Food Litigation 2016 Year in Review

A LOOK BACK AT KEY ISSUES FACING OUR INDUSTRY

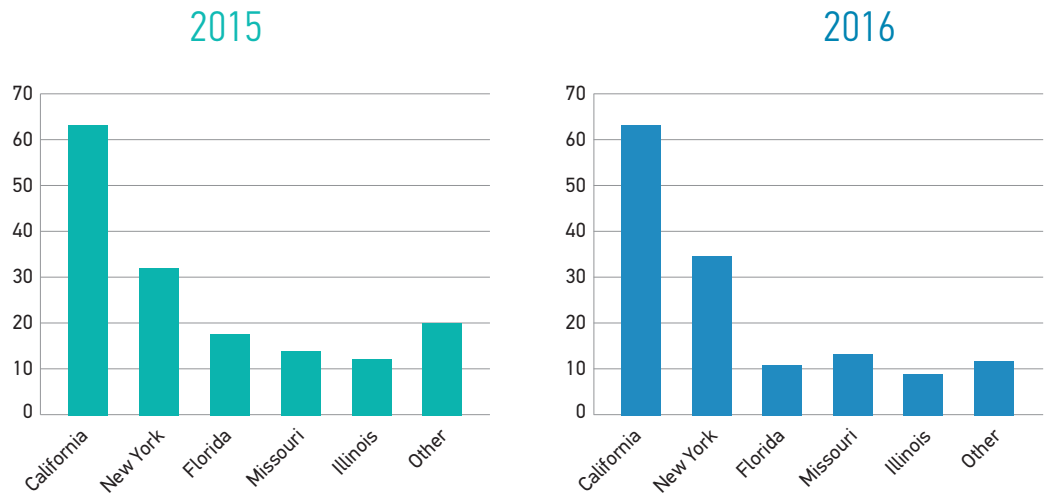
PERKINSCOIE

CLASS ACTION FILING TRENDS

Food class action filings decreased to 145 last year, from 158 in 2015. Still, the number of cases filed per year has been generally increasing since 2008—and the 2016 filings were about 47 percent higher than the next closest year, 2012. California remains the favored jurisdiction for food and beverage cases, although the gap between the Golden State and the Empire State (ranked second in both 2015 and 2016) narrowed last year, with 64 class actions filed in California and 35 filed in New York. Missouri, Florida and Illinois remain other popular jurisdictions in which to litigate, as seen in Figure 1.

FOOD AND BEVERAGE CLASS ACTIONS:
FILINGS BY JURISDICTION

FIGURE 1

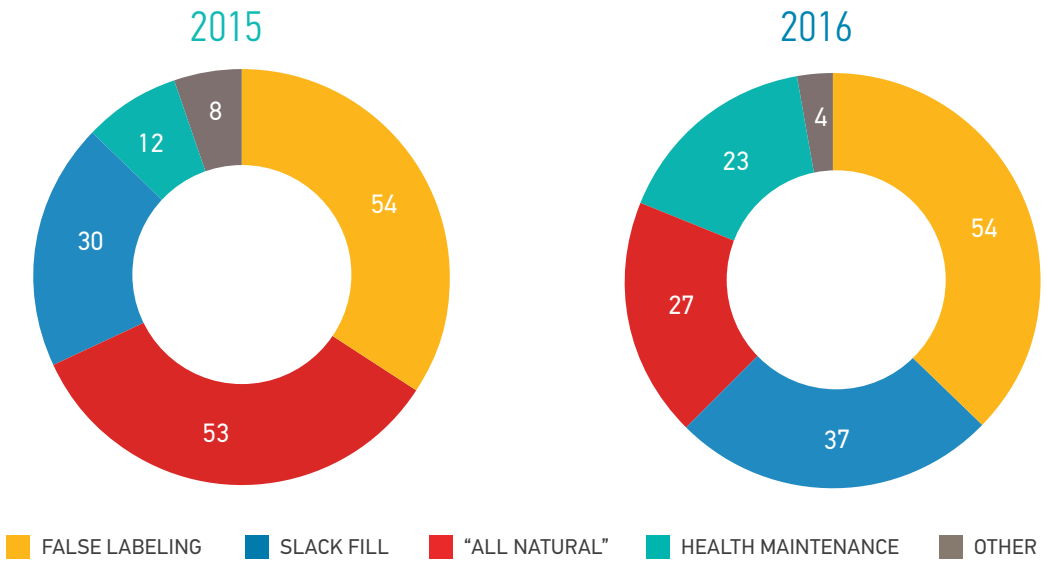


Data compiled by Perkins Coie based on a review of dockets from courts nationwide.

As Figure 2 indicates, plaintiffs most commonly attacked labels with claims alleging false statements of fact and nonfunctional slack fill; however, only slack fill and health misrepresentation claims grew in overall number.

INDUSTRY FILINGS AND TRENDS: CATEGORIES

FIGURE 2



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

FALSE LABELING

Although the number of claims stayed consistent with those from 2015, false labeling remained the largest category for filings in 2016. This category includes claims challenging representations made regarding the ingredients used in a product (such as "100% real cheese"), quality of ingredients used (such as "100% organic") and the type of processing used to make the product (such as "cold-pressed").

SLACK FILL

The number of cases involving nonfunctional slack fill, alleging violations of 21 C.F.R. § 100.100, increased by 23 percent. Plaintiffs remain very active in this area, and have extended the slack fill theory to include, for example, allegations that iced beverages are over-filled with ice or that canned foods have an excess amount of water in them.

"ALL NATURAL"

The number of filings aimed at food products or ingredients labeled as "natural" or "all natural" dropped significantly in 2016—by almost 50 percent from the 53 filed in 2015—but the category remained active. After a World Health Organization Report identified glyphosate as a potential carcinogen, plaintiffs began targeting the residual presence of glyphosate in foods. Plaintiffs have also begun to attack the "all natural" label based on the supply chain of a product, alleging that it is misleading to represent that a product is "natural" if it uses meat or dairy from cows given GMO feed.

HEALTH MAINTENANCE

Finally, we saw filings relating to health misrepresentations almost double, from 12 in 2015 to 23 in 2016. This category includes lawsuits alleging that any claim that implies a product is healthy is misleading if it contains added sugar above certain thresholds.

SIGNIFICANT LEGAL DEVELOPMENTS

"REASONABLE CONSUMER" STANDARD

The "reasonable consumer" standard—which requires plaintiffs to show a probability that a significant portion of consumers acting reasonably would be misled—has been applied by courts intermittently to dismiss food labeling cases at the Rule 12 stage. In 2016, however, the Ninth Circuit Court of Appeals may have increased the vitality of this doctrine in *Ebner v. Fresh, Inc.,* 838 F.3d 958 (9th Cir. 2016). In *Ebner*, the Ninth Circuit held that a "reasonable consumer" would not be deceived by an allegedly underfilled lipstick tube given that: (1) the tube accurately stated the amount of lipstick by weight in compliance with federal law, and (2) that any "reasonable consumer" knows that such containers aren't completely full. *Ebner* thus lends support to a more general "reasonable consumer" argument that relies on a label's otherwise compliant labeling to combat a claim of deception.

This standard has already gained traction in the lower courts. For example, in *Bush v. Mondelez International, Inc.,* No. 16-cv-02460-RS, 2016 WL 5886886 (N.D. Cal. Oct. 7, 2016), the Northern District of California applied *Ebner* to dismiss a slack-fill case involving travel-size snack products because it was not plausible that a reasonable consumer would be deceived by the slack-filled packaging where the package disclosed the net weight of product and the number of snacks per container on its packaging.

PRIMARY JURISDICTION DOCTRINE

The Ninth Circuit's sua sponte ruling in *Kane v. Chobani, LLC,* 645 F. App'x 593 (9th Cir. 2016), signaled the resurgence of the primary jurisdiction doctrine in food litigation. The doctrine permits a court to stay or dismiss (without prejudice) an action pending resolution of matter within the special expertise of an administrative agency. In *Kane*, the Ninth Circuit deferred to the FDA's expertise, staying a false advertising class action involving yogurt pending the FDA's review of the terms "natural" and "evaporated cane juice." Nearly a dozen district courts have followed suit, and the trend is likely to continue as the FDA has sought to redefine the term "healthy."

CLASS CERTIFICATION AND ASCERTAINABILITY

Since the Third Circuit, in *Carrera v. Bayer Corporation,* 727 F.3d 300 (3d Cir. 2013), applied a heightened ascertainability standard to class certification, the federal circuits have become divided on whether administrative feasibility is required under Rule 23. The Ninth Circuit weighed in on this question in *Briseno v. ConAgra Foods, Inc.,* 844 F.3d 1121 (9th Cir. 2017), departing from the Third Circuit's ascertainability standard in *Carrera*, and holding that plaintiffs aren't required under Rule 23 to establish an "administratively feasible" way of identifying putative class members. The Ninth Circuit's *Briseno* ruling deepens an already-existing circuit split on this issue, and may increase the likelihood that the Supreme Court may finally grant *certiorari* on this issue to settle the matter.

CORPORATE RESPONSIBILITY

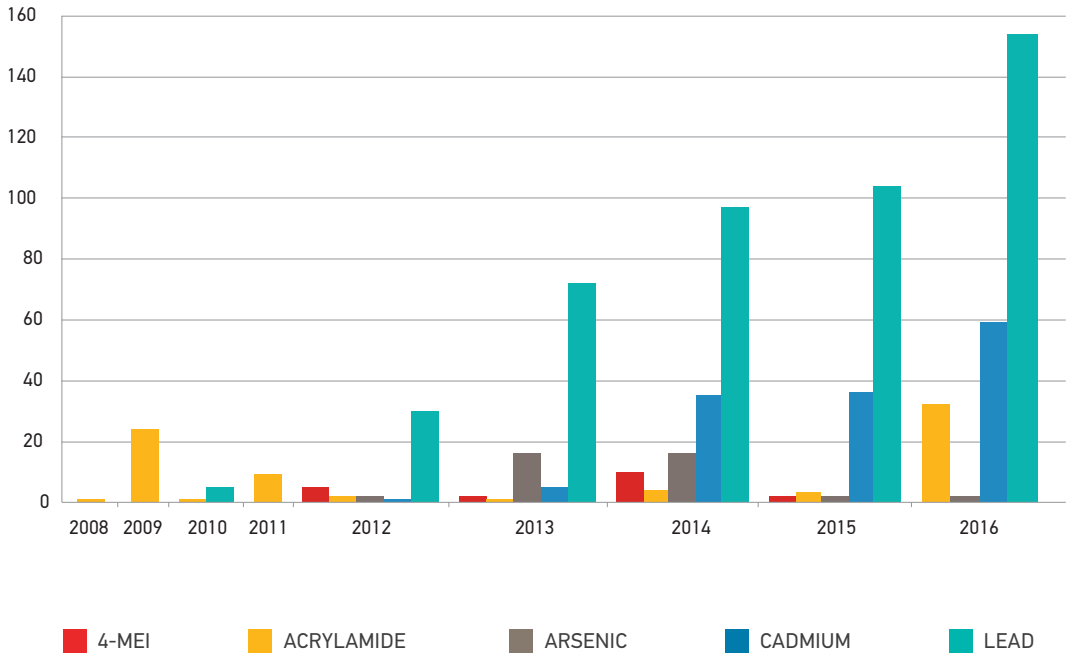
Courts dismissed several lawsuits alleging claims of failure to disclose use of forced labor in the supply chain. Two such dismissals relating to pet foods, *Wirth v. Mars Inc.,* No. SA CV 15-1470-DOC, 2016 WL 471234 (C.D. Cal. Feb. 5, 2016), and *Barber v. Nestlé USA, Inc.,* 154 F. Supp. 3d 954 (C.D. Cal. 2015), are currently before the Ninth Circuit.

PROPOSITION 65 TRENDS

Proposition 65, more formally known as California's Safe Drinking Water and Toxic Enforcement Act of 1986, continues to be a hotbed of activity. As shown in Figure 3, Proposition 65 warning letters impacting the food and beverage industry have increased steadily over the last five years. In 2016, plaintiffs filed nearly 250 warning letters regarding food, beverages or spices—many of which identified multiple products and companies. Plaintiffs also continue to file notices relating to acrylamide (potato and sweet potato snack foods, vegetable chips, prune juice and olives), cadmium (seaweed, shellfish products and cocoa products) 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

BISPHENOL A (BPA)

The addition of Bisphenol A (BPA) to the Proposition 65 list took effect on May 11, 2016. Due to the use of BPA in canned food liners, the anticipated impact of this listing on the food industry prompted the promulgation of emergency regulations applicable to canned foods. These regulations allow manufacturers to rely on generalized point-of-sale warning signs so long as the food manufacturer has added the food to an online database of products maintained by the Office of Environmental Health Hazard Assessment (OEHHA).

NEW WARNING REGULATIONS

OEHHA also finalized new regulations regarding what constitutes a "clear and reasonable warning." The new regulations are effective 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 lead would be required to bear the following warning:

> WARNING: Consuming this product can expose you to lead, which is known to the State of California to cause birth defects or other reproductive harm. 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.

Contact Us

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