

## Another Heavy Metal Lawsuit Dismissed

Article By:

Food and Drug Law at Keller and Heckman

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- On September 11, 2023, a consumer class action lawsuit against Kroger for selling baby teething wafers with allegedly elevated levels of heavy metals was dismissed with leave to amend.
- Unlike several other heavy metal [cases](#), the Court declined to invoke the “primary jurisdiction” doctrine. The Court found that an underlying reason for the application of primary jurisdiction is a “desire for uniformity,” and that the absence of any regulations on the subject indicated that FDA had not expressed such a desire. As to FDA’s Closer to Zero plan, the Court noted that the plan was announced more than two years ago and that it did not include a timeline for proposed or final regulations.
- Nevertheless, the Court dismissed the claims. Several of the claims were dismissed for procedural reasons (e.g., failure to specify governing laws), while a claim under the Indiana Deceptive Consumer Sales Act was dismissed because, absent notice to the Defendant (which was not given), the Plaintiffs were required to show that the Defendant acted with an “intent to defraud or mislead.” No such allegations were made.
- On the count alleging violation of the Washington Consumer Protection Act, which requires (among other things) an unfair or deceptive act or practice and an injury to plaintiff’s business or *property*, the Court held that no injury to property was shown; on the contrary, the wafers were bought and fed to children, who suffered no ill effects.
- Notably, on this count, the Court found that Plaintiffs *had* met their pleading burden to identify an unfair or deceptive act (i.e., the omission of heavy metal warnings) even though Plaintiffs did not “provide actual test results” or “list who conducted the testing or when they conducted it.” The failure to include detailed test results in a complaint has doomed other lawsuits. Nevertheless, this count was dismissed based on the failure to show injury to property.

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