

# Client Alert

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For more information,  
contact:

Matthew J. Blaschke  
+1 415 318 1212  
[mblaschke@kslaw.com](mailto:mblaschke@kslaw.com)

Bailey J. Langner  
+1 415 318 1214  
[blangner@kslaw.com](mailto:blangner@kslaw.com)

Rachel Rubens  
+1 415 318 1210  
[rrubens@kslaw.com](mailto:rrubens@kslaw.com)

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## King & Spalding

San Francisco  
50 California Street  
Suite 3300  
San Francisco, California  
94111  
Tel. +1 415 318 1200

Toxic Tort and Environmental Litigation

## Plastics Cases in the U.S. – An Overview

As concerns over plastic pollution have skyrocketed over the past decade, so too has litigation related to plastic. Since 2020, litigation surrounding plastic has taken several forms, and plaintiffs' attorneys continue to come up with new legal theories in an effort to hold consumer product manufacturers responsible for plastic pollution.

One of the first lawsuits filed against plastic product manufacturers - and still the only of its kind - was brought by the non-profit organization Earth Island Institute seeking to hold numerous food and beverage companies responsible for pollution in California's waterways. The lawsuit, which was filed in 2020 in California State Superior Court in San Mateo County, alleged claims for breach of warranty, product liability and public nuisance, in addition to violations of the California Consumer Legal Remedies Act. In May 2023, the Court sustained Defendants' Demurrer to all causes of action, reasoning that - as to the public nuisance claim - Earth Island failed to sufficiently plead causation or that Defendants promoted a product for hazardous use. The Court separately noted that the argument that the products are not recyclable contradicted the express allegations of the Complaint. In October 2023, Earth Island filed an Amended Complaint, adding new facts in support of its public nuisance claim, in addition to a claim under California's unfair competition law. Defendants again filed a Demurrer, which is set for hearing in April. The lawsuit strongly resembles the myriad lawsuits that have been filed against energy companies for promoting greenhouse gases.

Another type of lawsuit which has emerged over the past few years concerns localized plastic pollution. The most high-profile of these lawsuits so far was filed by a group of Texas residents and activist against petrochemical manufacturer Formosa Plastics for its discharge of plastic pellets and other pollutants into Texas waterways. The lawsuit led to a \$50 million settlement, which will be funneled back into the community to fund education, research and conservation initiatives along the Texas Gulf Coast.



One of the most prevalent types of plastic litigation over the past few years has been consumer class action lawsuits alleging that, given that such a small percentage of plastic is actually recycled, companies' claims regarding the "recyclability" of products are misleading. Many of these lawsuits have been dismissed on the grounds that reasonable consumers are unlikely to interpret a representation such as "100% recyclable" as meaning a product will necessarily be recycled. In addition to challenging companies' claims regarding the recyclability of products, non-profit environmental and consumer protection organizations have filed consumer protection lawsuits against large plastic polluters, based on aspirational claims about the sustainability of their business practices. Those cases that have been allowed to proceed past the motion to dismiss stage have a common denominator - they pointed to *specific* statements that could be proven false.

Most recently, litigation has emerged concerning the presence of microplastics in water. The most recent wave of consumer litigation involves claims accusing water bottle companies of fraudulently labeling their water as "natural" when they contain microplastics. So far, these lawsuits have been brought under state consumer deception statutes and two of the three pending lawsuits have also included counts for common law fraud. Plaintiffs cite to studies concerning the health effects of microplastics in support of their allegations.

Another first of its kind lawsuit relating to microplastics pollution was filed in November 2023 by New York's Attorney General, seeking to hold Pepsi responsible for plastic pollution along the Buffalo River. The Complaint brings claims for public nuisance and strict products liability, in addition to violation of New York's General Business Law and Executive Law. According to the lawsuit, microplastics have been detected in the city of Buffalo's drinking water supply, and an analysis of microplastics fragments found in the river confirmed the presence of plastic of the type used in Pepsi products. If these microplastics-related lawsuits are successful, it will undoubtedly have far-reaching consequences as additional lawsuits will surely be filed alleging these, and other novel, legal theories.

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