

Microcontaminant Litigation Is On The Rise

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There has been an uptick in the number of cases (particularly, class actions and Attorney General actions) asserting claims related to the presence of microcontaminants in food and other consumer products.

In the class action context, plaintiffs typically assert claims under omissions, affirmative misrepresentation, and breach of warranty theories. These plaintiffs allege that defendants failed to disclose the presence of the microcontaminant, or that “natural,” “healthy,” “safe” or similar representations on product packaging are deceptive and misleading to consumers given the presence of the microcontaminant. Many class action complaints have been brought by a handful of plaintiffs’ firms, and they are typically filed in California, Illinois, or New York federal courts.

There are four main types of microcontaminants at issue:

- **Heavy metals:** Heavy metals are found naturally in the environment and can end up in food via contaminated soil and water. The litigation surrounding heavy metals largely involves baby food, dark chocolate, and pet food.
- **Phthalates:** Chemical compounds that are used to make plastics more durable. Phthalates are typically alleged to be present in boxed macaroni and cheese products.
- **Benzene:** Benzene is a colorless, highly flammable chemical carcinogen. Litigation alleging the presence of benzene has been brought against personal care products such as dry shampoo, spray antiperspirants, sunscreen, and hand-sanitizer.
- **PFAS:** Per- and polyfluoroalkyl substances are synthetic organofluorine chemical compounds that are widely used, pervasive in the environment, and nicknamed “forever chemicals.” Consumers allege the presence of PFAS in a variety of consumer good spaces, including cosmetics, fast food items and packaging, juice drinks, and waterproof apparel.

Defendants have successfully dismissed these class action complaints on standing, preemption, and primary jurisdiction grounds^[1]. Claims have also been subject to dismissal if the court finds that no reasonable consumer could have been deceived by the product packaging or that plaintiffs

failed to allege consumers actually relied on any purported misrepresentations^[2]. However, some defendants have resolved claims through public settlements as high as \$8 million^[3]. Manufacturers can mitigate risk against these types of claims by examining their supply chains and conducting finished goods testing when feasible.

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Footnotes

[1] See, e.g., *In re Gerber Prod. Co. Heavy Metals Baby Food Litig.*, No. 21-269, 2022 WL 10197651 (E.D. Va. Oct. 17, 2022) (dismissing complaint alleging Gerber concealed the presence of heavy metals in its baby foods because, inter alia, the FDA had primary jurisdiction); *Kimca v. Sprout Foods, Inc.*, No. 21-12977, 2022 WL 1213488 (D.N.J. Apr. 25, 2022) (dismissing complaint alleging Sprout Foods concealed the presence of heavy metals in its baby foods because, inter alia, plaintiffs failed to establish that the levels of heavy metals in the products were unsafe).

[2] See, e.g., *Richburg v. Conagra Brands, Inc.*, No. 22-2420, 2023 WL 1818561 (N.D. Ill. Feb. 8, 2023) (dismissing complaint alleging Conagra concealed the presence of PFAS in its microwave popcorn products because, inter alia, no reasonable consumer would understand PFAS to be an ingredient); *Seidl v. Artsana USA, Inc.*, No. 22-2586, 2022 WL 17337910 (E.D. Pa. Nov. 30, 2022) (dismissing complaint alleging Artsana concealed the presence of flame retardants and PFAS in certain child restraint seats because, inter alia, plaintiff did not sufficiently plead that she relied on any misrepresentations regarding the use of chemicals in the car seat).

[3] *In Re: Procter & Gamble Aerosol Products Marketing And Sales Practices Litigation*, No. 2:22-md-3025 (S.D. Ohio) (P&G agreed to an \$8 million settlement to resolve claims its aerosolized products contain benzene); *Dickens v. Thinx, Inc.*, No. 1:22-cv-4286 (S.D.N.Y.) (Thinx agreed to a \$5 million settlement to resolve claims that its menstrual underwear contains PFAS and silver nanoparticles).

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