

Second Judge Tosses Heavy Metal Baby Food Class Action Suit for Lack of Standing

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Key Takeaways:

- A speculative risk of future harm is not enough to establish Article III standing
- Plaintiffs arguing price premium and benefit of the bargain theories must plead a harm to themselves, not others, and they must plead more than the conclusory allegation that they overpaid

A Virginia federal judge tossed a class action lawsuit on October 17 alleging Gerber Products Company (“Gerber”) deceptively led consumers to believe their baby food products were “healthy” and “safe” despite allegedly containing unsafe levels of toxic metals. U.S. District Judge Michael S. Nachmanoff granted Gerber’s motion to dismiss, holding that Plaintiffs did not have standing to file claims premised on the following economic harm theories: (1) Gerber’s baby food products were “worthless or worth less” because they contained heavy metals, and (2) Plaintiffs paid more money than what the products were worth due to the presence of heavy metals.

First, Plaintiffs claimed that Gerber’s failure to disclose the presence of heavy metals in the products and the risks of consuming heavy metals rendered the products “worthless or worth less” than they actually paid, depriving them of their benefit of the bargain. Gerber argued that Plaintiffs received the benefit of the bargain because they were able to use the products as intended without suffering any adverse health consequences. The court agreed with Gerber, stating that in order to succeed under a benefit of the bargain theory, Plaintiffs must plead with specific facts as to why the product is unsafe as to the *plaintiffs*, not to *others*. Here, Plaintiffs failed to allege that the presence of heavy metals were unsafe as to them; they did not allege that their children suffered harm or were at an imminent risk of harm. Indeed, Plaintiffs disclaimed any personal injuries from consumption of the products. In addition, Plaintiffs failed to assert that the products did not serve their intended purpose (providing nourishment to children). The court held that Plaintiffs bargained for safe and healthy baby food, and that is what they received.

Second, Plaintiffs argued that Gerber’s omissions surrounding the presence of heavy metals allowed them to charge more for the products than they were actually worth. The court held that this price premium theory failed for the same reasons as the benefit of the bargain theory. Plaintiffs were not able to show that the value of the products was less than what Gerber falsely represented or what Plaintiffs believed it to be at the time of purchase. Plaintiffs

only stated that they overpaid for the products, but they did not clarify how much they paid for the products, how much they would have paid if the material facts had been disclosed, or any other details that would inform the court's decision. Plaintiffs pointed to other baby food products on the market that contain lower levels of heavy metals, but Plaintiffs did not show that the price of the products was correlated to their heavy metal content.

The court stated that it found the District of New Jersey court's ruling in *Kimca v. Sprout Foods, Inc.*, 2022 WL 1213488 (D. N.J. Apr 25, 2022) (dismissing claims for lack of standing), more persuasive than the contrary ruling by a Northern District of California court in *In re Plum Baby Food Litig.*, No. 4:21-cv-913 (Dkt. 125) (Jan. 12, 2022) (plaintiffs adequately alleged standing). The Virginia federal court also agreed with the New Jersey federal court in dismissing the claims under the doctrine of primary jurisdiction because the issue of whether the levels of heavy metals in baby foods is harmful is a policy consideration within the expertise of the Food and Drug Administration.

This industry-side win further illustrates one of the key takeaways from the Supreme Court's ruling last year in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021): "No concrete harm, no standing." This decision will put prospective plaintiffs on notice that some tenuous risk of future harm will not be enough to establish Article III standing.

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