

Food Litigation 2018 Year in Review



A LOOK AT KEY ISSUES FACING OUR INDUSTRY



INTRODUCTION

PERKINS COIE IS PLEASED TO PRESENT ITS THIRD ANNUAL FOOD LITIGATION YEAR IN REVIEW,

summarizing important developments in consumer litigation affecting the food and beverage industry. Class action litigation against the food and beverage industry continued unabated in 2018, with 158 new lawsuits filed—a figure equaling 2015’s high-water mark. And despite some favorable rulings at the motion to dismiss stage, on balance indicators suggest that these filing trends will continue in 2019 and beyond.

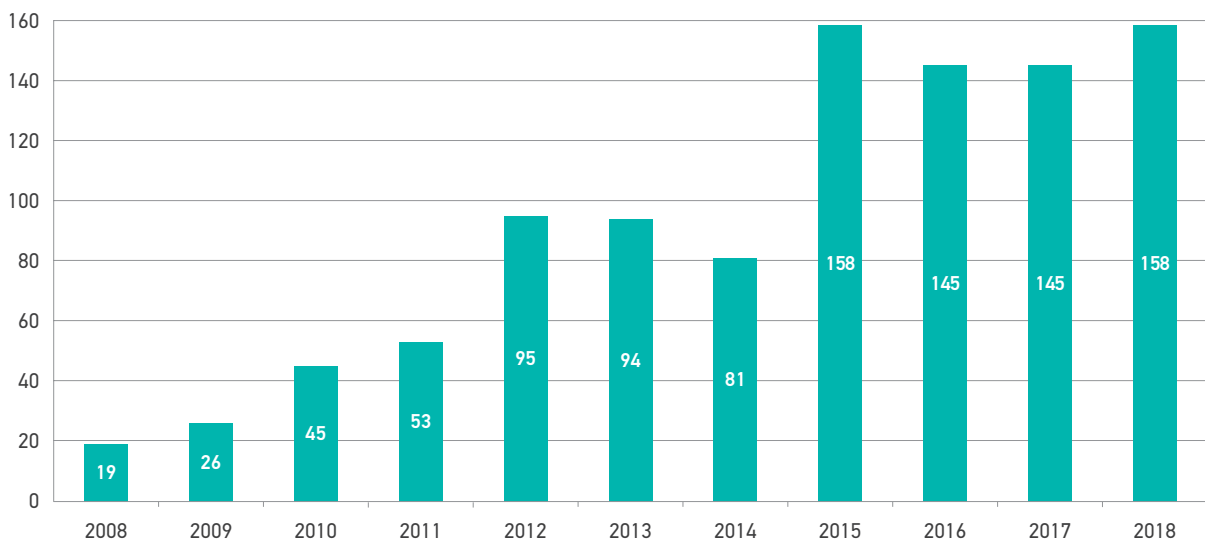
Once again, the “reasonable consumer” defense remained at the forefront in decisions on motions to dismiss. Several judges rejected a series of lawsuits challenging the use of the term “diet” for various diet drinks, concluding no “reasonable consumer” expects drinking diet soda is necessarily going to cause weight loss. These courts likewise placed under stricter scrutiny plaintiffs’ counsel’s reliance on scientific studies to prop up otherwise implausible complaints.

But the deterrent effect of victories in these and other “reasonable consumer” rulings was likely offset to some degree by class certification rulings in food and beverage cases. Several courts this year accepted plaintiffs’ proposed damages models as sufficient to certify food and beverage class actions, even where those models were not supported by an actual analysis of whether or how they might work at trial.

The Perkins Coie food litigation group secured an important Proposition 65 victory in *Post, et al. v. Superior Court*. In this pathbreaking decision, the California Court of Appeals held that Proposition 65 warnings for cereal based on the presence of acrylamide would conflict with the United States’ Food and Drug Administration’s (FDA) longstanding policies *encouraging* the consumption of whole grain cereals as part of a healthy diet; the court then entered summary judgment in favor of the food industry’s leading cereal makers. The decision later withstood plaintiff’s attempted appeal to the California Supreme Court.

FOOD AND BEVERAGE CLASS ACTIONS: FILINGS BY YEAR

FIGURE 1



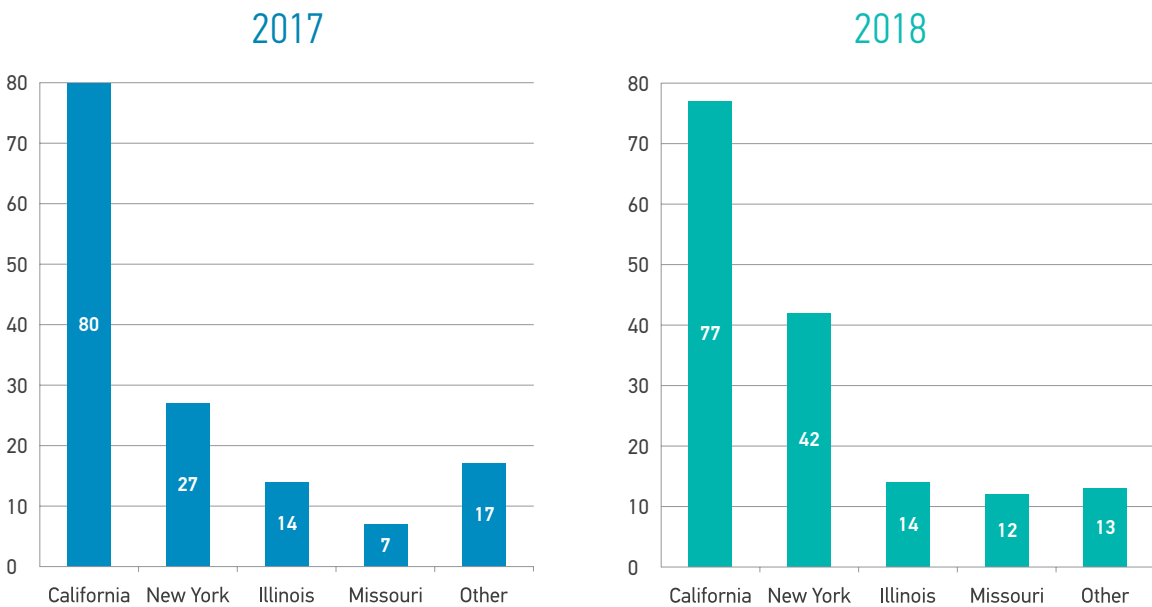


CLASS ACTION FILING TRENDS

The year 2018 continued the upward trend for food and beverage class actions. The total number of cases filed hit 158, representing a roughly 9% jump over the previous year. Likewise, the jurisdictional trend towards New York took hold, with a nearly 33% increase in filings there. Because it remains generally quite difficult to certify nationwide class actions, New York's large population base and the relatively fast movement of cases through the federal courts there has likely encouraged this trend. Indeed, this year that trend was so pronounced that there was an overall drop—albeit very slight—in the number of new cases filed in California, which remains the most active jurisdiction.

FOOD AND BEVERAGE CLASS ACTIONS: FILINGS BY JURISDICTION

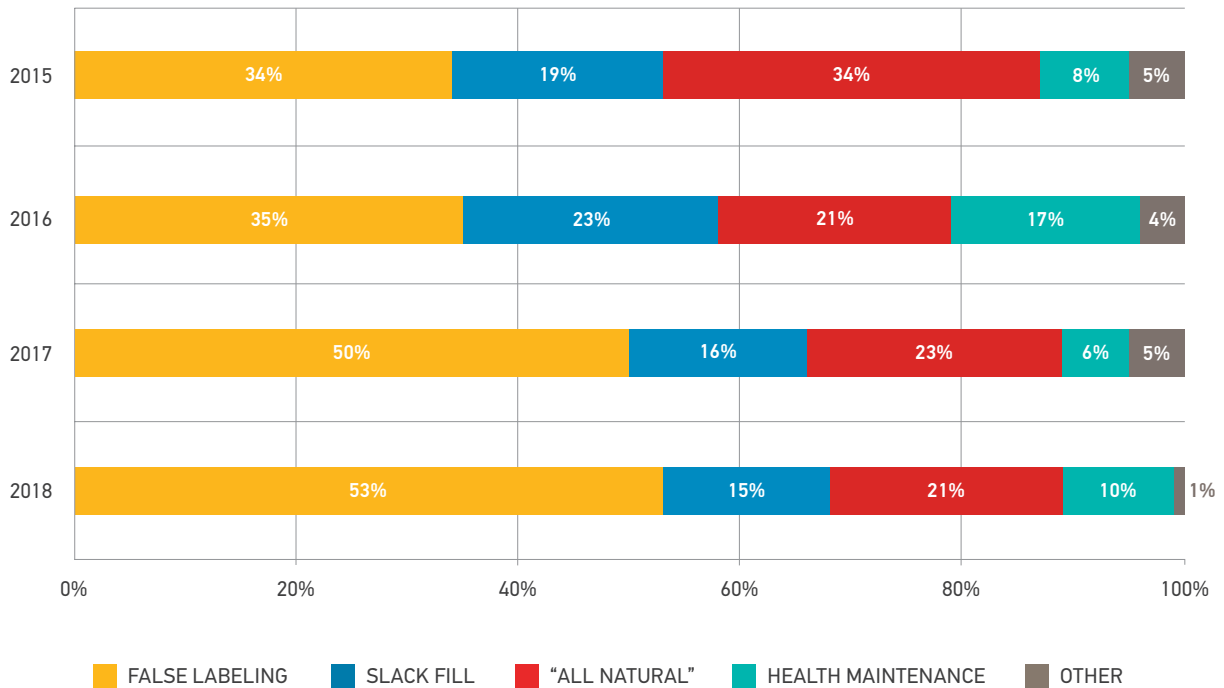
FIGURE 2



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

INDUSTRY FILINGS AND TRENDS: CATEGORIES

FIGURE 3



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

FALSE LABELING

False labeling claims rose yet again in 2018, although the increase was only 16%, as compared to a 60% increase from 2016 to 2017. Six percent of false labeling cases in 2018 involved animal treatment. Multiple suits were filed against milk producers regarding whether their cows were grass-fed where butter or ice cream was advertised as originating from grass-fed cows and against egg producers regarding whether their hens were provided outdoor access as claimed by product labels. A vast majority of 2018's false advertising cases involved alleged misrepresentations of the quality or quantity of certain ingredients (e.g., well water advertised as spring water, probiotic bacteria in kombucha lower than advertised) and alleged misrepresentations of product origin (e.g., olive oil represented as made in Italy, where ingredients from other countries are then combined in Italy).

SLACK FILL

Plaintiffs continued to target alleged nonfunctional slack fill in food packaging this year, filing 23 class action lawsuits. Although the number of claims stayed consistent with those from 2017, defendants secured consistent wins at the federal level this year. Armed with favorable decisions (discussed below), defendants have been increasingly willing to litigate slack-fill actions, which may impact filing trends in 2019.

“ALL NATURAL”

“Natural” filings ticked up by 22% between 2016 and 2017 but held steady in 2018 at 33 total filings. Foods with multi-function ingredients like malic acid and ascorbic acid remained a focus of these cases, as well as foods alleged to contain trace amounts of pesticides such as glyphosate. In the meantime, several courts extended primary jurisdiction stays in deference to the FDA’s open docket on defining “natural” in food labeling.

HEALTH MAINTENANCE

Health maintenance claims climbed between 2017 and 2018, from 9 claims in 2017 to 17 claims in 2018. Diet soda was a focus in several of these cases, with plaintiffs alleging that the term “diet” is misleading to a reasonable consumer. As discussed below, this theory was met with universal disapproval in the district courts.



SIGNIFICANT LEGAL DEVELOPMENTS

GLYPHOSATE

In the wake of a plaintiff's verdict in a personal injury case involving the use of glyphosate, *Johnson v. Monsanto*, the anti-pesticide non-profit Environmental Working Group (EWG) published an online article claiming to have detected trace amounts of glyphosate in several popular oat-based breakfast cereals. The levels of glyphosate EWG claims to have detected were in the billionths, and all well below levels that the Environmental Protection Agency (EPA) and Food and Drug Administration (FDA) specifically allow for glyphosate in oats. EWG's report nonetheless prompted a spate of class action filings against Quaker, Kellogg's, Bob's Red Mill, and General Mills, whose cereals were all identified in the EWG report. These lawsuits allege that the companies should be forced to disclose the alleged presence of trace glyphosate—even though there is no federal requirement that food manufacturers do so. As of January 2019, dismissal briefing is pending in many of these cases.

In the meantime, courts continued to be skeptical of attempts to regulate the use of pesticides through consumer class action litigation. In December of 2018, the Eastern District of New York dismissed a putative class action, *Axon v. Citrus World, Inc.*, No. 18-cv-4162 (ARR) (RML), 2018 WL 6448648 (E.D.N.Y. Dec. 10, 2018), alleging that the use of the word "natural" on the labels of orange juice was misleading due to the alleged presence of trace glyphosate in the product. The court rejected the plaintiff's definition of "natural" and dismissed the lawsuit, reasoning: "Given the widespread use of herbicides, the court finds it implausible that a reasonable consumer would believe that a product labeled ['Florida's Natural'] could not contain a trace amount of glyphosate that is far below the amount deemed tolerable by the FDA." *Id.* at *7 (internal quotation marks and citation omitted). So it is possible this new round of class actions may falter on a similar rationale.

REASONABLE CONSUMER

The "reasonable consumer" defense remains an important tool for defendants in food and beverage class actions, and in 2018 courts continued to rely on that defense in lawsuits that offered strained and implausible definitions of disputed labeling terms.

In a series of decisions in the Northern District of California and the Southern District of New York, putative class actions filed against the manufacturers of diet soft drinks were all dismissed under the "reasonable consumer" standard. The cases all alleged that the word "diet" in the brand names of diet sodas communicated to consumers that drinking the product would necessarily lead to weight loss. In a consistent string of decisions granting motions to dismiss, courts explained that no "reasonable consumer" interprets the term "diet" to communicate guaranteed weight loss. Several of these courts also reasoned that the complaints' reliance on scientific studies supposedly showing some correlation between consumption of aspartame (the sweetener used in diet soda) and weight gain did not make plaintiffs' theory plausible. These courts scrutinized the actual science cited and explained that none of it showed that diet soda *caused* weight gain—so the science actually undermined the plaintiffs' theory of deception.

In a similar case involving nutrition bars, *Clark v. Perfect Bar, LLC*, No. C 18-06006 WHA, 2018 WL 7048788 (N.D. Cal. Dec. 21, 2018), the Northern District of California likewise rejected the notion that the product's marketing and labeling—which focused on its protein content and nut-based formula—misled consumers about its sugar content. The court dismissed the complaint, describing the plaintiffs' theory as "untenable" and explaining: "The actual ingredients were fully disclosed. Reasonable purchasers could decide for themselves how healthy or not the sugar content would be." *Id.* at *1. Again, the court in *Clark* dismissed the complaint in spite of its attempted reliance on scientific studies to complain of the alleged health harms of sugar.

DAMAGES ISSUES

Notwithstanding positive developments at the motion to dismiss stage, in 2018 there were a series of class certification rulings that allowed plaintiffs to move forward with damages models that had previously been viewed with skepticism by many district courts.

Specifically, courts in both the Northern and Southern Districts of California allowed classes to be certified in reliance on “conjoint analysis,” a damages model that relies on survey evidence to allegedly determine how much consumers would be willing to pay for a product marketed with a particular labeling term. See, e.g., *Schneider v. Chipotle Mexican Grill, Inc.*, No. 16-cv-02200-HSG, 2018 WL 4700353 (N.D. Cal. Sept. 29, 2018), and *Clay v. Cytosport, Inc.*, No. 3:15-cv-00165-L-AGS, 2018 WL 4283032 (S.D. Cal. Sept. 7, 2018). So, for example, a conjoint-based damages model might survey potential buyers to see how much they would pay for a burrito labeled “non-GMO” versus one without that claim. Many academics—and several courts—have criticized the conjoint-based model as improper for valuing damages in consumer class actions for food and beverage products. Among other flaws, the model typically only measures the “demand side” of the economic equation (i.e., what consumers might pay) versus the “supply side” of the equation (i.e., whether the manufacturer will actually adjust pricing for these claims). Moreover, the decisions that allowed classes to be certified with this model did not actually look to how it would apply to the specific defendant’s product or pricing—rather, these courts held that the model itself was sufficiently acceptable to certify a class, and remaining issues over its potential defects could be challenged at trial.

The Ninth Circuit has yet to definitively answer whether a conjoint-based model (or a similar theoretical model) can be used to certify a class in cases where the model is not actually proven up through the use of real-world data or testing, although a Rule 23(f) petition to appeal the class certification decision was granted in *Clay* and has been filed in *Schneider*. So perhaps this is an area where the Ninth Circuit might provide some much-needed clarity in 2019.

MULTIFUNCTION INGREDIENTS (MALIC/SORBIC ACID)

2018 saw a significant uptick in cases challenging the presence of synthetic multi-function ingredients—including malic acid, ascorbic acid, and fumaric acid—in foods labeled “naturally flavored.” These acids are recognized by the FDA as multi-function ingredients; that is, they can serve several different functions in food. Malic acid, for example, can function as a flavor, a flavor enhancer, or a pH control agent. 21 C.F.R. § 184.1069(c). In at least eight cases filed this year, plaintiffs allege that implicit or explicit “naturally flavored” claims on foods containing synthetic malic, ascorbic, or fumaric acid are misleading because those ingredients function as flavors in the foods, rendering the products artificially flavored. These plaintiffs assert that foods containing malic or ascorbic acid must be labeled “artificially flavored” pursuant to FDA regulations.

Courts have been reticent to dismiss these cases at the pleading stage, and at least one case has proceeded past summary judgment. In motions to dismiss, food companies point out that malic, ascorbic, and fumaric acids can serve several different functions in food and that plaintiffs fail to plausibly allege the acids in the products function as flavor as opposed to pH control agents or flavor enhancers. Because federal law does not require ingredients that function as pH control agents to be disclosed as “artificial flavors,” plaintiffs’ claims regarding the “naturally flavored” label (and the sought-after “artificially flavored” disclosure) are preempted. Moreover, because the products are accurately labeled consistent with federal regulations, the labels are not misleading to a reasonable consumer. Courts have rejected these arguments, holding that whether the multi-function ingredient functions as a flavor is an issue of fact

ill-suited for resolution at the pleading stage. See, e.g., *Allred v. Frito-Lay N. Am., Inc.*, No. 17-CV-1345 JLS (BGS), 2018 WL 1185227, at *5 (S.D. Cal. Mar. 7, 2018); *Allred v. Kellogg Co.*, No. 17-cv-1354-AJB-BLM, 2018 WL 1158885, at *4 (S.D. Cal. Feb. 23, 2018). At least one of these cases has proceeded past the summary judgment stage, with the court holding—in the face of conflicting declarations about the function of fumaric and malic acid in the product—that the case should proceed to trial on the issue of whether the acids functioned as flavors. *Hilsley v. Ocean Spray Cranberries, Inc.*, No. 17cv2335-GPC(MDD), 2018 WL 5617701, at *3–6 (S.D. Cal. Oct. 30, 2018).

At least one district court has disagreed. In *Hu v. Herr Foods, Inc.*, 251 F. Supp. 3d 813 (E.D. Pa. 2017), the plaintiffs alleged that the statement “No Preservatives Added” on several of defendant’s food products was misleading because the products contained citric acid. *Id.* at 819. The court dismissed plaintiffs’ claims, reasoning that plaintiffs failed to allege that citric acid—as used in defendant’s products—functioned as a preservative, and as a result, failed to allege that the claim “No Preservatives Added” was false or misleading. *Id.* at 821–22.

CORPORATE RESPONSIBILITY

While corporate social responsibility continues to be a hot-button issue for putative class actions, the Ninth Circuit provided important clarity on the interplay between consumer protection laws and forced labor disclosure requirements in *Hodson v. Mars, Inc.*, 891 F.3d 857 (9th Cir. 2018). Specifically, the court held that California consumer protection laws do not impose any independent obligation to label products with labor disclosures unless such information relates to the product’s “central function” or advises of some safety hazard. In other words, consumer protection statutes cannot be used to require information disclosure that may be of public interest but ultimately has no connection to the product’s function.

In *Hodson*, relying on a framework of California consumer protection laws, the plaintiff demanded that Mars disclose the fact that a raw ingredient used to make its candy bars may have been a product of child slave labor. Interestingly, the plaintiff did not assert that Mars misrepresented information regarding its supply chain; rather, the plaintiff argued that Mars omitted supply chain information and that the consumer protection laws imposed an independent labeling duty.

The Ninth Circuit affirmed the lower court’s dismissal and confirmed that the consumer protection statutes impose no such duty. Rather, the court recognized the need to combat human rights abuses but held that consumer protection laws were not the appropriate sword, stating: “In the absence of any affirmative misrepresentations by the manufacturer, we hold that the manufacturers do not have a duty to disclose the labor practices in question, even though they are reprehensible, because they are not physical defects that affect the central function of the chocolate products.” *Id.* at 860.

SLACK FILL

In the slack-fill arena, 2018 welcomed a consistent string of defendant wins at the federal level. Moreover, several district courts relied on the plaintiff’s failure to meet critical pleading standards—including (1) the “reasonable consumer” standard; and (2) failure to adequately plead non-functionality of the alleged slack-fill—as bases for defeating putative class actions at the motion to dismiss phase.

For example, Immaculate Baking Company, represented by the Perkins Coie food litigation team, warded off a slack fill class action lawsuit using the reasonable consumer standard. In *Reider v. Immaculate Baking Co.*, No. 8:18-cv-01085-JLS-AS (C.D. Cal. Nov. 8, 2018), the plaintiff alleged that Immaculate's Yellow Cake Scratch Mix contained over 50% empty space, or slack fill, and the empty space deceived him into expecting more cake mix than was actually being sold. The court dismissed the class action and found that the cake mix packaging was not deceptive as a matter of law, because no reasonable consumer would be misled when the packaging included both an illustrative chart that showed exactly how many cakes and how many cupcakes the mix would yield upon baking and prominently disclosed the product's net weight on the front of the box. Notably, the court wrote, "It is difficult to see how a reasonable consumer could expect a box of Cake Scratch Mix to contain any more mix than the amount sufficient to make that much cake."

Likewise, in *Daniel v. Tootsie Roll Industries, LLC*, No. 17 Civ. 7541 (NRB), 2018 WL 3650015 (S.D.N.Y. Aug. 1, 2018), the Southern District of New York dismissed a slack fill class action against Tootsie Roll Industries, because the plaintiff failed to demonstrate, with factual assertions, that the slack-fill in the Junior Mints candy boxes was "non-functional." Consumer protection laws provide for manufacturing safe harbors that justify some empty space in packaging as "functional," and as such, plaintiffs must plead non-functionality to survive a motion to dismiss. In *Daniel*, the court found that the plaintiff failed to show that those safe harbors were inapplicable—that the slack fill in the Junior Mints boxes was not necessary to "protect" the candies or was not the result of "unavoidable settling."

And in *Daniel v. Mondelez International, Inc.*, 287 F. Supp. 3d 177 (E.D.N.Y. Feb. 26, 2018), the Eastern District of New York granted a motion to dismiss on reasonable consumer grounds. The plaintiff sued Mondelez International, Inc., arguing that the "excessive empty space" in Swedish Fish packaging misrepresented the amount of Swedish Fish gummies contained inside. The court found that reasonable consumers would not be misled by slack fill where the product's label disclosed the exact weight of the product contained therein and the total product count.

This year's defendant wins suggest that courts are less accepting of challenges to truthful labeling. Armed with favorable rulings, defendants are increasingly willing to litigate rather than settle, and 2019 is likely to see less slack-fill litigation filings.

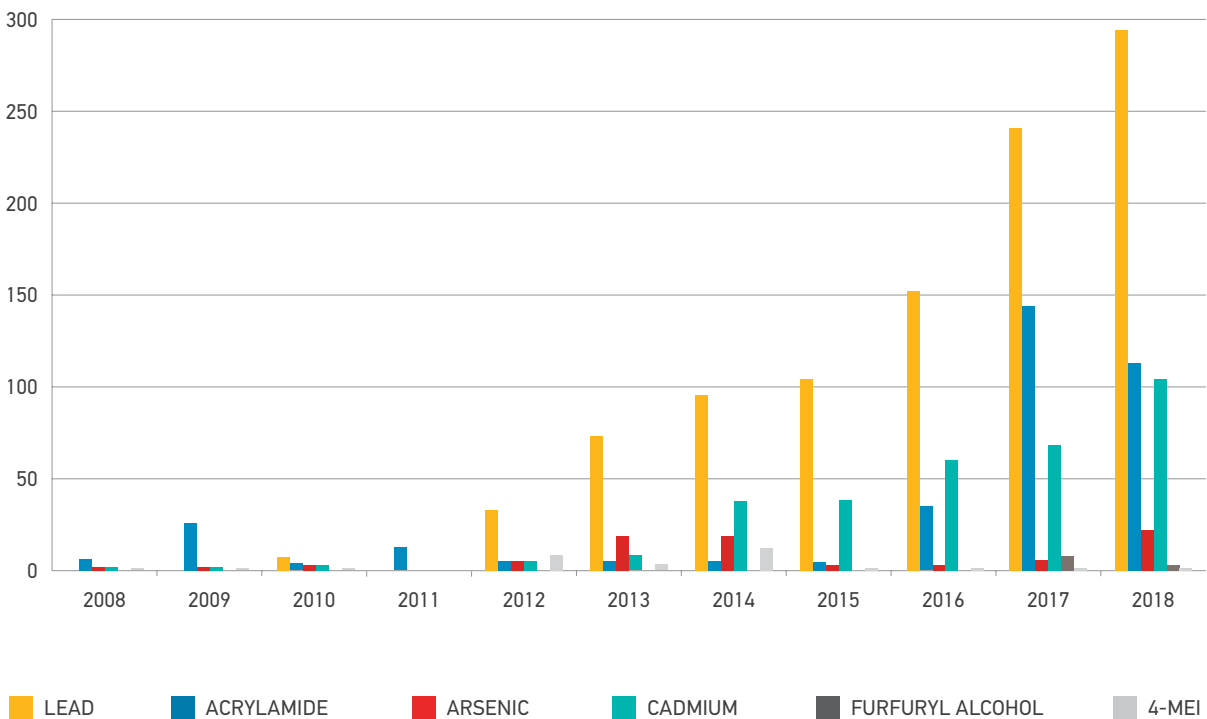


PROPOSITION 65 TRENDS

Proposition 65 was a California initiative approved by voters in 1986 and enacted into law as the Safe Drinking Water and Toxic Enforcement Act. Proposition 65 prohibits retailers and manufacturers from knowingly and intentionally exposing California consumers to a chemical known to the State of California to cause cancer, birth defects or reproductive harm without first providing a “clear and reasonable warning.” It is administered and regulated by the Office of Environmental Health Hazard Assessment, commonly referred to as OEHHA. Currently, there are over 900 chemicals on the Proposition 65 list, with new chemicals added each year. As shown in Figure 4 below, Proposition 65 pre-litigation notices impacting the food and beverage industry have increased steadily over the last seven years. Plaintiffs served more than 530 pre-litigation notices regarding food and beverage products in 2018. Notably, there has been a significant spike in the number of pre-litigation notices involving lead, acrylamide and cadmium, which now account for the vast majority of the pre-litigation notices involving food and beverage products. Another noteworthy trend is the increase in the number of pre-litigation notices involving dietary supplements. The number of filings involving dietary supplements in 2018 was double the total number of filings in 2017.

FOOD AND BEVERAGE PROPOSITION 65 ACTIONS: PROPOSITION 65 NOTICES

FIGURE 4



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



PROPOSITION 65 REGULATORY UPDATES

KEY CONFLICT PREEMPTION RULING

In *Post Foods, LLC v. Superior Court*, 235 Cal. Rptr. 3d 641 (Cal. Ct. App. 2018), the food industry secured an important victory in a Proposition 65 lawsuit, with the California Court of Appeals holding that a proposed Proposition 65 warning on the labels of whole grain cereals, due to the presence of acrylamide, conflicts with the FDA's longstanding policy *encouraging* the consumption of whole grain cereals as healthy. The trial court had denied the motion for summary judgment filed by the defendants—the industry-leading cereal companies General Mills, Kellogg's, and Post—on that issue. The California Court of Appeals granted an extraordinary writ, took the case, and reversed by entering summary judgment in the defendants' favor. The Court of Appeals noted the FDA's consistent dietary guidance encouraging consumption of whole grain cereals, explaining that this guidance would be undermined by a contrary Proposition 65 warning. The California Court of Appeals ruling was later sustained by the California Supreme Court.

NEW WARNING REGULATIONS

In 2016, OEHHA promulgated new consumer warning regulations, which took effect on August 30, 2018 (Cal. Code Regs. tit. 27, § 25600 et seq.). A key focus of the new regulations is to provide greater specificity regarding what a warning must say, where it must be placed and how conspicuous it must be. To be compliant, standard warnings must now contain a warning symbol as well as the word "WARNING." In addition, the warning must say that the product "can expose you to" a Proposition 65 chemical rather than saying the product "contains" the chemical. The warning must now also identify at least one listed chemical that prompted the warning and include the web address for OEHHA's new Proposition 65 warnings website, [P65Warnings.ca.gov](http://www.P65Warnings.ca.gov). For example, a product that contains one or more carcinogens must read:

WARNING: This product can expose you to chemicals, including [name of chemical], which is/are known to the State of California to cause cancer.
For more information, go to www.P65Warnings.ca.gov

The new regulations also place the primary responsibility for providing consumer warnings on the manufacturer. Manufacturers may comply by directly labeling the product with a warning or providing notice to the retailer. The notice to the retailer must identify the specific product at issue and the chemical prompting the warning, and provide the required warning materials to be used. The new regulations also provide that retailers and manufacturers may agree to allocate responsibility for providing warnings among themselves.

For online purchases, a warning must now appear on the product display page or through a clearly marked hyperlink using the word "WARNING" that links to the warning language. The new regulations also contain express requirements regarding specific situations including environmental exposures and occupational exposures. The new regulations also impose additional requirements for certain products and industries, including restaurants and alcohol and furniture manufacturers. Because the new regulations are very detailed and complex, manufacturers and retailers should carefully review the regulations, seek legal counsel and take any necessary steps to ensure that they continue to comply with the new regulations.

PROPOSED REGULATION REGARDING COFFEE

On June 15, 2018, OEHHA announced a proposed regulation stating that coffee does not require a Proposition 65 cancer warning. OEHHA's action was based on a June 13, 2018 monograph on coffee and cancer published by the International Agency for Research on Cancer, subsequent scientific literature, and OEHHA's independent statistical analysis of the data. OEHHA concluded that exposures to listed chemicals in coffee, including acrylamide, created by and inherent in the process of roasting coffee beans or brewing coffee do not pose a significant risk of cancer, and therefore coffee does not require a cancer warning label. OEHHA's conclusions are contrary to prior rulings by a California Superior Court in *Council for Education and Research on Toxics v. Starbucks Corporation*, Case No. BC435759, a Proposition 65 enforcement action concerning acrylamide in coffee. That case is currently stayed pending review by and further order from the California Court of Appeal.

OEHHA held a public hearing on the proposed regulation on August 16, 2018 and accepted public comments on the proposed regulation until August 30, 2018. Given the enormous impact of this proposed regulation, the food and beverage industry, as well as many others, is eagerly awaiting the fate of this proposal.



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 respective supply chains, 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 have 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 understand 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 Food & Beverage Practice Group of the Year by *Law360*. We are also consistently ranked in Band 1 for Retail by *Chambers USA*.

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