

# Microplastics – A New Litigation Trend

A few years ago, most of us never heard of microplastics. But it is time to learn about them because our clients, including manufacturers and distributors in diverse industries, are increasingly defending microplastic-based litigation.

Like it or not, plaintiffs' attorneys are relentlessly innovative in seeking new litigation pathways. Now they've found microplastics and these substances are fueling the early stages of a growth trend. Will that trend continue? It is difficult to predict, but given the ubiquitous presence of plastic products in our lives, the possibility of unchecked litigation growth is, for manufacturers, a real and troubling possibility.

Microplastics are micro-sized particles of plastic and related chemicals. This tiny plastic "debris," including submicron-sized particles, can come in all shapes and sizes.<sup>1</sup> They come from various sources, including larger plastic debris that degrades into smaller and smaller pieces. Microplastics have been found in many items, including take-out food containers, water bottles, baby bottles, breastmilk storage bags, cleansers, and toothpastes.<sup>2</sup> One type of microplastics are microbeads, which are "tiny pieces of manufactured polyethylene plastic that are added as exfoliants to health and beauty products." *Id.*

Over the past several years, the potential health risks of microplastics have attracted much scrutiny, as they have also been found in various human foods and environmental compartments, such as drinking water, table salt, sugar, and air. Money is beginning to flow in steady amounts to scientists who are researching the possible medical and physiological effects of

microplastics.<sup>3</sup> Current technologies are not yet able to allow researchers to identify the precise amount of human microplastic exposure, or determine the proportion of those particles which linger in our bodies. As the research proceeds, depending on the findings, we may see product liability cases alleging that "contamination" of products with microplastics is a product defect.

Despite the lack of clarity on the basic question of whether microplastics pose any risks to human health, the plaintiffs' bar has increasingly filed class actions based on the presence of microplastics in various products. These cases span jurisdictions including district courts in Connecticut, Massachusetts, Florida, California, and Illinois. *See Lopez v. Mayborn USA, Inc.*, No. 3:24-cv-01164-MPS, (D. Conn., July 2024) (class action alleging that Defendant falsely markets its Tippee-brand baby bottles as free of microplastics); *Perez v. Philips North America LLC*, No. 1:24-cv-11755-JEK, (D. Mass., July 2024) (class action alleging Philips baby bottles contain microplastics that are released when heated); *Gyani v. Lululemon USA Inc. et al*, No. 1:24-cv-22651-BB (S.D. Fla., July 2024) (class action alleging that Lululemon's marketing campaign misleads customers into believing its business practices are environmentally friendly when they are responsible for release of microplastics into the environment). For example, in class actions filed this year, plaintiffs from the normally plaintiff-friendly states of California and Illinois alleged that BlueTriton Brands "misleadingly labels its Arrowhead-brand bottled water as '100% Mountain Spring Water,' despite the fact that

1. National Ocean Service, *What are Microplastics?*, <https://oceanservice.noaa.gov/facts/microplastics.html> (last visited September 12, 2024).

2. Fangdi Du, *Microplastics in take-out food containers*, *Journal of Hazardous Materials*, Vol. 399 (Nov. 2020).

3. Stephanie Dutchen, *Microplastics Everywhere*, *Harvard Medicine*, Spring 2023, <https://magazine.hms.harvard.edu/articles/microplastics-everywhere>.

it contains microplastics.” See *Perry Bruno v. BlueTriton Brands, Inc.*, 2024 WL 3993861 at \*1 (C.D. Cal., Aug. 8, 2024) and *Slowinski v. BlueTriton Brands, Inc.*, 2024 WL 3757097 at \*1 (N.D. Ill., Aug. 9, 2024).

Plaintiffs in both cases allege that the water is not 100% natural spring water because it includes microplastics. They sought to impose a “no microplastics” requirement for spring water, “believ[ing] that the water isn’t 100% natural spring water if it contains microplastics,” and sought damages and injunctive relief, as well as attorneys’ fees and costs. *Id.* at 3, 11. These plaintiffs alleged that they “paid a premium” for Ice Mountain water because of the labeling, and that they did not receive “the benefit of the bargain they paid for” because of the misleading label. *Id.* at 15. The Illinois District Court found the allegations insufficient, holding that “plaintiffs’ barebones assertion that they didn’t get the benefit of the bargain is not enough” because they “fail[ed] to show that they suffered ‘any observable economic consequences’ from purchasing Ice Mountain water.” *Id.* at 16. The Court held that plaintiffs failed to plead a plausible damages theory. Ultimately, it affirmed that plaintiffs failed to plead that BlueTriton created a material misrepresentation that would deceive a reasonable consumer. The Court accordingly granted defendant’s motion to dismiss. *Id.* at 17.

Similarly, the court in the California case rejected theories that BlueTriton violated California false labeling or false advertising laws. It explained that plaintiffs’ proposed requirement to remove “100%” from its label due to the presence of microplastics, or to more accurately disclose their presence, “would impose obligations that go beyond those provided in the FDCA” (the Food, Drug, and Cosmetic Act). See *Bruno*, 2024 WL 3993861 at \*3.

Several courts have found that such claims are “better suited for decision by the FDA” because “claims regarding what concentration of microplastics might violate the FDA’s regulations concerning ‘purified water’ would implicate technical and policy claims.” *Baker v. Nestle S.A.*, 2019 WL 960204 at \*3 (C.D. Cal., Jan. 3, 2019).

Congress has placed issues such as the labeling of bottled water as pure or purified within the jurisdiction of the FDA. *Id.*

One plaintiff filed a class action against Nestle for “misrepresenting that Nestle Pure Life Purified bottled water was ‘pure’ or ‘purified’” when it allegedly contained microplastics. *Id.* at 1. She filed eight claims, including violation of California’s Consumer Legal Remedies Act, unfair competition law, false advertising laws, and negligent misrepresentation. *Id.* The Central District Court granted Nestle’s motion to dismiss, holding that state law claims based on the term “purified water” were preempted by the FDA, which regulates the term. *Id.* Ultimately, as long as “Defendant is in compliance with the FDA’s requirements regarding the term ‘purified water,’ any claims asserting Defendant cannot label its water ‘pure’ seek to impose an obligation different from the FDCA, and are preempted.” *Id.* at 2.

As the Illinois Northern District Court stated, “[a]t the end of the day, microplastics are in just about everything. Even the most health-conscious person among us can’t escape the possibility of consuming microplastics. When simply breathing air puts you at risk of inhaling microplastics, it’s unreasonable to assume that your spring water won’t have any microplastics.” See *Slowinski*, 2024 WL 3757097 at \*14.

Time will tell whether microplastics will lead to mass toxic tort claims or equally prevalent consumer fraud actions. In the interval, this new frontier in litigation merits monitoring and scrutiny, as well as the early identification and assembly of experts to meet and understand claims arising from the presence of microplastics in modern life. A few years ago, most of us never heard of microplastics. But it is time to learn about them because our clients, including manufacturers and distributors in diverse industries, are increasingly defending microplastic-based litigation. ●

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