Food Litigation 2019 Year in Review

A LOOK AT KEY ISSUES FACING OUR INDUSTRY

PERKINS COIE

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INTRODUCTION

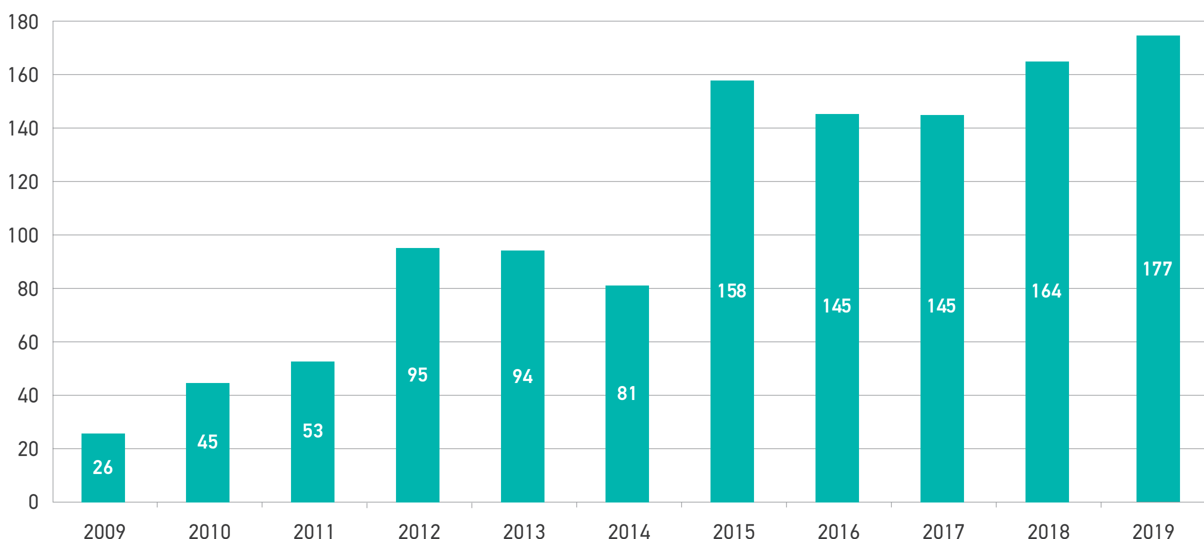
PERKINS COIE IS PLEASED TO PRESENT ITS FOURTH ANNUAL FOOD LITIGATION YEAR IN REVIEW, summarizing important developments in consumer litigation affecting the food and beverage industry. Filings against the food and beverage industry reached new highs once again in 2019, with 177 putative class action complaints filed in courts nationwide—exceeding last year's record-breaking total. Plaintiffs' lawyers continue to target the industry, relying on new theories and claims, and spurred on by some plaintiff-friendly rulings that have allowed classes to proceed to certification based on damages models once considered flawed or incomplete. The upward filing trends in the class action landscape are mirrored in other industries and in the prosecution of related claims: putative class actions against the pet food and dietary supplement industries were on the rise in 2019, as were Proposition 65 warning notices.

Despite these trends, 2019 saw several important rulings for companies defending such lawsuits. The "reasonable consumer" defense continues to serve as an important checkpoint in food and beverage lawsuits. Both the Second and Ninth Circuits issued opinions affirming that reasonable consumers have common-sense notions about food and beverage products—like the fact that soda labeled "diet" doesn't cause weight loss without other dietary changes. Likewise, in the supplement space, courts have reaffirmed the vitality of preemption defenses to complaints challenging allegedly misleading structure/function claims. And in the pet food space, just as courts have done in similar lawsuits against food companies, courts rejected the notion that a "natural" claim on pet food necessarily communicates that the food is completely free of trace pesticides down to the molecular level. Despite these victories, our outlook for 2020 is similar to the trend in 2019: a continued targeting of these industries by the plaintiffs' bar.

We monitor filings on a daily basis and provide real-time updates on cases filed, Proposition 65 notices, and important industry decisions to clients and key contacts via our Perkins Coie Food Litigation Update email report. To receive this daily email report, please email PerkinsCoieFoodLitigationUpdate@perkinscoie.com.

FOOD AND BEVERAGE CLASS ACTIONS:
FILINGS BY YEAR

FIGURE 1



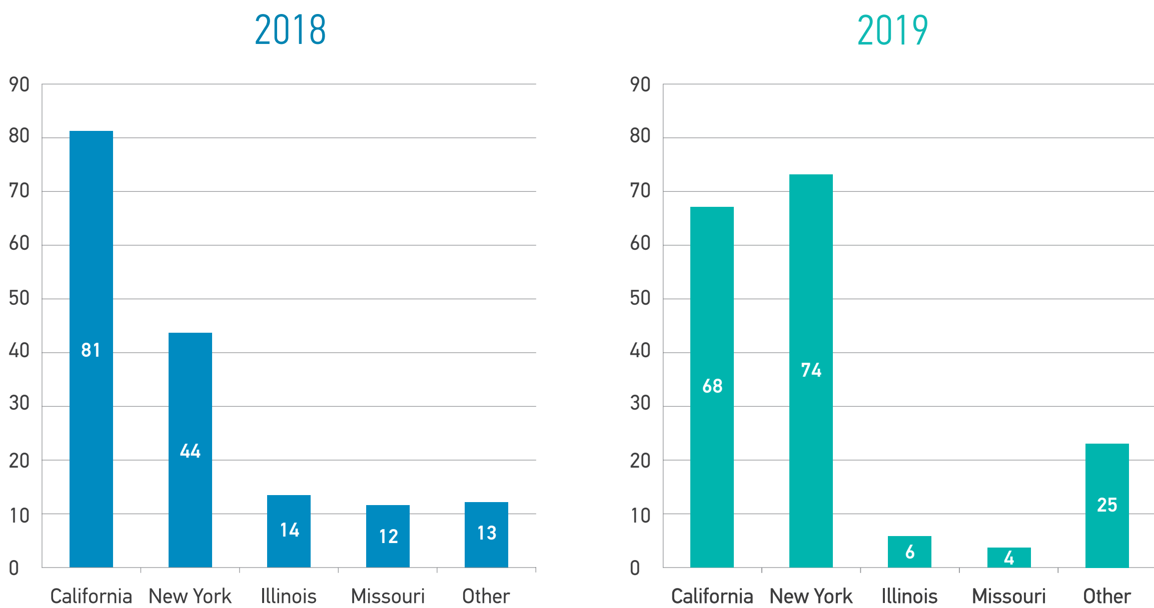
Data compiled by Perkins Coie based on a review of dockets from courts nationwide.

CLASS ACTION FILING TRENDS

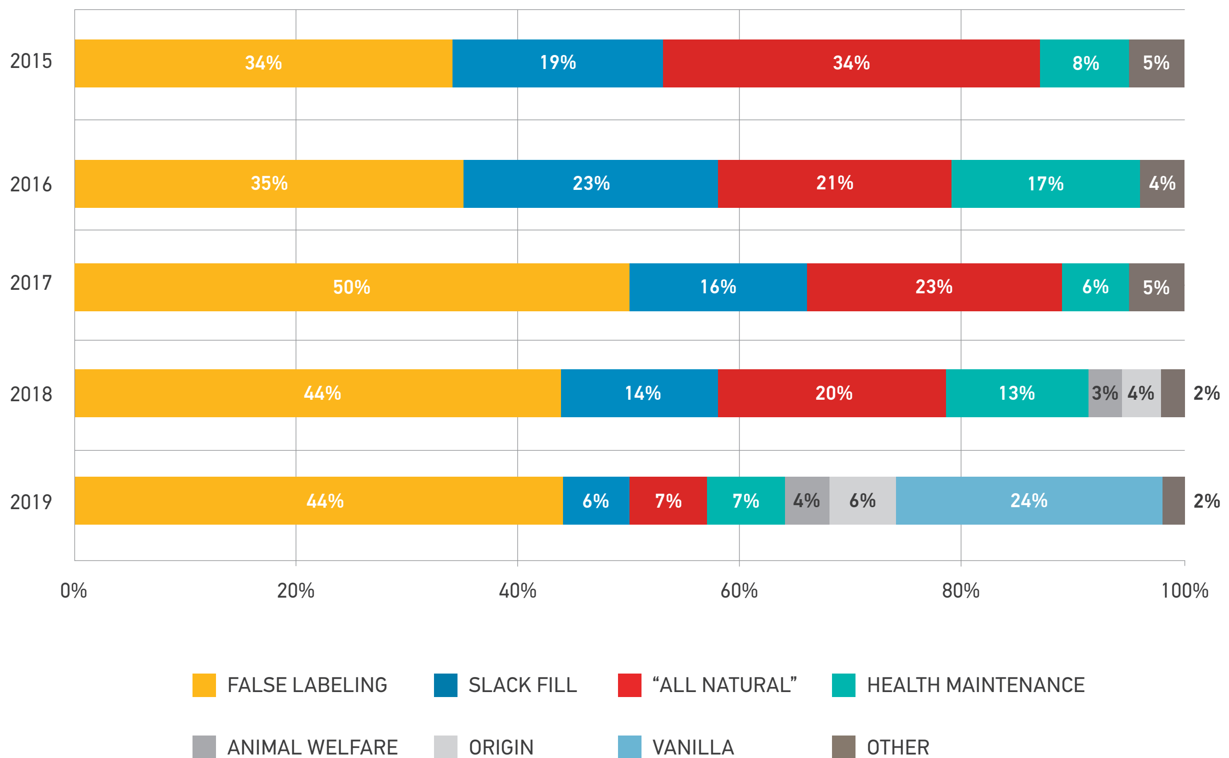
As noted, 2019 saw a record number of filings against the food and beverage industry. For the first time, however, California was not the favored jurisdiction of the plaintiffs' bar. That distinction went, instead, to New York, with 74 lawsuits filed in 2019. Many of these lawsuits were—as described in more detail below—filed by a small number of firms challenging the labeling of products flavored with vanilla. However, we expect New York to remain neck and neck with California in 2020.

FOOD AND BEVERAGE CLASS ACTIONS:
FILINGS BY JURISDICTION

FIGURE 2



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



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

FALSE LABELING

False labeling claims saw a slight uptick in 2019 to 77 total claims, compared with 72 such filings in 2018, 73 in 2017, and only 46 in 2016. About 15 percent of false labeling cases in 2019 involved chocolate. Multiple suits were filed against food companies alleging that claims that products included "white chocolate" were false because the food lacked cocoa butter. Several cases alleged that food companies mislabeled their products as made with "real cocoa" when in reality they contained cocoa processed with alkali, or "Dutch" cocoa. Many of 2019's false advertising cases involved alleged misrepresentations of the quality or quantity of certain ingredients in food. Those include claims that "ginseng and honey" tea does not contain detectable levels of ginseng and allegations that probiotic bacteria in kombucha is lower than advertised. Many cases involved alleged misrepresentations of how a product was made, such as corn chips falsely labeled as "homemade" or ice cream falsely labeled as "artisan" when the manufacturing process does not meet the definition of artisan.

SLACK FILL

Slack fill class action filings slowed considerably in 2019, dropping from 23 in 2018 to a mere 11 in 2019. Defendants' consistent wins at the federal level in 2018 appear to have had an impact on filing trends.

"ALL NATURAL"

New filings of "natural" cases continued in 2019. Multifunction ingredients (malic acid and ascorbic acid) remained a primary driver of "natural" cases over the course of the year. In addition, plaintiffs continued to lodge "natural" cases based on an array of differing theories, such as animal welfare (e.g., chicken allegedly cannot be "all natural" if chickens contain antibiotic and pharmaceutical residue and are raised indoors in crowded and dirty sheds) and use of pesticides (e.g., baby food allegedly cannot contain "100% natural ingredients" if it contains glyphosate and the synthetic insecticides thiacloprid and bifenthrin).

At the regulatory level, the U.S. Food and Drug Administration (FDA) has indicated that regulation of "natural" remains an ongoing agency priority. In light of the FDA's public statements in this regard, courts have continued to stay "natural" cases under the primary jurisdiction doctrine in deference to the FDA's deliberative process.

HEALTH MAINTENANCE

Health maintenance claims saw a precipitous drop between 2018 and 2019, falling from 21 cases in 2018 to 13 total cases in 2019. Healthy fats were a focus in several of these cases—plaintiffs alleged that "health and wellness" claims on various coconut products were false because the products were high in saturated fat.

ANIMAL WELFARE / ENVIRONMENTAL PRACTICES

Seven animal welfare cases were filed in 2019, a slight increase from the five filed in 2018. Three of these cases alleged that "dolphin safe" labels on defendants' tuna products were false or misleading because the companies use fishing practices that allegedly harm dolphins (even though the fishing practices are approved by federal law). The remaining cases allege that generalized advertising by meat, egg, and dairy producers misleadingly implies messages about the company's treatment of animals or related environmental practices.

ORIGIN

There was a moderate increase in 2019 of new cases based on alleged misrepresentations of product origin. Plaintiffs in product origin cases allege that words and imagery carried on a product's labels (e.g., a Paris emblem, "Depuis 1747," and *Que Maille* carried on Dijon mustard) can deceive reasonable consumers into believing the product is sourced from a given location (e.g., Maille, France), or produced in a given manner, even if the label does not specifically indicate the product's origins.

VANILLA

The year 2019 saw dozens of new filings alleging that food products' representations regarding vanilla flavoring were false or misleading. Nearly all of these suits were filed in federal courts in New York by one of two plaintiffs' firms.

The allegations in the more than 40 vanilla cases are largely identical, claiming that a product marked "vanilla" is flavored with an insufficient quantity of actual vanilla. In many suits, plaintiffs allege that the product's ingredient list does not identify vanilla extract despite a representation that the product's flavor is "vanilla." These cases have targeted products across categories, including almond milk, soy milk, ice cream, and baked goods.

While several of the vanilla cases have been voluntarily dismissed, the vast majority of these cases continue to work their way through the courts. The coming year will reveal how courts wrestle with motions to dismiss on these claims.

SIGNIFICANT LEGAL DEVELOPMENTS

GLYPHOSATE

In 2019, courts continued to remain highly skeptical of class actions challenging the trace presence of glyphosate in food and beverage products. In April of 2019, the Southern District of New York dismissed a putative class action challenging the use of the term "natural" on Rachael Ray Nutrish dog food. Plaintiffs had alleged that the "natural" claim was false because of an alleged trace presence of glyphosate in the products. But, applying the "reasonable consumer" standard, the court dismissed, explaining, "A reasonable consumer would not be so absolutist as to require that 'natural' means there is no glyphosate, even an accidental and innocuous amount, in the Products." *Parks v. Ainsworth Pet Nutrition, LLC,* 377 F. Supp. 3d 241 (S.D.N.Y. 2019).

Similarly, the Southern District of Florida dismissed class action lawsuits against General Mills and Quaker Oats challenging the labeling of certain oat-based cereals due to the alleged presence of trace glyphosate. *See Green v. Pepsico*, No. 18-cv-620110-RNS (S.D. Fla. Apr. 12, 2019), slip op. at 2; *Doss v. General Mills, Inc.,* No. 18-cv-61924-RNS (June 14, 2019), slip op. at 3. In both *Green* and *Doss*, the court reasoned that merely purchasing a product that might contain trace glyphosate does not give rise to any Article III injury sufficient to support standing. As the court explained in *Doss*, the allegations that the potential presence of glyphosate in food might result in some harm to consumers "are far too speculative to manufacture standing." Slip op. at 5.

REASONABLE CONSUMER

The "reasonable consumer" defense remains an important tool for defendants in food and beverage class actions. In 2018, courts relied on that defense in lawsuits that offered strained and implausible definitions of disputed labeling terms. Courts continued this trend in 2019, and several key dismissals were affirmed on appeal.

In 2018, a spate of cases rose and fell on what courts have called the "common sense" application of the reasonable consumer test. *See Brady v. Bayer Corp.*, 26 Cal. App. 5th 1156, 1172 (2018) (identifying four themes in reasonable consumer law, among them "common sense"). These cases hold that a consumer fraud claim does not lie when it is based upon plaintiff's unreasonable interpretation of a key label phrase. For example, in several cases filed against soda companies in federal courts in New York and California, plaintiffs alleged that the word "diet" associated with diet soda communicated to them that drinking the beverages would help them lose weight. This claim was misleading, according to plaintiffs, because the aspartame in diet soda actually causes weight gain. In addition to noting causation issues (Does aspartame cause weight gain? Probably not.), district courts universally held that no reasonable consumer believes "diet" in the context of "diet soda" means weight loss.

The Second and Ninth Circuits affirmed these cases on appeal in 2019. *See Becerra v. Dr Pepper/Seven Up, Inc.*, 945 F.3d 1225 (9th Cir. 2019); *Geffner v. Coca Cola Co.*, 928 F.3d 198 (2d Cir. 2019) (per curiam); *Excevarria v. Dr Pepper Snapple Grp., Inc.*, 764 F. App'x 108 (2d Cir. 2019); *Manuel v. Pepsi-Cola Co.*, 763 F. App'x 108 (2d Cir. 2019). In the two published opinions—*Becerra* and *Geffner*—the Ninth and Second Circuits charged consumers with a common sense understanding of consumer goods and the phrases used to advertise them: "Diet soft drinks are common in the marketplace and the prevalent understanding of the term in that context is that the 'diet' version of a soft drink has fewer calories than its 'regular' counterpart. Just because some consumers may unreasonably interpret the term differently does not render the use of 'diet' in a soda's brand name false or deceptive." *Id.* at *4; *see also Geffner*, 928 F.3d at 200.

Even prior to *Becerra* and *Geffner*, district courts continued the "common sense" application of the reasonable consumer standard in 2019. *See Brown v. Starbucks Corp.*, 2019 WL 996399, at *3 (S.D. Cal. Mar. 1, 2019). For example, courts held in several trace pesticide cases that "[p]laintiff does not sufficiently allege facts showing how or why a reasonable consumer would understand 'Natural' or 'All Natural Ingredients' to mean the utter absence of residual pesticides." *Hawyuan Yu v. Dr Pepper Snapple Grp., Inc.*, 2019 WL 2515919, at *3 (N.D. Cal. June 18, 2019). And in *Brown*, the court cited the "common sense" trend and found that no reasonable consumer would interpret gummy labels depicting fruit to mean that the product is free from artificial ingredients. 2019 WL 996399, at *4. Finally, in *Truxel v. General Mills Sales, Inc.*, the district court held that no reasonable consumer is misled about a cereal's sugar content and related healthfulness when the sugar content is plainly disclosed on the cereal's front and back labels. *Truxel v. General Mills Sales, Inc.*, 2019 WL 3940956, at *5 (N.D. Cal. Aug. 13, 2019). *Truxel* and a similar case, *Clark v. Perfect Bar*, are on appeal to the Ninth Circuit.

CLASS CERTIFICATION

Damages Issues

As part of damages allegations in food and beverage class action litigation, plaintiffs often allege that they paid more for the product given the challenged product attribute than they would have otherwise had the labeling not been false or misleading. Proving up these claims on damages often requires plaintiffs to demonstrate either (a) that they paid full price for a product that they would not have otherwise purchased (meaning that plaintiffs are entitled to a full refund) or (b) that they paid a price premium for the product given the allegedly false representation (meaning that damages are a percentage of the purchase price). Expert analysis is generally required to provide quantification for these allegations of economic damages, especially in evaluating the price premium attributable to the challenged product characteristic. In a class action case, these damages must be calculable on a class-wide basis.

Following the U.S. Supreme Court's decision in *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013), courts have often required putative class action plaintiffs to demonstrate at the class certification stage how defendant's conduct led to economic damages alleged. In 2019, a series of class certification rulings allowed plaintiffs to move forward with damages models that had previously been viewed with skepticism by many district courts.

Conjoint Analysis

Conjoint analysis is a market research tool that purports to practically demonstrate consumers' willingness to pay for specific product features or a combination of attributes. In prior years, many courts had rejected conjoint analyses when they failed to consider the supply-side aspects of this analysis, namely manufacturers' willingness or ability to sell, or market-based factors affecting the product. *See Hadley v. Kellogg Sales Co.,* 324 F. Supp. 3d 1084, 1105 (N.D. Cal. 2018) ("[I]n cases where price premia are the relevant measure of damages, courts have repeatedly rejected conjoint analyses that only measure demand-side willingness-to-pay.").

In 2019, however, conjoint models have been deemed sufficient in certain cases. See *Hasemann v. Gerber Prod. Co.,* 331 F.R.D. 239 (E.D.N.Y. 2019); *Allen v. Conagra Foods, Inc.*, 331 F.R.D. 641, 671 (N.D. Cal. 2019) (later decertified on other grounds). Still, courts reject conjoint analysis when the model used is incomplete. *Mohamed v. Kellogg Co.*, No. 14-CV-2449-L-MDD, 2019 WL 1330920 (S.D. Cal. Mar. 23, 2019).

Hedonic Regression

Hedonic regression is an economic analysis technique that purports to model the price premium applied to the challenge claim. It requires certain conditions for proper modeling. Generally, courts have looked with skepticism on hedonic regression models, but some courts have accepted these methods either alone or when combined with conjoint analysis. *Hadley v. Kellogg Sales Co.*, No. 16-CV-04955-LHK, 2019 WL 3804661 (N.D. Cal. Aug. 13, 2019); *Hasemann v. Gerber Prod. Co.*, 331 F.R.D. 239 (E.D.N.Y. 2019).

Predominance in Reliance Issues

Under Federal Rule of Civil Procedure 23(b)(3), questions of law or fact common to class members must predominate over questions that affect only individual members. Putative class action plaintiffs often contend that they relied upon the challenged labeling in making their purchase decision. In most jurisdictions, reliance is a required element for state law fraud claims.

The predominance inquiry is primarily concerned with the balance between individual and common issues involved in the class action suit. Courts have rejected certification where plaintiffs cannot show that members of the class were exposed to, and therefor relied upon, the same alleged misrepresentations. *See Reitman v. Champion Petfoods USA, Inc.*, No. CV181736DOCJPRX, 2019 WL 7169792, at *9 (C.D. Cal. Oct. 30, 2019). In the words of the District of New Jersey, the "poster child for lack of predominance" occurs when the court would be required to perform an individualized inquiry into each product purchased to determine what combinations of labels were visible before determining whether that combination is deceiving to a reasonable consumer. *In Re Tropicana Orange Juice Mktg. and Sales Practice Litig.*, No. 2:11-07382, 2019 WL 2521958 (D.N.J. June 18, 2019).

Class Settlements Issues

Heightened Scrutiny on Classes Certified for Settlement

The Ninth Circuit reaffirmed in 2019 that class actions certified for purposes of settlement must withstand a higher level of scrutiny under Rule 23(a). *Murphy v. SFBSC Mgmt.*, --- F.3d ----, No. 17-17079, slip op. at 14, 23 (9th Cir. Dec. 11, 2019) (applying *Allen v. Bedolla*, 787 F.3d 1218, 1224 (9th Cir. 2015)). The Court in *Murphy* reversed the district court's approval of a class certified for settlement, emphasizing that—particularly for settlements reached before a class is certified—there is no presumption of fairness for class action settlements negotiated at arm's length, and the district court must carefully scrutinize the settlement for evidence of collusion. *Id.*

Choice of Law

Choice of law remains an interesting issue for parties seeking to certify a national class for settlement purposes. The longstanding rule from *Phillips Petroleum v. Shutts* is that a forum state may constitutionally apply its own substantive law to the claims of a nationwide class *only if* the state has a "significant contact or significant aggregation of contacts" with the claims of each class member such that application of the forum law is not "arbitrary or unfair." However, the Ninth Circuit recognized a softening of this rule in the settlement context when it affirmed settlement of a national class applying California law. *See In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 564 (9th Cir. 2019) (en banc) (rejecting Virginia objector's claim that applying California law to her claim violated due process). Nevertheless, choice of law is a complicated issue that can raise constitutional and procedural hurdles to class settlement.

MULTIFUNCTION INGREDIENTS (MALIC/SORBIC ACID)

At least eight new multifunction ingredient cases were filed in 2019, suggesting that—while the pace of new filings has slowed somewhat—this remains an area of focus for plaintiffs' lawyers. "Multifunction ingredient" cases typically come in two varieties. In the first, plaintiffs allege that an artificial ingredient such as malic acid functions as a flavor in a product because it "simulates, resembles, or reinforces" the product's characterizing flavor. This renders the product's "no artificial flavors" claim false. In the second, plaintiffs allege that an artificial ingredient like citric acid or tocopherols functions in the product as a preservative, rendering the product's "no artificial preservatives" claim false or misleading. Defendants counter that the artificial ingredient does not serve the purpose alleged by plaintiff, but courts typically deny motions to dismiss in these cases and hold that an ingredient's function in a food is an issue of fact ill-suited to resolution on the pleadings.

In 2019, two multifunction ingredient cases made it to the summary judgment stage with differing results. The court denied defendant's motion for summary judgment in *Hilsley v. Ocean Spray Cranberries, Inc.*, 17-cv-2335, ECF No. 193 (S.D. Cal. July 3, 2019), based on expert opinion presented by plaintiff that "malic acid adds tartness, astringency, and a fruit-like flavor profile to foods and simulates, resembles, or reinforces various tart, fruity flavors" and that Ocean Spray adds it to its cranberry juice for this purpose. *Ocean Spray* later settled on a class-wide basis for $5.4 million (including up to about $1.8 million in attorneys' fees) and meaningful injunctive relief.

In *Clark v. Hershey Co.*, the court first denied, but later granted defendant's motions for summary judgment. The court denied defendant's first motion for summary judgment based largely on disputed issues of fact. 2019 WL 2288041 (N.D. Cal. May 29, 2019). But Hershey later moved for summary judgment on the issue of causation/reliance, and the district court granted the motion. 2019 WL 6050763 (N.D. Cal. Nov. 15, 2019). It found based on one named plaintiff's deposition testimony that he would not have purchased the products at issue had he known the products contained artificial *ingredients*. Therefore, his injury was not caused by the alleged mislabeling of the product, which promised the product was free from artificial *flavors*, "but rather [his] misunderstanding that the 'No Artificial Flavors' statement meant there were no artificial ingredients whatsoever in the products." As for the remaining two named plaintiffs, both started purchasing the products before they displayed the allegedly misleading "no artificial flavors" label and didn't change their purchasing practices when the label was introduced. Therefore, neither plaintiff relied on the "no artificial flavors" claim to form a false or misleading belief about the products.

Finally, in *Tarzian v. Kraft Heinz Foods, Co.*, 2019 WL 5064732 (N.D. Ill. Oct. 10, 2019), the district court granted Kraft's motion to dismiss—a rare early victory for a defendant in these challenging cases. Plaintiff alleged that "no preservative" claims on Kraft's Capri Sun products were false because the products contained citric acid. Plaintiff alleged that it was cheaper and easier to use synthetic citric acid, therefore Kraft must use synthetic citric acid in its products. The court held this was "too great of an inferential leap," even at Rule 12. To satisfy Rule 12, plaintiff needed to plausibly allege the citric acid in Kraft's products was synthetic.

CORPORATE RESPONSIBILITY

Forced labor in food manufacturers' supply chains continues to be a hot topic in the corporate responsibility sphere. Hershey, Mars, and Nestle have been targeted by lawsuits asserting that the candy bar manufacturers' products should be accompanied by disclosures that they source cocoa beans from farms that allegedly exploit child labor.

A Massachusetts federal court dismissed duty to disclose cases against these three companies back in January 2019, finding that the defendants had not engaged in any deceptive conduct and noting that the defendants' websites *did* explain the potential supply chain issues plaintiffs raised. *See, e.g., Tomasella v. Nestle USA, Inc.*, 364 F. Supp. 3d 26 (D. Mass. 2019). These cases are now on appeal to the First Circuit, where, during oral argument, the panel asked pointed questions about how much information companies should be expected to disclose on their packaging. Hopefully the forthcoming opinion will provide some much-needed clarity on this topic.

Meanwhile, Nestle and Cargill have asked the U.S. Supreme Court to reconsider a Ninth Circuit decision holding that claims of forced labor on Ivory Coast cocoa farms fall within the scope of the 1789 Alien Tort Statute (ATS). The statute grants U.S. federal courts original jurisdiction over any civil action brought by a foreign national for a tort in violation of international law. While the Supreme Court has previously decided that the law doesn't apply to foreign corporations, the Ninth Circuit found that the allegations against Nestle and Cargill might establish a sufficient U.S. connection if the plaintiffs amended their complaints and provided more details on that point. *See Doe v. Nestle, S.A.*, 929 F.3d 623 (9th Cir. 2018). Several amicus briefs have argued that recognizing corporations as "subjects" of international law would compromise state sovereignty and expose companies to a slew of frivolous ATS suits. In January 2020, the Supreme Court asked the U.S. Solicitor General to advise whether the Court should hear the appeals. These will be cases to follow. *Nestle USA, Inc. v. Doe I*, petition for cert. pending No. 19-416 (filed Sept. 25, 2019); *Cargill, Inc. v. Doe I*, petition for cert. pending, No. 19-453 (filed Oct. 2, 2019).

SLACK FILL

Defendants secured a few significant slack fill wins at the federal level in 2019, as courts continued to reject putative class actions at the motion to dismiss phase based on plaintiffs' failures to meet critical pleading standards—namely, (1) the failure to adequately plead non-functionality; and (2) the "reasonable consumer" standard.

For example, in *Cordes v. Boulder Brands USA, Inc.*, No. 18 CV 6534, 2019 WL 1002513 (C.D. Cal. Jan. 30, 2019), the plaintiff alleged that the Glutino Gluten Free Pretzels packaging contained empty space that deceived consumers into expecting more pretzels than were actually being sold. But the court granted defendant's motion to dismiss, holding that the plaintiff failed to sufficiently allege that the slack fill was "non-functional," i.e., unnecessary to "protect" the pretzels or not the result of "unavoidable settling."

Likewise, in *Green v. SweetWorks Confections, LLC*, No. 18 CV 902-LTS-SN, 2019 WL 3958442 (S.D.N.Y. Aug. 21, 2019), the Southern District of New York granted defendant's motion to dismiss on reasonable consumer grounds. The court held that the plaintiff could not plausibly claim that the Sixlets candy box was materially misleading, because the box clearly and accurately disclosed the candies' net weight and the total product count. Moreover, the court noted that "[p]laintiff has not alleged any facts from which the court can infer that the size or mass—as opposed to the weight or number of pieces—of Sixlets candy is material to a reasonable consumer."

Finally, the Seventh Circuit explored a damages defense in *Benson v. Fannie May Confections Brands, Inc.*, 944 F.3d 639 (7th Cir. 2019). In *Benson*, the lower court dismissed plaintiffs' claim that Fannie May included too much empty space in its chocolate boxes on the grounds that plaintiffs' claims were inadequately alleged and preempted by the federal Food, Drug, and Cosmetic Act (FDCA). But, affirming the lower court's decision, the Seventh Circuit held that the plaintiffs' suit

ultimately failed because they did not plausibly allege Fannie May's packaging caused them to suffer *actual damages*. In other words, plaintiffs had not alleged that the seven ounces of chocolate in the box were worth less than the $9.99 paid or that they could have purchased the chocolates for a better price.

The 2019 successes of slack fill defense, including Fannie May's ultimate victory with its damages defense, suggest that courts are becoming less willing to accept boilerplate challenges to the amount of food contained in manufacturers' packaging.

CANNABIS/CBD

The 2018 Farm Bill ushered in a new era for cannabis and cannabidiol (CBD). Following the law's passage, products containing CBD have continued to proliferate throughout the country. The law distinguished hemp from other cannabis plants and defined hemp as containing 0.3 percent or less THC (the chemical commonly associated with a marijuana "high").

In late 2019, the FDA revised its Consumer Update concerning products containing CBD, particularly food and drink items. Per the FDA, "It is currently illegal to market CBD by adding it to a food or labeling it as a dietary supplement." The FDA also issued more than a dozen warning letters to manufacturers of CBD products.

In the absence of clear federal guidance, state and local authorities have stepped up their regulatory and enforcement authority regarding CBD-containing products. For example, in December 2019, New York state passed sweeping reforms related to the authorized sale of CBD-containing products. Among these changes are requirements for independent laboratory testing and grading of CBD products, descriptions of the source of the CBD, and licensure from state authorities. The law is slated to go into effect in March 2020, and significant open issues remain in the law that will need to be clarified in forthcoming regulations.

Earlier in 2019, New York City enforced an embargo against food and beverage products containing CBD. Sellers of such products in the city are subject to fines up to $650. The state of Maine also instituted a ban on food and beverage products containing CBD, but later reinstituted the sale of such products.

Numerous class action lawsuits were launched against CBD product manufacturers in the wake of state and federal action surrounding CBD. As one article put it, "The CBD lawsuit floodgates are opening." We expect additional class action lawsuits in this space, especially as the regulatory environment continues to develop.

PLANT BASED

As plant-based foods steadily emerge as a growth segment of the food industry, state laws in Arkansas, Louisiana, Missouri, Mississippi, and elsewhere have attempted to impose restrictions on labeling of meat-alternative products that would hinder manufacturers from using meat-like descriptions for their goods. In several highly publicized examples, terms like veggie "burgers" or seitan "steaks" could run afoul of such restrictions. A federal bill, called the "REAL Meat Act," was introduced that would provide similar restrictions at the federal level.

Several of the state laws have faced judicial challenges. In Missouri, Turtle Island Foods (manufacturer of the Tofurky product brand), the Good Food Institute, the Animal Legal Defense Fund, and the American Civil Liberties Union of Missouri filed a lawsuit in 2018 asserting that the state's statute was unconstitutional. Efforts to settle that matter broke down in 2019. Another lawsuit challenging Arkansas' labeling law, brought by the same parties, led to a December 2019 preliminary injunction issued by the Eastern District of Arkansas banning the state's enforcement of the law.

In Mississippi, the Plant Based Foods Association and Upton's Naturals filed a lawsuit similarly challenging the constitutionality of meat-alternative labeling laws in that jurisdiction. Settlement negotiations led to the state revising its regulation to permit terms like "meat-free," "plant-based," and "vegetarian" on plant-based products. The lawsuit was subsequently dismissed.

The coming year will see increased scrutiny of state and federal proposals to restrict labeling terms for meat-alternative products. Specifically, the regulatory structure (and uncertainty) around cell-cultured meat will test the Memorandum of Understanding between the FDA and the U.S. Department of Agriculture in the regulation of such products. Cell-cultured meat involves tissue drawn from a live animal and grown in a lab. Even what to call this industry has proven a challenge, with proposals ranging from "clean meat," to "in vitro meat," to "lab-grown meat." These products are not yet commercially available, but proponents of such products predict that they will hit store shelves in the not-too-distant future.

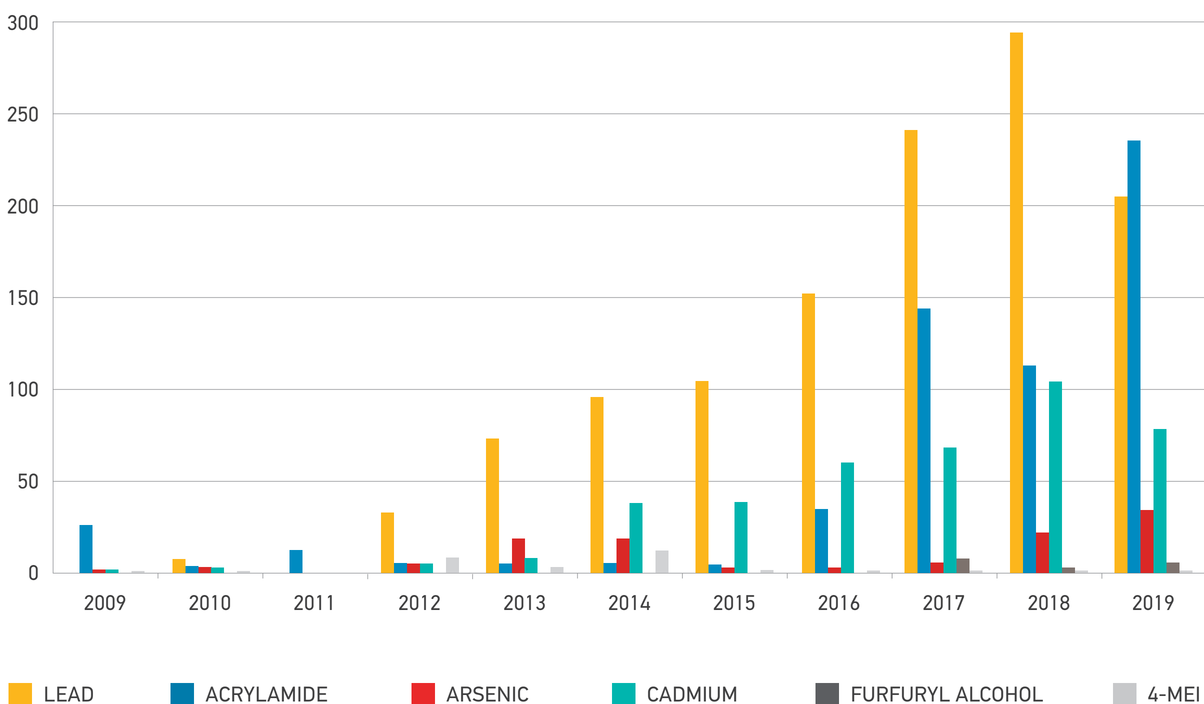
PROPOSITION 65 TRENDS

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, over 1,000 chemicals are on the Proposition 65 list, with new chemicals added each year. As shown in the figure below, Proposition 65 pre-litigation notices impacting the food and beverage industry have increased steadily over the last seven years. Plaintiffs served nearly 500 pre-litigation notices regarding food and beverage products in 2019.

Notably, there has been a significant spike in the number of pre-litigation notices involving acrylamide, lead, and cadmium, which now account for the vast majority of the pre-litigation notices involving food and beverage products. Among the key food targets for acrylamide notices are potato-based fried and baked snack foods such as chips, crackers, cookies, pretzels, and roasted nuts. Private enforcers have also stepped up pre-litigation notices targeted at dry spices, dried or roasted seaweed snacks, green juices, and protein supplements for containing trace amounts of lead and/or cadmium. Another noteworthy trend is the increase in the number of pre-litigation notices involving dietary supplements. The number of filings involving dietary supplements doubled from 2017 to 2018 and kept on pace in 2019 with approximately 120 pre-litigation notices.

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

FIRST AMENDMENT CHALLENGE

On October 7, 2019, the California Chamber of Commerce (CalChamber) filed a lawsuit against California Attorney General Xavier Becerra in the U.S. District Court for the Eastern District of California. The lawsuit seeks to enjoin the attorney general and private bounty hunter plaintiffs from enforcing Proposition 65 regulations relating to acrylamide in food.

Currently, Proposition 65 requires any business that manufactures, distributes, or sells food products containing acrylamide to provide a warning unless the business can prove, with expert evidence, that the amount of acrylamide in the food does not pose a "significant risk" of cancer. To avoid the incredible expense and uncertainty of litigation, however, many businesses have been forced to label their products with scientifically dubious, but state-mandated, cancer warnings for acrylamide.

The CalChamber lawsuit argues that cancer warnings for acrylamide are misleading because neither the California Office of Environmental Health Hazard Assessment nor any other governmental entity has determined that acrylamide is a *human* carcinogen. As such, the lawsuit argues that companies should not be forced to provide unsubstantiated acrylamide warnings or face potentially costly enforcement actions initiated by the attorney general or private enforcers. Moreover, the CalChamber lawsuit argues that, by mandating warnings for acrylamide in food, Proposition 65 is forcing individuals and businesses to say something false and misleading in violation of the First Amendment.

The District Court recently granted the California attorney general and intervenor's motions to dismiss the CalChamber lawsuit with leave to amend. As a result, the CalChamber's motion for preliminary injunction has been taken off calendar. The CalChamber case is expected to continue for some time. In the meantime, businesses still need to abide by any Proposition 65 settlement agreements or consent judgments relating to acrylamide that are already in place.

COFFEE EXEMPTION GOES INTO EFFECT

OEHHA's new regulation exempting coffee from Proposition 65 warnings went into effect on October 1, 2019. The rule states: "Exposures to chemicals in coffee, listed on or before March 15, 2019 as known to the state to cause cancer, that are created by and inherent in the processes of roasting coffee beans or brewing coffee do not pose a significant risk of cancer."

OEHHA originally proposed the coffee exemption rule in 2018, shortly after a California Superior Court, in *Council for Education and Research on Toxics v. Starbucks Corp, et al.*, Case No. BC435759, ruled that coffee must carry cancer warnings. The lawsuit, initiated by serial plaintiff Council for Education and Research on Toxics, alleged that Starbucks, Peet's, Seattle Coffee Co., and other coffee sellers had violated Proposition 65 by failing to warn consumers about acrylamide in their coffee products.

The FDA has also weighed in on OEHHA's coffee exemption rule. In August 2018, the FDA issued a public statement asserting that a cancer warning on coffee products, based on the presence of acrylamide, would be more likely to mislead consumers than to inform them. The FDA stated: "[the] current research on coffee and cancer . . . doesn't support a cancer warning for coffee. In fact, . . . a [Proposition 65] warning could mislead consumers to believe that drinking coffee could be dangerous to their health when it actually could provide health benefits." The FDA further cautioned that a cancer warning on coffee could constitute "mislabeling" in violation of the FDCA.

OEHHA's new coffee exemption rule 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 these data. OEHHA concluded that exposure to listed chemicals in coffee, including acrylamide, created by and inherent in the process of roasting coffee beans or brewing coffee does not pose a significant risk of cancer, and therefore does not require a cancer warning label.

NEW WARNING REGULATIONS

In 2016, OEHHA promulgated new consumer warning regulations that took effect on August 30, 2018 (27 Cal. Code Reg. Section 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 Prop 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. For example, the warning on 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 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, identify the chemical prompting the warning, and provide the required warning materials to be used. The regulations also provide that retailers and manufacturers may agree to share responsibility for providing warnings.

The new regulations also contain express requirements regarding specific situations including environmental exposures and occupational exposures. Additional requirements are imposed for certain products and industries, including restaurants, the alcohol industry, and furniture manufacturers. Given how detailed and complex the new regulations are, manufacturers and retailers should carefully review the regulations, seek legal counsel, and take any necessary steps to ensure that they remain in compliance.

OEHHA CLARIFIES RETAILER WARNING RESPONSIBILITIES

On January 14, 2020, OEHHA issued finalized amendments to its regulations that will become effective on April 1, 2020. Per OEHHA, the amendments "clarify how intermediate parties in the chain of distribution can satisfy their obligation to provide a warning" under Proposition 65. OEHHA also revised the level of knowledge required to trigger warning obligations for retail sellers.

The amendments allow manufacturers, producers, packagers, importers, suppliers, or distributors of products to discharge their warning requirements under Proposition 65 either by: (a) providing adequate warnings on the product's labeling that satisfy the Proposition 65 requirements; or (b) providing written notice to the authorized agent for the retail seller or the business to which they are selling the product. That notice must be renewed annually during the product's retail sale in California. (27 Cal. Code Reg. Section 25600.2(b)).

In addition, the amendments change certain aspects of when a retail seller is responsible for adding warnings to product labeling. Specifically, a retail seller is required to provide Proposition 65 warnings only in certain circumstances, such as when the seller has "actual knowledge" of potential exposure and no intermediary party meets requirements for California's jurisdiction. OEHHA further clarified that "actual knowledge" means "the retail seller receives information from any reliable source that allows it to identify the specific product or products that cause the consumer product exposure." And, the knowledge must "be received by the retail seller, its authorized agent or a person whose knowledge can be imputed to the retail seller from any reliable source."

ONLINE WARNINGS

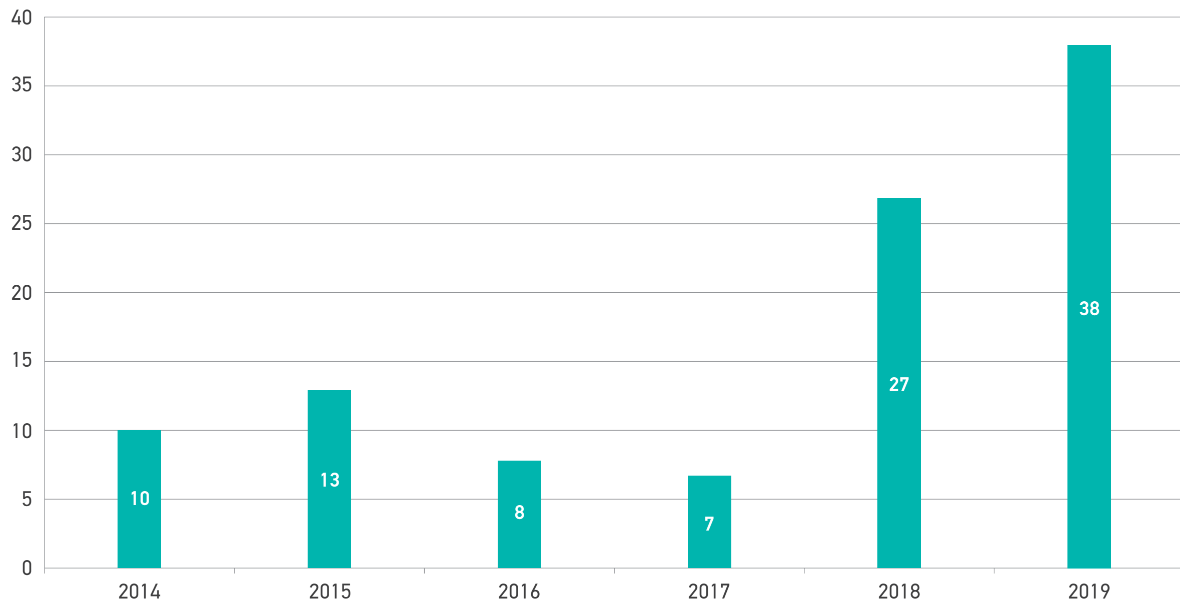
For consumer product purchases made over the internet, the business must provide a product-specific warning that must appear on the product's unique display page, through a clearly marked hyperlink using the word "WARNING" that links to the warning language, or by otherwise prominently displaying the warning to the purchaser prior to completing the internet purchase. For a website warning, if a label is used for a product warning, a business may opt to provide a photograph of the warning label used on the product—e.g., include a product picture that shows a Proposition 65 warning label on the back or side of the product as long as the warning is legible in the picture.

LEGAL TRENDS IN PET FOOD

The pet food industry ended the past five-year period with a significant increase in class action litigation. As shown below, filings in 2019 were nearly 400% above the 2014 number, a growth from 10 to almost 40 cases.

PET FOOD CLASS ACTIONS:
FILINGS BY YEAR

FIGURE 5



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

Trends in pet food litigation largely mirror those in food litigation generally. As these cases start to work their way through the courts, an emerging body of case law is developing. In many instances, decisions have tracked analyses from food and beverage matters. But issues unique to pet food—prescription-based diets, for example—are giving rise to decisions unique to the segment.

Prescription Pet Foods

The Seventh Circuit revived a class action matter against Hill's Pet Nutrition over allegations that its prescription pet food product was mislabeled because it was not "medically necessary" for the health of pets. *Vanzant v. Hill's Pet Nutrition, Inc.*, 934 F.3d 730 (7th Cir. 2019). A similar lawsuit, *Moore v. Mars Petcare US, Inc.*, was dismissed by the Northern District of California and is presently on appeal in the Ninth Circuit. We will be monitoring the action carefully to see if the Ninth Circuit takes a different approach.

Presence of Heavy Metals and Other Contaminants

The Central District of California rejected class certification where consumers alleged that commercial dog food contained heavy metals and other contaminants that were harmful to their pets. *Reitman v. Champion Petfoods USA, Inc.*, et al., No. CV181736DOCJPRX, 2019 WL 7169792 (C.D. Cal. Oct. 30, 2019). The matter is currently on appeal.

"Natural" Labeling

The Eastern District of New York dismissed a suit alleging that Rachael Ray Nutrish dog food had misleadingly labeled its products "natural" because they contained trace amounts of glyphosate and found that "a reasonable consumer would not interpret the label 'natural' as warranting that the Products contain no amount of glyphosate." *Parks v. Ainsworth Pet Nutrition, LLC*, 377 F. Supp. 3d 241, 248 (S.D.N.Y. 2019).

Harmful Levels of Vitamin D

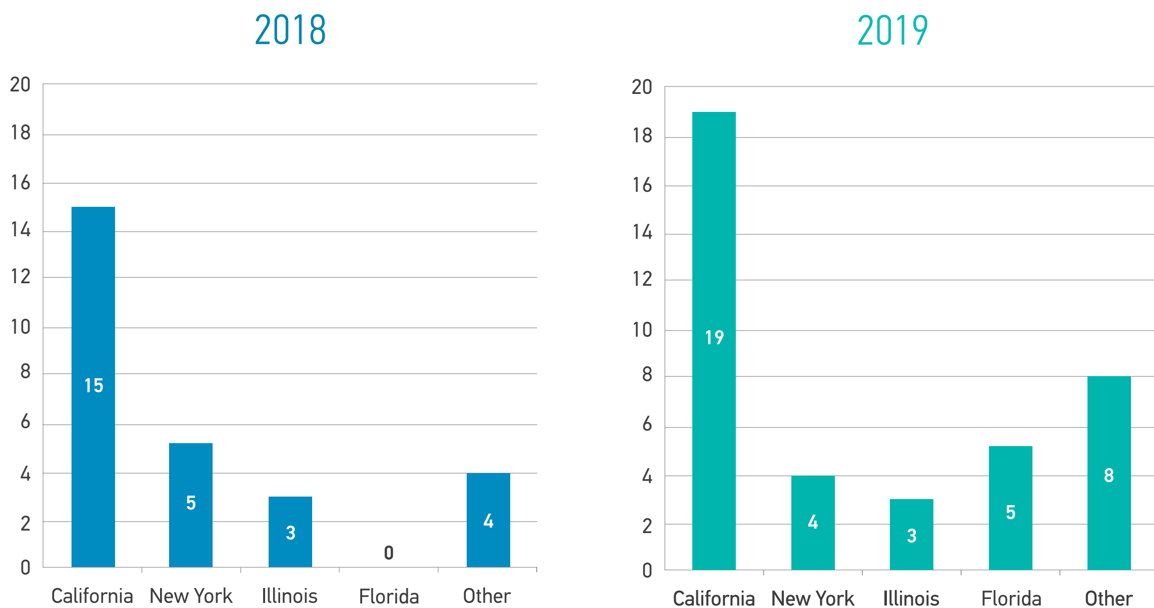
Following a recall of dog food products allegedly containing harmful levels of vitamin D, a multidistrict litigation has been centralized in the District of Kansas to handle numerous class action matters related to the products. *See In re Hill's Pet Nutrition, Inc., Dog Food Prod. Liab. Litig.*, 382 F. Supp. 3d 1350, 1351 (U.S. Jud. Pan. Mult. Lit. 2019).

LEGAL TRENDS IN SUPPLEMENTS

Rounding out the decade and reaching a record high, the number of cases filed against dietary supplement makers spiked to 39 in 2019, a 44 percent increase over 2018. Additionally, plaintiffs filed in a number of jurisdictions, embracing venues in Florida, Georgia, Massachusetts, Michigan, and even Canada, but California remains the jurisdiction of choice in most cases—with about half of cases filed in the Golden State.

DIETARY SUPPLEMENT CLASS ACTIONS:
FILINGS BY JURISDICTION

FIGURE 6

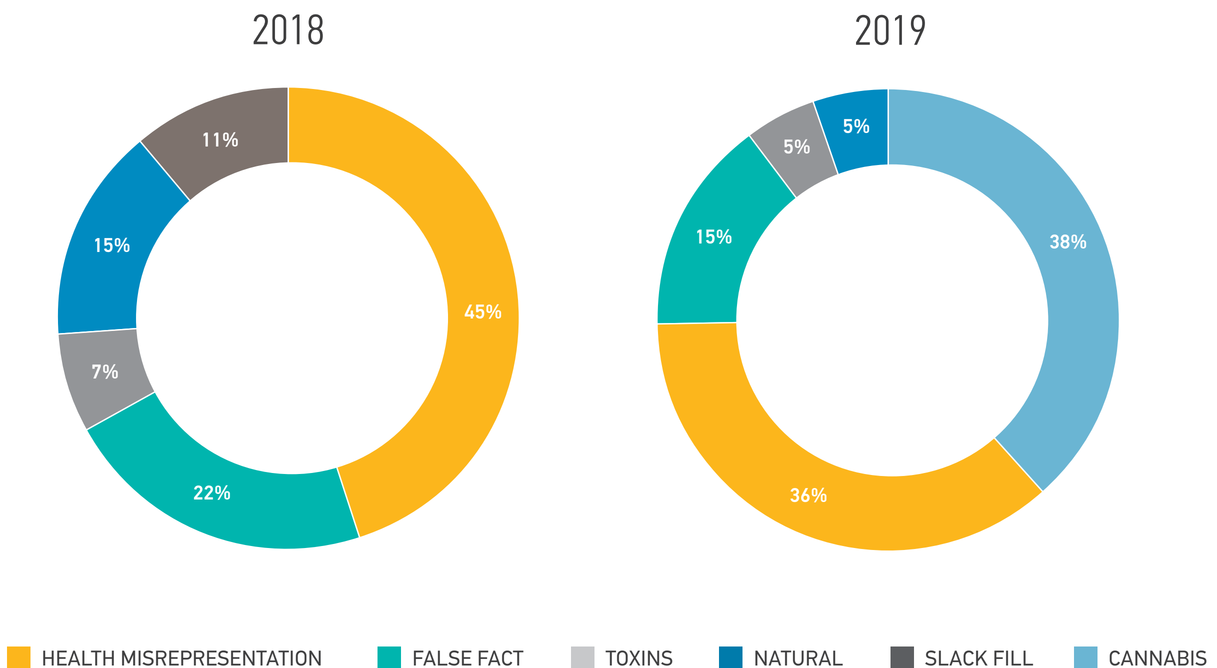


Data compiled by Perkins Coie based on a review of dockets from courts nationwide.

Cannabis claims hit the scene in 2019, accounting for 38 percent of all filings, with many claims filed as a result of the FDA decision that it is illegal to market CBD by adding it to dietary supplements. Another go-to ground for plaintiffs, health misrepresentation claims, also saw an uptick in filings in 2019, holding strong at 36 percent of filings. In contrast, challenges to slack fill, toxins, and natural claims were on the decline, mirroring a similar trend in food litigation.

INDUSTRY FILINGS AND TRENDS: CATEGORIES

FIGURE 7



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

A STRONGER PREEMPTION DEFENSE

After two major preemption rulings in 2018, the Ninth Circuit further clarified—and strengthened—the preemption defense for supplement makers. In *Dachauer v. NBTY, Inc.*, the Ninth Circuit held that federal law preempted state false and misleading advertising suits that challenge a supplement's structure/function claims. 913 F.3d 844 (9th Cir. 2019). The *Dachauer* plaintiff alleged that a vitamin E supplement made false claims, that it "support[ed] cardiovascular health" and "promote[d] immune function," because the supplement did not in fact *prevent* heart disease. The Ninth Circuit held such challenges were preempted: "The FDA allows manufacturers of supplements to make general claims—such as 'promotes heart health'—and to substantiate them with evidence that a supplement has some structural or functional effect on a given part of the human body. Manufacturers need not also have evidence that those structural or functional effects reduce the risk of developing a certain disease." *Id.* at 848.

However, false advertising claims are still allowed when a plaintiff proves that a structure/function claim itself is false or misleading. The Ninth Circuit adhered to the longstanding California rule that plaintiffs may not bring suit claiming a manufacturer simply lacks substantiation for a structure/function claim. *Id.* at 847. Reiterating that FDA regulations prohibit the failure to disclose material facts and California law prohibits any claim that is likely to deceive a reasonable consumer, the court ruled that one of three challenged structure/function claims was not preempted. The structure/function claim that vitamin E "promotes immune health" was not preempted because the manufacturer allegedly failed to disclose a material harmful fact—the vitamin E supplements increased the risk of death—and that made the "promotes immune health" claim potentially deceptive. *Id.* at 849.

District courts have quickly put *Dachauer* into practice. For example, in *Greenberg v. Target Corp.*, the court relied on *Dachauer* when holding that false advertising claims against manufacturers of a biotin supplement were preempted by federal law. 402 F. Supp. 3d 836 (N.D. Cal. 2019). Although the plaintiff alleged the biotin supplements were "superfluous for the general public," the court held federal law did not require manufacturers to substantiate a practical effect for the general public to claim that biotin "helps support healthy hair and skin." *Id.* at 840. Because biotin "does indeed affect human structure or function," as required by federal law, any additional requirement under state law was preempted. *Id.* at 840–42.

PLAINTIFF'S EVIDENCE OF FALSITY

Ninth Circuit rulings in 2019 emphasized plaintiffs' burdens at two of the most important stages of pre-trial litigation. First, to survive a motion to dismiss, a private-party plaintiff must plausibly allege falsity of the challenged advertising claims. *Tubbs v. AdvoCare Int'l, L.P.*, 785 F. App'x 396 (9th Cir. 2019) (relying on *Kwan v. SanMedica Int'l*, 854 F.3d 1088, 1096 (9th Cir. 2017)). In *Tubbs*, although the plaintiff alleged that advertising claims for defendant's energy and weight-loss supplement were false, the Ninth Circuit held that plaintiff's "anecdotal evidence, standing alone, is insufficient to create an inference for falsity." *Id.* at 396. Nor was plaintiff's "scientific study of the effects of [the supplement] on sprinting times of college athletes" sufficient, because a study measuring short-term physical exertion had no bearing on the supplement's claims for "mental focus" and "long-lasting energy." *Id.* at 397.

Second, to avoid summary judgment, a plaintiff must offer his or her own scientific evidence to counter a defendant's scientific evidence that the supplement has health benefits. *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989 (9th Cir. 2018). After the *Sonner* ruling in late 2018, the Ninth Circuit in 2019 again reversed summary judgment for a supplement maker and remanded the matter where both sides presented conflicting scientific evidence as to gingko biloba's health benefits. *Korolshteyn v. Costco Wholesale Corp.*, 755 F. App'x 725, 726 (9th Cir. 2019). (But on remand, the district court again granted summary judgment for the supplement maker, this time on preemption grounds, citing the recent decision in *Dachauer*.) As *Tubbs* and *Korolshteyn* illustrate, courts are increasingly interested in plaintiff's evidence of falsity, on a motion to dismiss and at summary judgment.

A CIRCUIT SPLIT OVER STANDING

In a 2019 decision from the Eleventh Circuit in *Debernardis v. IQ Formulations, LLC*, a plaintiff established injury-in-fact for standing by alleging he spent money on energy-promoting supplements that were adulterated, therefore illegal to sell, and therefore "valueless." 942 F.3d 1076, 1085 (11th Cir. 2019). The Eleventh Circuit agreed these allegations were sufficient to establish an economic injury under the benefit-of-the-bargain theory common in product liability cases. In its holding, the panel relied on a similar decision from the Ninth Circuit in *Franz v. Beiersdorf, Inc.*, 745 F. App'x 47 (9th Cir. 2018). However, the Ninth Circuit in 2019 signaled an opposite position. Where a plaintiff also alleged economic

injury because a supplement was "worthless," the Ninth Circuit affirmed the lower court's reasoning that the plaintiff's injury was not actual or imminent because "a plaintiff certainly will not purchase a worthless product in the future." *Min Sook Shin v. Umeken USA, Inc.*, 773 F. App'x 373 (9th Cir. 2019). In sum, despite *Debernardis*, plenty of uncertainty remains.

NO LIABILITY FOR MARKETPLACE PROVIDERS

As supplements are increasingly sold by third parties over marketplaces such as Amazon or eBay, plaintiffs increasingly seek to hold the marketplaces liable as "sellers" or "suppliers." In a 2019 decision, the Ohio Court of Appeals affirmed summary judgment for Amazon on this issue. *Stiner v. Amazon.com, Inc.*, 120 N.E.3d 885 (Ohio Ct. App. 2019). After a teen ingested a fatal dose of a dietary supplement, the Court of Appeals held Amazon was not a "supplier" of the product under Ohio law where the third-party seller, not Amazon, listed the product for sale; the third-party seller, not Amazon, provided product information, storage, and shipping; and the transaction at all times identified the third-party seller, not Amazon, as the seller. *Id.* at 891–92. As another court put it, *Stiner* is part of "an emerging consensus" in the courts against construing marketplaces such as Amazon as a "seller," "distributor," or "supplier," and therefore against holding them liable for products sold on their websites.

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, 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 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*.

Contact Us

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