



Key takeaways:

- A recent report from the House of Representatives has motivated nearly 100 false advertising cases against baby food manufacturers.
- The cases allege that the companies sold food containing heavy metals and failed to disclose that fact.
- The filings have prompted Food and Drug Administration and Congressional action on heavy metals in baby food and may invite additional scrutiny from regulators and plaintiffs' counsel on trace substances in consumer product goods, beyond baby food.

There is a recent spike in consumer class action filings related to heavy metals in baby food. Plaintiffs have filed nearly 100 cases in the past three months alleging that baby food manufacturers violated state false advertising laws when they sold baby food containing "dangerous levels" of lead, arsenic, cadmium and mercury without disclosing that fact. We expect these cases will open the door to additional filings accusing consumer product goods companies of selling goods allegedly tainted with undesirable substances, including heavy metals. On February 4, 2021, the House of Representatives Committee on Oversight and Reform, Subcommittee on Economic and Consumer Policy published a report accusing seven baby food companies of selling foods "tainted with dangerous levels of arsenic, lead, cadmium and mercury." These substances occur in nature and are nearly impossible to eradicate from food. The subcommittee nevertheless chastised the companies for failing to disclose to consumers that their products contained heavy metals that, according to plaintiffs, could be harmful to children. Plaintiffs filed follow-on false advertising class actions almost immediately. The first case was filed on February 5 in the Eastern District of New York and almost 100 cases have been filed to date. Plaintiffs are consumers who purchased purees, puffs, teething biscuits and other foods from the seven companies named in the House Report. They allege the companies violated state false advertising law by marketing their products as wholesome, healthy and safe when the products contained allegedly dangerous levels of heavy metals and by failing to disclose the heavy metals. There is a pending motion before the Judicial Panel on Multidistrict Litigation to consolidate the baby food cases for pre-trial proceedings. Defendants largely opposed the motion, and oral argument is set for later this month. In the meantime, defendants' deadlines to respond to the complaints are fast approaching. We anticipate they will move to dismiss primarily based on Article III standing and the reasonable consumer standard. The House Report prompted regulatory and legislative initiatives on heavy metals that could impact food and beverage companies: The FDA launched a multiyear strategy, called "Closer to Zero," to establish guidelines for heavy metals in baby foods. And Members of Congress introduced the federal "Baby Food Safety Act of 2021," which proposes maximum levels of heavy metals in "infant and toddler food" far below those currently set by the FDA. We will continue to watch these cases closely.

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