

Kroger Must Keep Fighting Metal-Tainted Baby Food Claims

By [Hailey Konnath](#) · [Listen to article](#)

Law360 (May 8, 2024, 11:05 PM EDT) -- An Ohio federal judge Wednesday refused to throw out a proposed class action accusing the Kroger Co. and its subsidiaries of selling baby food tainted with toxic metals, ruling that the mothers who sued have plausibly alleged that they wouldn't have purchased the product had they known the truth.

U.S. District Judge Douglas R. Cole denied Kroger's motion to dismiss, shooting down the grocer's arguments that the mothers don't have standing to bring their claims. While the mothers haven't alleged that the Simple Truth Organic Rice Rusks Baby Teething Wafers at the center of the suit caused physical injury to their children, they do argue that they relied on Kroger's alleged misrepresentations in purchasing the teething wafers, the judge said.

According to the mothers, Kroger represented the food as "high quality," "a perfect snack for tiny tummies" and safe. However, those representations were false because Kroger knew about the elevated levels of toxic metals.

Those alleged misrepresentations caused the mothers to "purchase a product they otherwise would not have purchased," according to the order.

"That type of injury has common law roots and is cognizable under Article III," the judge said.

In their case, Tasheba Barnett, Adele Hoffman and Chadaela Lovincey claim they wouldn't have purchased the baby food if they'd known it contained dangerous metal levels. Theirs is one of many suits filed in the wake of a February 2021 report from the [U.S. House of Representatives Committee](#) on Oversight and Reform bringing attention to dangerous metal levels in baby food sold by [Walmart Inc.](#), Gerber and others.

Kroger isn't mentioned in that report, but the mothers base their complaint on the harm those metals can cause. In particular, they allege that the teething wafers contain elevated levels of arsenic, cadmium, lead and mercury.

The mothers filed suit in [September 2022](#). A year later, Judge Cole [agreed to throw out the suit](#), finding that the mothers failed to show Kroger knew of the contamination. However, he allowed the mothers to amend their complaint, and they did so in December.

In its latest dismissal bid, Kroger argued that the mothers lack standing to bring their claims, that the [U.S. Food and Drug Administration](#) has jurisdiction here, and that they haven't stated plausible common law or consumer protection claims.

Judge Cole said Wednesday that he was mistaken in his order dismissing the claims for failing to specify the applicable state's law.

"That is because choice-of-law questions are legal questions to be briefed by opposing parties and decided by the court," the judge said. "In other words, while choice of law is an issue the court may need to address in resolving a motion to dismiss, it is not a pleading requirement."

However, it could be relevant in deciding a motion to dismiss because choice of law could inform whether a plaintiff has plausibly alleged a claim, he said.

Judge Cole said he recognized that his initial ruling had caused the "current quandary," and therefore denied the

portions of the dismissal motion relating to the mothers' common law claims. Still, he said Kroger could again seek dismissal via supplemental briefing.

That briefing should address "both what state's (or states') law should apply to the common-law claims here and why, under such choice of law (or any alternative choice of law that may apply), plaintiffs' common law claims are implausible," he said.

Judge Cole added that those arguments "may carry implications for later stages of this litigation, and in particular class certification."

As for Kroger's other arguments, the First Circuit and other appellate courts have rejected them, according to the order.

Kroger argued that if the mothers' economic injury stems from a premium paid for the teething wafers, they must specifically allege an alternative nonpremium product they would've purchased if they knew the truth. But the plaintiffs aren't alleging any sort of "premium price" theory, and that means they don't need to point to an alternative product, Judge Cole said.

"Rather they need allege only that they would not have purchased this product at all, which is exactly what they do," he said.

And one of the mothers, Barnett, has indeed adequately alleged that, based on FDA standards, the teething wafers were unsafe, Judge Cole said. That, in turn, means she has adequately, for now, alleged that Kroger misrepresented an aspect of the product.

"That her child has not yet experienced negative health effects does not change that fact," the judge said.

Similarly, Hoffman has addressed issues with one of her claims under Indiana consumer sales law, Judge Cole held.

"The grocery stores claim that plaintiff Hoffman's allegations do not meet the necessary threshold because they lack too many details," the judge said.

While it's true she'll need to prove her allegations to win in the end, for present purposes, "the allegations are specific enough," Judge Cole held.

Kroger and counsel for the mothers didn't immediately respond to requests for comment late Wednesday.

Barnett, Hoffman and Lovincey are represented by Terence R. Coates and Dylan J. Gould of [Markovits Stock & DeMarco LLC](#), Nicholas A. Migliaccio, Jason S. Rathod and Mark D. Patronella of [Migliaccio & Rathod LLP](#) and Gary Graifman of [Kantrowitz Goldhamer & Graifman PC](#).

[The Kroger Co.](#) and its subsidiaries are represented by Fredrick H.L. McClure, Lindsay P. Lopez and Bradley A. Muhs of [Trenam Law](#) and Nathaniel Lampley Jr., David F. Hine and Petra G. Bergman of [Vorys Sater Seymour and Pease LLP](#).

The case is Tasheba Barnett et al. v. the Kroger Co. et al., case number [1:22-cv-00544](#), in the [U.S. District Court for the Southern District of Ohio](#).

--Additional reporting by Rachel Riley, Ryan Harroff, Eric Heisig, Gina Kim and Mike Curley. Editing by Jay Jackson Jr.

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