cv-11042 (RGS), 2017 WL 6397758 (D. Mass. Oct. 25, 2017), the District of Massachusetts rejected an attack on use of "natural" claims to describe cooking oil made from bioengineered crops. In reaching its holding, the court noted that plaintiffs' theories regarding use of the term "natural" were contrary to the fact that "humans have been genetically altering organisms for our use for at least 30,000 years."

Similarly, a lawsuit challenging the "natural" claim on Nature Valley granola bars—again attacking that term's use because of the alleged trace presence of glyphosate—was dismissed pursuant to Rule 12 based on the reasonable consumer standard. *See In re: Gen. Mills Glyphosate Litig.*, No. 16-2869 (MJD/BRT), 2017 WL 2983877 (D. Minn. July 12, 2017). There, the District of Minnesota explained that no "reasonable" consumer would expect a "natural" claim to mean that a product was free from anything the plaintiff considered "non-natural" down to the molecular level: "The Court concludes that it is not plausible to allege that the statement 'Made with 100% Natural Whole Grain Oats' means that there is no trace glyphosate in Nature Valley Products or that a reasonable consumer would so interpret the label. It would be nearly impossible to produce a processed food with no trace of any synthetic molecule." *Defendants in the General Mills Glyphosate litigation were represented by the Perkins Coie food litigation team.*

Finally, in *Podpeskar v. Dannon Company*, the Southern District of New York dismissed a lawsuit challenging the "natural" claim on certain Dannon yogurts. 2017 WL 6001845 (S.D.N.Y. Dec. 3, 2017). In *Podpeskar*, the plaintiff alleged that "natural" was misleading because of the possibility that the dairy cows whose milk made the yogurt ate GMO crops. Once again, the court held as a matter of law that no "reasonable consumer" would have the idiosyncratic definition of "natural" held by the putative plaintiff—particularly in light of the undisputed truth of Dannon's product labels. The court explained: "There is no legal support for the idea that a cow that eats GMO feed or is subjected to hormones or various animal husbandry practices produces 'unnatural' products; furthermore, Dannon does not specifically represent that its products are either GMO-free or not given hormones or antibiotics. The Court therefore finds plaintiff's argument too speculative to state a plausible claim and GRANTS defendant's motion to dismiss."

Meanwhile, in cases where "natural" claims were not simply dismissed outright, district courts in the Ninth Circuit and across the country continued in 2017 to invoke the primary jurisdiction doctrine to stay or dismiss "natural" cases pending FDA regulatory activity regarding use of the term.

Since the FDA's 2015 Notice that it intended to consider "natural" claims, the question of whether and under what circumstances the FDA will regulate use of the term "natural" remains under the Agency's advisement. While the Agency has yet to finalize any formal rules regarding use of the term, federal courts have looked to recent indications from Congress and the FDA that the agency can—and should—act on this issue to continue stays of "natural" cases in the meantime.

As to FDA activity, the FDA's Commissioner, Scott Gottlieb, recently affirmed in October 2017, that "his agency is . . . looking at how to define 'healthy' and 'natural' more uniformly," noting also that "[t]he claims have been the subject of lawsuits, particularly in California." Heather Haddon, *FDA Commissioner Wants Closer Look at Health Claims on*

Packaging, Wall St. J. (Oct. 10, 2017), https://www.wsj.com/articles/fda-commissioner-wants-closer-look-at-health-claims-on-packaging-1507673335.

As to Congressional activity, Congress likewise expressly acknowledged in 2017 that the FDA can and should promulgate a national standard for the use of "natural" in food labeling. Specifically, in the July 17, 2017 Bill Report accompanying the 2018 Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Bill, the Committee on Appropriations "commend[ed] the FDA for taking the first step towards defining the term 'natural'" and directed the FDA to provide a report within 60 days of enactment of the Act on the FDA's activities in this regard "so that there is a uniform national standard for the labeling claims and consumers and food producers have certainty about the meaning of the term." H.R. Rep. No. 115-232 at 72 (2017) (Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Bill, 2018). This bill remains active through the 2018 legislative session.

The above activity, coupled with the recognized application of the primary jurisdiction doctrine to "natural" cases, has spurred federal courts to impose and continue stays of these cases pending FDA activity. *See, e.g., Wong v. Newman's Own, Inc.*, No. 16-cv-06690-ARR-RML (E.D.N.Y. Nov. 1, 2017) (ordering that "[i]n light of the number of comments received by the FDA and the FDA Commissioner's recent statement that the FDA is looking at defining the term 'natural,' the defendant's request for a six-month stay of the proceedings [was] granted."); *Rosillo v. Annie's Homegrown Inc.*, No. 17-cv-02474-JSW, 2017 WL 5256345 (N.D. Cal. Oct. 17, 2017) (holding that "natural" case should be stayed in deference to FDA authority and noting that "the Court believes that the congressional interest reflected in [the Congressional] committee report makes it likely that the FDA will address, in a relatively short amount of time, the use of the term 'natural' on food labels."). *Defendant in the* Rosillo v. Annie's Homegrown Inc. *litigation is represented by the Perkins Coie food litigation team.*

CLASS CERTIFICATION STANDARDS

Since the Third Circuit, in *Carrera v. Bayer Corporation*, 727 F.3d 300 (3d Cir. 2013), applied a heightened ascertainability standard to class certification, courts remain divided over whether or not Rule 23 creates an implicit requirement that a class must be ascertainable in order to be certified. While courts in the First, Third, Fourth and Eleventh Circuits have applied the heightened ascertainability requirement, other circuits have rejected such a requirement, finding that any ascertainability requirement is met if a class is defined using objective criteria that establish a class membership with definite boundaries. In 2017, the Ninth Circuit in *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017) rejected this heightened ascertainability requirement set forth in *Carrera*, and held that plaintiffs aren't required under Rule 23 to establish an "administratively feasible" way of identifying putative class members. The Supreme Court declined to accept certiorari of the *Briseno* appeal, thus leaving in place the deepening circuit split on this issue.

Notwithstanding the continued uncertainty over the application of ascertainability to class actions, plaintiffs continued to struggle at the class certification stage, often due to an inability to provide a reliable damages model for class certification. For example, in *Kraft v. Morales*, No.14-cv-4387 (C.D. Cal. June 9, 2017), the court decertified a Rule 23(b)(3) damages class based in part on rebuttal expert testimony demonstrating that plaintiffs' damages models were methodologically unsound. Likewise, in *In re 5-Hour Energy Mktg. Litig.*, No. ML 13-2438 PSG (PLAx), 2017 WL 2559615 (C.D. Cal. June 6, 2017), the Central District of California refused to certify a class challenging the labeling of 5-Hour Energy drink, in part because the plaintiff could not offer any reliable damages model to show that the

challenged claims resulted in any price increase or had any value or impact in consumers' purchasing decisions. The court rejected plaintiff's contention that a class could nonetheless be certified without such evidence: "Plaintiffs' argument that they do not need to provide a 'complex price-premium damages model' is neither here nor there because, regardless of whether Plaintiffs' provide a price-premium model or not, they still must be able to account for consumer preferences and the relative value that consumers ascribe to different aspects of the product."

CORPORATE RESPONSIBILITY

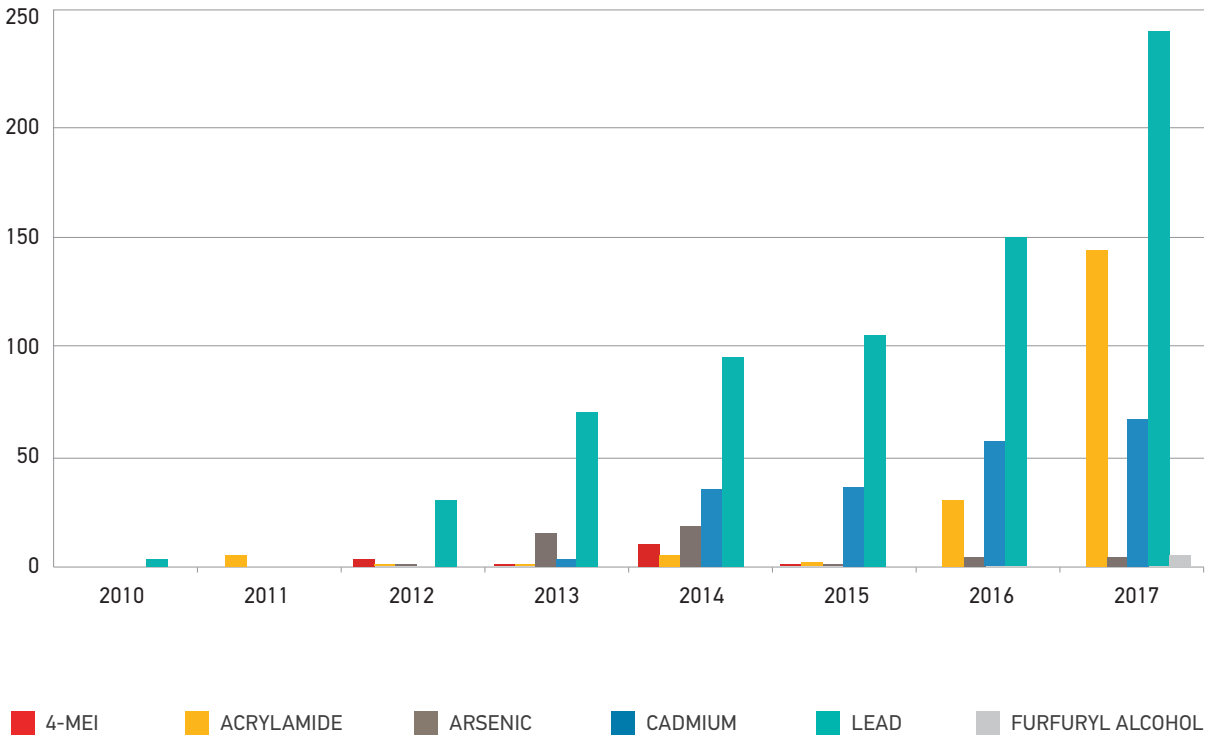
Corporate Responsibility in class actions addresses the question of whether there is a duty to disclose the use of forced labor in a supply chain. Over the past few years, interest in corporate responsibility has increased significantly. Nevertheless, courts have recently dismissed several lawsuits asserting claims of failure to disclose the use of forced labor. For example, in *Sud v. Costco Wholesale Corporation*, No. 15–cv–03783–JSW, 2017 WL 345994 (N.D. Cal. Jan. 24, 2017), a federal district court recently dismissed claims challenging website statements in a "Disclosure Regarding Human Trafficking and Anti-Slavery" and supplier "Code of Conduct" regarding the prohibition of forced labor, based on purported violations by third-party suppliers in Thailand, Indonesia, Vietnam and Malaysia. The court held that the claims failed for lack of standing and reliance because the plaintiffs did not allege they read and relied on the website statements prior to purchasing the products at issue. While the majority of the recent civil suits challenging Corporate Social Responsibility (CSR) statements and omissions have failed, many of those cases are now on appeal. Given the rising popularity of corporate responsibility statements and the growing number of studies showing the importance of corporate responsibility to consumers and investors, companies must take steps to minimize litigation and liability risk.

PROPOSITION 65 TRENDS

Proposition 65, a California initiative approved by voters in 1986 and enacted into law as the Safe Drinking Water and Toxic Enforcement Act continues to be a hotbed of activity. As shown in Figure 3, Proposition 65 pre-litigation notices impacting the food and beverage industry have increased steadily over the last seven years, with new chemicals such as furfuryl alcohol added to the Proposition 65 Warning List in 2017. Plaintiffs served more than 450 pre-litigation notices regarding food, beverages or spices—many of which identified multiple products and companies. Plaintiffs served notices relating to acrylamide (e.g., fried/baked snack foods, baked goods, prune juice, olives), furfuryl alcohol (e.g., breads, potato-based snack foods), lead and cadmium (e.g., seafood, chocolate, baked goods, infant formula) and arsenic.

FOOD AND BEVERAGE PROPOSITION 65 ACTIONS:
PROPOSITION 65 NOTICES

FIGURE 3



Data compiled by Perkins Coie based on a review of Proposition Notices filed with the California Office of Attorney General.

PROPOSITION 65 REGULATORY UPDATES

FURFURYL ALCOHOL

Effective September 30, 2017, California's Office of Environmental Health Hazard Assessment (OEHHA) required warnings for consumer products containing furfuryl alcohol (FFA). FFA is a natural byproduct of the cooking process and appears in many foods and beverages, including alcoholic beverages, coffee, fruit juices and baked goods. Plaintiffs served five notices in 2017 relating to furfuryl alcohol and we expect to see more in 2018.

BISPHENOL A (BPA)

Bisphenol A (BPA) was added to the Proposition 65 list on May 11, 2016. Due to the widespread use of BPA in canned and bottled foods and beverages, the anticipated impact of this listing on the food and beverage industry prompted OEHHA to adopt an emergency regulation permitting manufacturers to rely on generic point-of-sale warning signs, if the food manufacturer added the food to an online database of products maintained by OEHHA. In December 2016, OEHHA adopted an interim rule extending the emergency regulation through December 30, 2017. As the interim rule has expired, food and beverage companies with canned or bottled products listed in the OEHHA database that have not phased out the use of BPA in their packaging should consult with legal counsel to assess their options.

NEW WARNING REGULATIONS

OEHHA implemented new regulations regarding what constitutes a "clear and reasonable warning." The new regulations will be mandatory on August 30, 2018, but OEHHA allows earlier compliance. The new warning language varies by type of exposure and must be tailored to the specific chemical. For food products, the warning must list the chemicals at issue and the harm at issue (cancer or reproductive toxicity). As an example, a product containing furfuryl alcohol would be required to bear the following warning:

> WARNING: Consuming this product can expose you to furfuryl alcohol, which is known to the State of California to cause cancer. For more information, go to www.P65Warnings.ca.gov/food.

The new regulations allow warnings for in-store purchases of food products to be placed on the product itself or displayed via shelf sign in the store. For product warnings, the regulations provide specific font size requirements. To warn consumers via shelf signs, the manufacturer must provide notice to each retail seller that the product may result in exposure to the chemical listed in the warning, and provide a sufficient supply of all necessary warning materials (signs/shelf tags) and instructions for placement.

For online purchases, the product display page should include the warning language or a clearly marked hyperlink with the word "WARNING" that links to the warning language below.

NOTABLE PROPOSITION 65 LITIGATION

In one of the largest Proposition 65 cases to be tried, the Council for Education and Research on Toxics alleges that over 90 manufacturers and retailers of ready-to-drink coffee failed to warn consumers that the coffee contained acrylamide, a chemical listed as a carcinogen under Proposition 65. Filed in 2010, the lawsuit seeks monetary penalties and injunctive relief in the form of warnings and/or product reformulation. The bench trial before Judge Elihu Berle of the Los Angeles County Superior Court was bifurcated into two phases. Phase one, which took place in 2014, focused on the "no significant risk" level. Ruling in favor of plaintiff, the court found that defendants did not present sufficient evidence, based on a quantitative risk assessment, that lifetime exposure to acrylamide in coffee poses no significant risk at the level in question. Phase two, which commenced in September 2017, involved the "alternative significant risk" level (ASRL) defense. Parties presented evidence through experts on the issue of whether defendants can establish and meet an ASRL for acrylamide in coffee because the chemical is produced by the roasting process to make the coffee palatable or microbiologically safe. The trial on ASRL concluded in November 2017, and the court is expected to issue a ruling soon. If defendants lose, the trial will proceed to remedies. Several defendants have settled along the way, including 7-Eleven which recently agreed to pay $900,000 and to post warnings. *Council for Education and Research on Toxics v. Starbucks et al.*, No. BC435759, Los Angeles County Superior Court.

ABOUT PERKINS COIE

As shown in this report, the food and beverage industry is one of the top targets for class actions and individual lawsuits following increased attention to product labeling, advertising, genetically modified organisms (GMOs) and consumer fraud. Perkins Coie attorneys have had considerable success in countering this rising litigation trend. We protect food and beverage clients by deploying decisive measures that reduce their liability and, when feasible, shut down litigation early and cost-effectively.

Perkins Coie has worked with major food and beverage manufacturers and distributors, as well as their supply chain, since the beginning of the food activist movement and the increase in FDA regulations. Additionally, we have advised clients on product recalls and product liability exposure and served as national coordinating defense counsel in complex nationwide class actions. Perkins Coie attorneys often lead the industry conversation in this evolving area of law. For example, our winning defense in a class action, *Turek v. General Mills*, which involved nutrient content claims, led to the first published federal appellate decision on the scope of Nutrition Labeling and Education Act (NLEA) preemption.

Our resident knowledge base includes attorneys from our nationally recognized Retail & Consumer Products industry group, and within that group, attorneys focused on the Food & Beverage sector. Many of our attorneys appear as seminar speakers, provide commentary to the media and publish articles on topics that our clients need to know before litigation arises. Our Food Litigation Blog provides real-time information on significant arguments and emerging trends in food and beverage litigation.

Our work in the industry has led to numerous recognitions, including Perkins Coie being named a 2017 Food & Beverage Practice Group of the Year by *Law360*. We also are consistently ranked in Band 1 for Retail by *Chambers USA*.

Contact Us

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