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Microplastics At The Crossroads Of Regulation And Litigation

By **Aliza Karetnick and Franco Corrado** (May 6, 2024, 2:55 PM EDT)


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Rising alarm over microplastics as pollutants has sparked significant attention, stirring public concern and regulatory scrutiny.

While there is both a lack of standardized methods for measuring microplastics and no scientific consensus about their potential health impacts, manufacturers are facing a surge of lawsuits asserting consumer protection claims based on the purported presence of microplastics in bottled water, and questions remain about the approach state and federal regulatory agencies might take to address the widespread use of plastic products in food production and storage.

Defining Microplastics

Microplastics are minuscule fragments or fibers of plastic measuring less than 5 millimeters in diameter — smaller than a pencil eraser — that are insoluble in water and nondegradable.

Because "microplastics" is an umbrella term that covers many particle shapes, sizes and polymer types, the physical and chemical properties of microplastics vary. They may originate from a variety of sources, including the breakdown or degradation of larger plastic debris, microbeads from personal care products, and synthetic fibers from textiles.

It has also been alleged in recently filed litigation that water bottles exposed to environmental factors such as sunlight can also cause microplastics. These small particles may pose environmental challenges because they can be ingested by marine life and other organisms, potentially entering the food chain.

Microplastics have reportedly been detected in a wide array of environments. Both tap water and bottled water have been reported to contain microplastics, and recent research suggests microplastics can be found in human organs and tissues, including the placenta.

Much remains unknown about microplastics, particularly the primary pathways through which humans are exposed to them. Although apparently ubiquitous, the increased attention on microplastics may put pressure on regulators to develop and enforce stricter environmental and food safety standards, pushing for more comprehensive research and oversight to safeguard public health and ecosystems.

States are also closely monitoring the evolving research on microplastics. California, for example, has

implemented testing requirements for certain consumer products and drinking water.

Federal Regulation of Microplastics

To date, the Microbead-Free Waters Act, which prohibits the use of microbeads in rinse-off cosmetic products, is the sole federal legislation aimed specifically at microplastics in consumer goods.

The U.S. Food and Drug Administration and U.S. Environmental Protection Agency have sponsored and encouraged extensive research into microplastics, but neither has proposed regulations specifically targeting microplastics, such as through pollution control; drinking water standards; or packaging, food additive and food contact substance regulation.

The FDA's approach to per- and polyfluoroalkyl substances in certain food-contact applications could be instructive. With respect to PFAS, the FDA's recent strategy has been to encourage companies in the food industry to voluntarily cease the sale of grease-proofing substances containing certain types of PFAS over a three-year period that began in 2021.

Indeed, the FDA's approach to the voluntary phaseout of PFAS in grease-proofing agents for food packaging shows a willingness to act more quickly to remove ingredients from the market than the lengthy and burdensome notice and comment rulemaking process would otherwise allow. The FDA may similarly encourage companies to phase out or significantly reduce the use of certain plastics in food production and storage.

Class Actions Involving Microplastics

As media reports about microplastics have increased, so too have class actions.

Since January, at least seven putative class actions have been filed against bottled water companies alleging that the companies falsely labeled, marketed or advertised their bottled water as natural when the water actually contained unnatural microplastics. These litigants generally seek monetary damages and injunctive relief to cease sales of bottled water. In some instances, defendants have filed motions to dismiss.

Unfortunately, these lawsuits appear to be harbingers of more claims to come against bottled — and possibly filtered — water companies, and perhaps more broadly against food and beverage manufacturers using plastic packaging.

Such lawsuits should also serve as a reminder to food manufacturers and marketers to set out their environmental claims with precision and ample substantiation, or to qualify their claims to protect against allegations of consumer deception or confusion.

To the extent possible, manufacturers should seek third-party certification validating environmental, sustainability and quality performance claims and refer to such certifications rather than the manufacturer's own characterizations.

Manufacturers should also be aware of the need for clear indemnification provisions in contracts with suppliers, e.g., food and beverage packaging suppliers, in the event that litigation arises.

Among other things, contracts should require indemnification for the cost of any investigations or

defense of litigation based on the supplier's claims, upon which the manufacturer relied.

Manufacturers should not wait until new state and federal regulations are proposed or promulgated to implement preventive measures. They should assess their manufacturing processes and packaging practices proactively and stay current on the changing legal and regulatory landscape to ensure compliance with state laws and federal guidelines.

This may entail conducting thorough reviews of supply chains to identify the use of materials containing or potentially shedding microplastics. Transitioning to nonplastic alternatives, such as recyclable metals or glass, may also be perceived as a competitive edge for manufacturers, fostering brand loyalty among consumers.

And as the FDA continues its post-market review of new scientific information on the authorized uses of plastics in food-contact substances, manufacturers should consider proactively working with the agency and state regulators to provide information on their products.

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