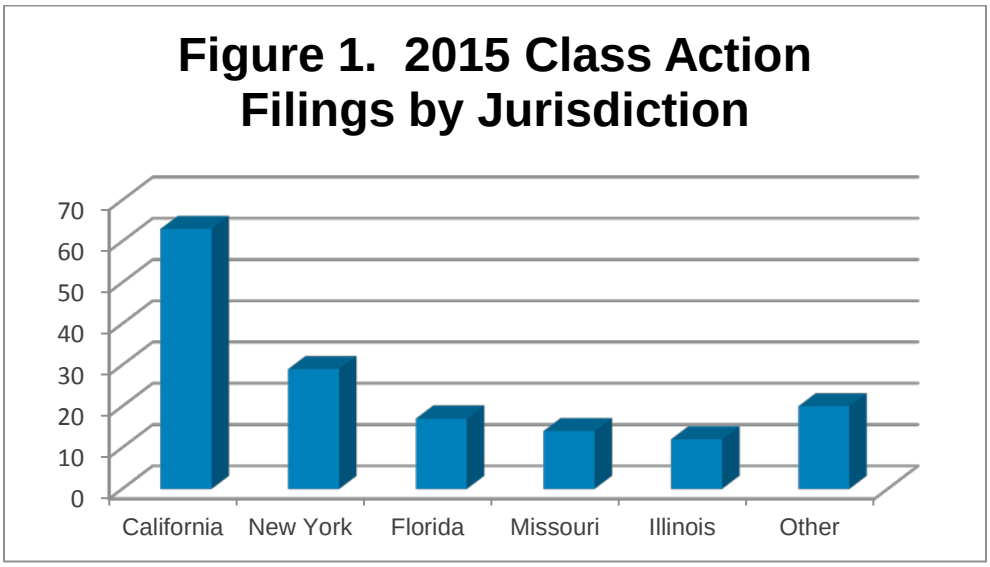
Perkins Coie Food Litigation

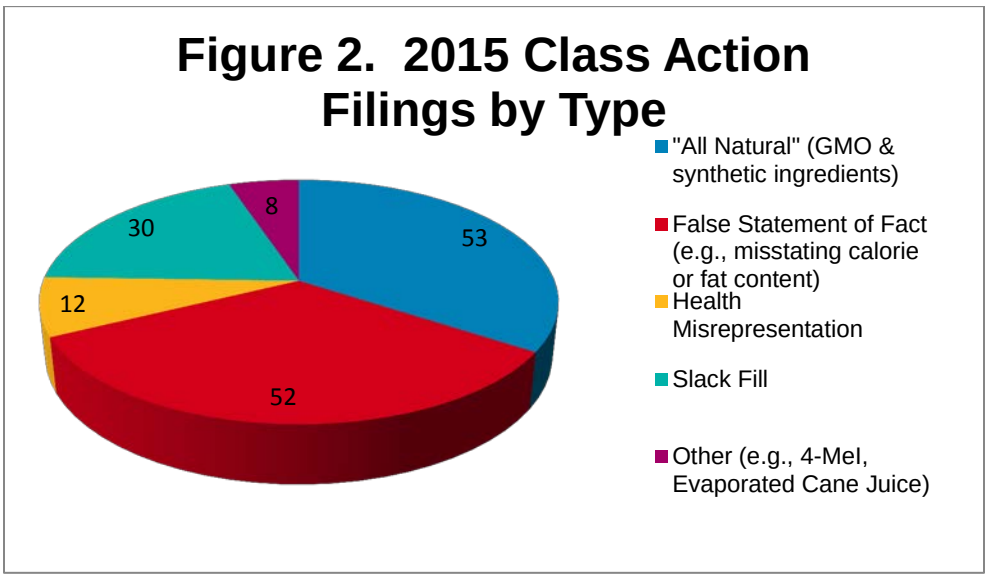
2015 Year in Review

Class Action Filing Trends

Food class action filings increased in 2015, from 90 putative class action filings in 2014 to 155 filings in 2015. While California still leads as the favored jurisdiction for food cases, plaintiffs filed in several other jurisdictions with regularity, including New York, Florida, Missouri, and Illinois. See Figure 1.



As Figure 2 demonstrates, plaintiffs continue to attack food labels on a variety of fronts, including “all natural” claims, allegedly false statements of fact, health misrepresentations, and nonfunctional slack fill.



"All Natural" Claims. While plaintiffs continue to file cases based on claims that food products or ingredients are "natural" or "all natural," these filings dropped off in 2015 as compared to previous years. These cases primarily focus on the inclusion of allegedly synthetic ingredients or GMO ingredients.

False Statements of Fact. Plaintiffs continue to file cases involving other allegedly false statements of fact. Examples of cases involving allegedly false statements of fact include:

- Cases alleging that defendants falsely represented a product's country of origin, see *Nixon v. Anheuser-Busch Co.*, No. CGC-15-544985 (Cal. Super. Ct.) (alleging that defendant states its beer is a "Product of the U.S.A." when the beer is brewed with imported hops);

- Cases focused representations regarding fair trade or other ethical practices of defendants, see *Campbell v. Chiquita Brands Inc.*, No. 2:15-cv-2860 (C.D. Cal.) (alleging that defendant promoted and sold its bananas "as though all of them are farmed in an ecologically friendly and otherwise sustainable manner" when in reality their "production methods contaminate water supplies, destroy the crops of local communities, and cause illness to children");

- Claims that defendants made false statements regarding the ingredients in their products, often in the name of the product itself, see *Davis v. Hampton Creek, Inc.*, No. 1:15-cv-20440-CMA (S.D. Fla.) (alleging that "Just Mayo" spread is falsely advertised and mislabeled because it is not actually mayonnaise); and

- Cases based on failures to comply with FDA regulations regarding nutrition facts labeling and nutritional content claims, see *Steinberg v. Ateeco*, Inc., No. 0:15-cv-60973 (S. D. Fla.) (alleging that defendant's products were mislabeled because they have improper serving sizes, understate the amount of calories and fat, and fail to provide the required disclosure regarding sodium content).

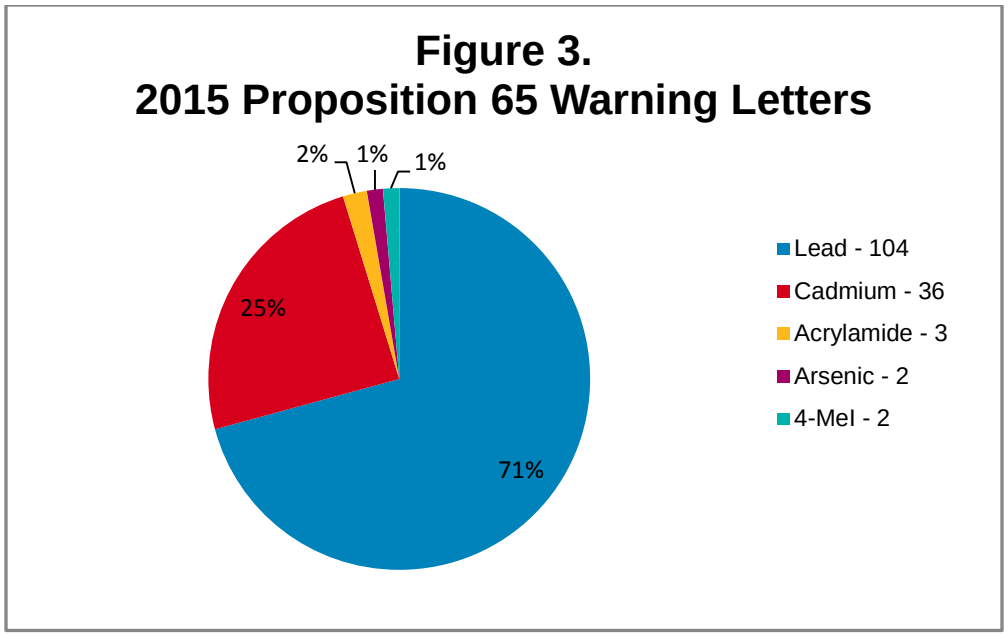
FDA warnings continue to trigger lawsuits in this area. For example, numerous lawsuits were filed regarding KIND snack bars following an FDA warning letter regarding numerous violations of FDA regulations.

Health Misrepresentation. Plaintiffs also continue to file cases alleging misrepresentations regarding the health benefits of products. In 2015, most of these cases involved the use of the term "healthy." See *In re KIND, LLC "All Natural" Litigation*, MDL No 2645 (S.D.N.Y.); see also *Workman v. Plum Inc., et al.*, No. 3:15-cv-02568-JCS (N.D. Cal.) (alleging that Plum Organics products are deceptively labeled and marketed as being "premium, nutritious organic" when in fact the products largely consist of "sugary apple juice or apple puree").

Slack Fill. Finally, in 2015 we saw a sharp increase of cases in which plaintiffs allege that products contain nonfunctional slack fill in violation of 21 C.F.R. § 100.100. See *In Re: McCormick & Co. Inc. Pepper Products Marketing and Sales Practices Litigation*, MDL No. 2665 (D. D.C.).

Proposition 65 Trends and Regulatory Updates

Food and beverage manufacturers continue to see a lot of activity in California under the Safe Drinking Water and Toxic Enforcement Act of 1986 ("Proposition 65"). In 2015, Proposition 65 plaintiffs filed with the California Attorney General at least 147 warning letters involving food and beverage products. Common allegations are that food and beverage products contain *lead* (ginger, seaweed, spices, chocolate), *arsenic* (wine, rice), *cadmium* (seaweed, spices, chocolate), *acrylamide* (vegetable-based snacks), and *4-MeI* (beverages containing caramel coloring). See Figure 3.



The California Office of Environmental Health Hazard Assessment (OEHHA) took several actions affecting food and beverage companies, including the following:

- **Bisphenol A (BPA).** On May 11, 2015, California added BPA as a female reproductive toxicant to the growing list of chemicals subject to Proposition 65's warning requirements. Effective May 11, 2016, products containing BPA need to contain a Proposition 65 warning. No safe harbor level has been set, and OEHHA recently issued interim regulations governing warnings regarding BPA in canned foods.

- **Lead and Proposed Changes to Proposition 65.** On July 8, 2015, the California Supreme Court denied review in *Environmental Law Foundation v. Beech-Nut Nutrition* (Case No. S226022). In response to the lower court's decision in Beech-Nut, which allowed defendants to average lead exposures over a 14-day period across lots, the Center for Environmental Health filed a petition in July 2015 asking OEHHA to repeal the current safe harbor for lead and to issue a new regulation that precludes averaging of lead exposure over time.

  OEHHA responded with a series of workshops and a pre-regulatory proposal that would:

  - set a range of lead safe harbors from 0.2mcg/day to 0.8mcg/day depending on the interval between exposures;
  - prohibit averaging reproductive toxicants (other than lead) over time to meet the regulatory safe harbor levels;
  - only allow averaging exposures using arithmetic (not geometric) averaging and no averaging across lots; and
  - establish "naturally occurring" levels for arsenic and lead in some foods and beverages.

  OEHHA has not initiated the formal rulemaking process.

- **Proposed Changes to Warnings.** In November 2015, OEHHA issued proposed changes to Proposition 65 warnings, including proposals that would lessen the warning requirements for retailers, but would require warnings:
    - that list at least one chemical;
    - that contain a symbol ⚠ and URL to OEHHA's website; and
    - for online purchases that are visible before the purchase is complete.

Class Certification and Ascertainability

Ascertainability has developed into a contentious issue in class action litigation. Two years ago, the Third Circuit increased the burden of class certification by requiring plaintiffs to prove that putative class members could be identified using objective criteria in a manner that was administratively feasible and reliable. *Carrera v. Bayer Corporation*, 727 F.3d 300 (3d Cir. 2013). There is a growing divide among the circuits on this issue. *Carrera* is now established precedent in the Third Circuit, and is followed by the Fourth and Eleventh Circuits. The Sixth and Seventh Circuits, however, have rejected *Carrera's* heightened ascertainability standard.

The Ninth Circuit is split. Some courts in the Northern District of California have adopted *Carrera* (see, e.g., *Sethavanish v. ZonePerfect Nutrition Co.*, No. 3:12-cv- 2907 (N.D. Cal.)), while others have not (see *Bruton v. Gerber Prods. Co.*, No. 5:12-cv-2412 (N.D. Cal.), *Werdebaugh v. Blue Diamond Growers*, No. 5:12-cv-02724 (N.D. Cal.)) and *Rahman v. Mott's LLP, No. 3:13-cv-03482 (N.D. Cal.)*. Courts in the Central District of California appear to have rejected *Carrera* entirely. See *In re ConAgra Foods, Inc.*, No. 2:11-cv-05379 (C.D. Cal.) and *Morales v. Kraft Foods Grp., Inc.*, No. 2:14-cv-04387 (C.D. Cal.)).

The Ninth Circuit will likely resolve the split when it weighs in on *Jones v. ConAgra Foods, Inc.*, No. 14-16327 (9th Cir.). Since January 2015, several food class actions have been stayed pending the Ninth Circuit's guidance in *Jones*. See, e.g., *Parker v. J.M. Smucker Co.*, No. 13-cv-0690 (N.D. Cal); *Leonhart v. Nature's Path Foods, Inc.*, No. 13-cv-00492 (N.D. Cal.); *Park v. Welch Foods Inc.*, No. 5:12-cv-6449 (N.D. Cal.); *Ivie v. Kraft Foods Global, Inc. et al.*, No. 5:12-cv-2554 (N.D. Cal.). A court in the Northern District of California bucked the trend in December 2015, when it declined to stay class action proceedings in *Kumar v. Salov North America Corp.*, No. 4:14-cv-02411 (N.D. Cal.).

Jones is fully briefed and oral argument is being considered by the court for July 2016.

Supreme Court Update

On January 20, 2016, the United States Supreme Court issued an opinion that may impact class action settlement strategies. The question presented in *Campbell-Ewald Company v. Gomez* was whether a defendant can render a class action moot by offering the class representative complete relief.

Respondent Jose Gomez filed a nationwide class action alleging a violation of the Telephone Consumer Protection Act. Before Gomez moved for class certification, petitioner offered to settle his individual claims. When Gomez did not accept the offer, petitioner moved to dismiss for lack of subject matter jurisdiction. Both the district court and the Ninth Circuit rejected petitioner's argument that an unaccepted settlement offer that would have fully satisfied an individual's claim renders the individual claim, and by extension, the class action, moot.

The Supreme Court affirmed the lower court's rulings. In an opinion authored by Justice Ginsburg, the Court applied "basic principles of contract law" and concluded that a settlement offer, once rejected, had no force. Because Gomez's claims remained unsatisfied, the parties were adverse, as they had been at the outset of the

litigation. Gomez's individual claims as well as the class action could not be mooted, as an actual case or controversy existed.

The Supreme Court reserved the question, however, of whether a class action is rendered moot when the defendant tenders the full amount of the plaintiff's individual claim to the court and the court enters judgment for the plaintiff.

Other cases to watch this Supreme Court term:

- ***Tyson Foods, Inc. v. Bouaphakeo,* No. 14-1146 (8th Cir.):** On November 10, 2015, the Court heard oral argument on this action raising two issues: (1) whether a class action can be maintained or certified when some putative class members lack standing because they have not been injured; and (2) whether statistical sampling and averages may be used to calculate class action damages. Analysis of the oral argument is available on SCOTUSblog.

- ***Spokeo, Inc. v. Robins*, No. 13-1339 (9th Cir.):** On November 2, 2015, the Court entertained argument on the issue of whether Congress may confer statutory standing on uninjured plaintiffs. SCOTUS blog's analysis of the oral argument suggests that the case is "too close to call."

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