



## A Preemption Defense—and Judicial Humor—Turn Microplastics Class Actions into a Laughing Matter

by Katie Bond & Samuel A. Butler

A series of lawsuits has targeted bottled water, claiming that the presence of microplastics make label claims like “Pure,” “Natural,” and “100% Mountain Spring Water” deceptive. It appears that after multiple successful motions to dismiss, the bottled water cases are drying up. But, what about other types of products? This post discusses how the bottled water cases have played out—with some judicial humor along the way—and how that might impact cases alleging the presence of microplastics in different types of products, other than bottled water.

### Bottled Water Cases

In 2018, a plaintiff’s firm filed a class action complaint alleging that because the bottled water in question contained microplastics, “Pure” and “Purified” claims on the label were deceptive in violation of various state laws. The complaint pointed to a 2018 study, contending that the study showed that 93 percent of 259 bottles of water tested, including the defendant’s brand, “showed signs of microplastic contamination.” The court granted a motion to dismiss, finding that a so-called “standard of identity” created by the Food and Drug Administration (“FDA”) for bottled water preempted the state law action. *Baker v. Nestle S.A.*, No. 18-cv-3097, 2019 WL 960204, at \*3-4 (C.D. Cal. Jan. 3, 2019) (citing 21 C.F.R. § 165.110(a)(2)(iv)). The court observed that while the standard of identity required, in relevant part, that “purified” bottled water has been purified through “distillation, deionization, reverse osmosis, or other suitable processes,” the standard of identity said nothing about microplastics.

That case could have been the end of the story, but another plaintiff’s firm sought a revival earlier this year, filing seven new cases between January and March—this time against bottled spring water, rather than bottled purified water. The new filings pointed to the exact same 2018 study in attacking claims like “100% Mountain Spring Water” and “Natural Artisan Spring Water.” They also allege that “[m]ouse models have reported potential effects on mammalian gut microbiota, as well as cellular and metabolic toxicity,” even if “consequences” of “exposure to microplastics in mammalian systems, particularly in humans, are not yet fully understood.” As the year ends, so have most of those seven cases.

Two cases were voluntarily dismissed in September, following successful motions to dismiss. *Slowinski v. BlueTriton Brands*, No. 24-cv-513, 2024 WL 3757097 (N.D. Ill. Aug. 9, 2024); *Bruno v. BlueTriton Brands, Inc.*, No. 24-cv-1563, 2024 WL 2794098 (C.D. Cal. May 6, 2024); *Bruno*, No. 24-cv-1563, 2024 WL 3993861 (C.D. Cal. Aug. 8, 2024) (dismissing amended complaint). Three were dismissed without any motion to dismiss being filed or briefed. *Moore v. BlueTriton Brands, Inc.*, No.

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24-cv-1640 (E.D.N.Y. Oct. 10, 2024); *Dotson v. Danone Waters of America, LLC*, No. 24-cv-2445 (C.D. Cal. Apr. 3, 2024); *Dotson v. CG Roxane, LLC*, No. 24-v-2567 (C.D. Cal. Apr. 25, 2024).

Only two of the seven cases remain in litigation. One has a motion to dismiss pending, and in the other, the court granted dismissal earlier this month, although with leave to amend. *Daly v. The Wonderful Co. LLC*, No. 24-cv-1267 (N.D. Ill.). Op. & Order, *Daly v. Danone Waters of America, LLC*, No. 24-cv-2424 (N.D. Ill. Nov. 5, 2024). Like the court in the 2018 case, the courts granting dismissal in these new cases found that the FDA standard of identity, which has requirements for bottled “spring water,” preempts the state-law based deceptive advertising allegations. The decisions are all pretty similar, with one standing out for how exactly it explained that the relevant complaint “doesn’t hold water.” *Slowinski v. BlueTriton Brands*, No. 24-cv-513, 2024 WL 3757097, at \*1.

The court reviewed the various requirements for “spring water” within the FDA standard of identity—including that it must be from an “underground formation from which water flows naturally to the surface” and “be collected only at the spring or through a bore hole tapping the underground formation feeding the spring.” *Id.* at 11. The court concluded that the FDA “had put a lot of thought into the meaning of ‘spring water,’” but never imposed requirements as to microplastics. In fact, according to the court, the standard of identity “makes no mention [at all] of teeny-tiny bits and pieces of itty-bitty plastic.” *Id.* Thus, according to the court, the standard of identity preempted the plaintiffs state law allegations.

The court also spent some time discussing how microplastics “are inescapable” in modern life and how the effect on humans “is not fully understood.” *Id.* at 11. The court observed: “At 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.” *Id.* at 14. The court included in that discussion a personal anecdote:

As fate would have it, [the defendant’s] Ice Mountain is also the brand of water offered as a courtesy by Uncle Sam down the hall here on the 23rd floor of the Dirksen Federal Building. Five-gallon jugs of Ice Mountain water are a fixture of the 23rd floor, and throughout the federal courthouse. Jurors drink it. So do jurists. Full disclosure: this Court does not know if any microplastics went down the judicial hatch.

*Id.* at 2. This decision is likely as useful as it is amusing. It takes a fearmongering complaint and flippantly places it in the proper context of what we actually know so far about microplastics—which isn’t much beyond their existence.

### **Risk for Other Types of Products**

Following the bottled water cases, a new round of cases has already been filed, this time targeting baby bottles and sippy cups that allegedly leach microplastics. *See, e.g., Compl., Barrales v. Newell Brands Inc.*, No. 24-cv-3025 (N.D. Ga. July 8, 2024); *Compl., Cortez v. Handi-Craft Co., Inc.*, No. 24-cv-3782 (N.D. Cal. June 25, 2024). These complaints tend to point to a 2020 study that allegedly found microplastics in polypropylene feeding bottles.

The bottled water cases, unfortunately, won’t provide direct protection from such class actions where many food products—and all non-food consumer products—lack an FDA standard of identity. That said, the dismissal decisions, particularly the funny one, *Slowinski*, nevertheless could serve as a reminder to courts that fearmongering advertising class actions must be reality checked based on the existing science.

In the midst of the bottled water cases, another positive development has come along that may help fend off further cases. Over the summer, the FDA issued a statement on microplastics in food. In that statement, the FDA addressed the weight of the evidence thus far and found little reason for concern, stating in part:

The presence of environmentally derived microplastics and nanoplastics in food alone does not indicate a risk and does not violate FDA regulations unless it creates a health concern. While many studies have reported the presence of microplastics in several foods, including salt, seafood, sugar, beer, bottled water, honey, milk, and tea, current scientific evidence does not demonstrate that the levels of microplastics or nanoplastics detected in foods pose a risk to human health. Additionally, because there are no standardized methods for how to detect, quantify, or characterize microplastics and nanoplastics, many of the scientific studies have used methods of variable, questionable, and/or limited accuracy and specificity.

FDA, Microplastics and Nanoplastics in Foods ("current as of July 24, 2024"), <https://www.fda.gov/food/environmental-contaminants-food/microplastics-and-nanoplastics-foods>. This statement could be especially helpful for foods, providing a shield to help reduce class action risk. For products other than food, the FDA statement is less directly useful, but nevertheless an authoritative position suggesting, correctly, that the rigor of the scientific evidence must always be considered, regardless of the type of product being studied for the presence or implications of microplastics.