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BLOG

Microplastics Policy: Is Federal Preemption a Viable Defense?

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KEY TAKEAWAYS

- While federal and state regulation specific to microplastics is not yet broad, more governing bodies are identifying microplastics as emerging pollutants, funding efforts to understand their human health and environmental effects, and considering regulation.
- Litigation over microplastics impacting consumers and the public may increase as the result of such investigations and as new regulations go into effect.
- Current federal regulation may also provide opportunities for defendants to raise defenses that certain claims are preempted.

Microplastics are small plastic particles less than 5 mm in diameter that form when solid plastics break down through abrasion, degradation, or chemical processes such as exposure to heat.[1] Because of their beneficial characteristics, microplastics have also been intentionally added to cleaning products, coatings, cosmetics, and other consumer products. Microplastics are insoluble in water, nondegradable, and studies report detecting them from Arctic glaciers to deep-sea sediment.[2] While research in the area is ongoing, there is no scientific consensus that microplastics have an adverse impact on human health.

The primary federal regulation aimed specifically at microplastics in consumer products is the Microbead-Free Waters Act of 2015, which prohibits the use of microbeads in cosmetic products.[3] At least eleven states have enacted their own bans on microbeads in personal care products. Some states are also enacting regulations to limit the supply of plastic that may eventually degrade into microplastics. And at least twelve states have enacted statewide legislation restricting the use of single-use plastics such as plastic bags at retailers and travel-size personal care products at hotels.

As discussion about potential environmental and human health effects of microplastics expands, several states and federal agencies are funding research into microplastics. California, Illinois, New Jersey, Minnesota, and Vermont recently passed legislation funding microplastics research and requiring state agencies to make policy recommendations to state legislatures.[4] The U.S. Environmental Protection Agency (EPA) is developing

standardized recommendations for monitoring the extent to which microplastics are present in food supplies and drinking water.[5] EPA is also considering new standards relating to any impact of microplastics on human health.[6] The U.S. Agency for Toxic Substances and Disease Registry has formed a working group in partnership with the Centers for Disease Control to define the human health risk from microplastics.[7] The task force is expected to publish the results of its literature review in the next few years.

There are myriad examples of lawsuits ensuing after a regulatory body or other agency issues a statement or report on a particular substance. As things currently stand, however, statements by the U.S. Food and Drug Administration (FDA) may offer a defense to claims involving microplastics. For example, in July 2024, FDA issued a statement that "[c]urrent scientific evidence does not demonstrate that levels of microplastics or nanoplastics detected in foods pose a risk to human health."[8] Of particular relevance to putative class actions against bottled water manufacturers alleging that companies falsely labeled their products as "natural" when they actually contain microplastics, FDA further stated, "[t]he presence of microplastics and nanoplastics in water alone, does not indicate a risk and does not violate FDA regulations unless it creates a health concern."[9]

FDA's statements reinforce a recent ruling from the United States District Court for the Northern District of Illinois, where consumers alleged that a bottled water product labeled as "100% natural spring water" was misleading to consumers due to the alleged presence of microplastics in the water. [10] The court granted the defendant's motion to dismiss, partially on the grounds that the phrase "spring water" is already regulated by the FDA and therefore the claim was preempted.[11]

We will continue to monitor state and federal regulation and reporting from government agencies to provide insight on the impact developing microplastics policy is likely to have on litigation.

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[1] Agency for Toxic Substances & Disease Registry, *What's Next?*, https://www.atsdr.cdc.gov/2020atsdrannualreport/whats-next.html.

[2] CalSPEC, *Microplastics Occurrence, Health Effects, and Mitigation Policies* (Jan. 2023) (CalSPEC), at 46. https://uccs.ucdavis.edu/sites/g/files/dgvnsk12071/files/media/documents/CalSPEC-Report-Microplastics-Occurrence-Health%20Effects-and-Mitigation-Policies.pdf.

[3] https://www.fda.gov/cosmetics/cosmetics-laws-regulations/microbead-free-waters-act-faqs.

[4] CalSPEC, at 45.

[5] https://www.epa.gov/water-research/microplastics-research.

[6] *Id.*

[7] *Supra*, n. 1.

[8] https://www.fda.gov/food/environmental-contaminants-food/microplastics-and-nanoplastics-foods.

[9] *Id.*

[10] *Slowinski et al. v. BlueTriton Brands Inc.*, 1:24-cv-00513 (N.D. Ill. Jan. 19, 2024).

[11] *Id.*, Dkt. 23, at 18-24.

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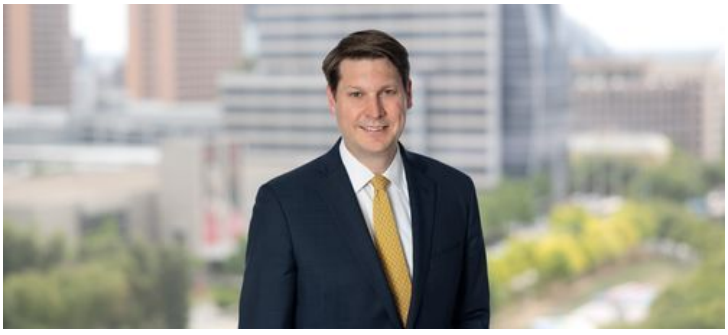

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