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Litigator of the Week: An Associate Takes the Lead in Knocking Out a Key Expert in Baby Food Heavy Metal Test Case

By Ross Todd

December 12, 2025

Our Litigator of the Week is **Covington & Burling** senior associate **Nicole Antoine**. She is part of the team defending Hain Celestial Group, the maker of Earth's Best organic baby food, in coordinated proceedings in California state court considering claims that heavy metals in its products and those of other baby food makers have caused children to develop autism and ADHD.

The defense team won summary judgment in the first case poised for trial in 2023 after securing a ruling excluding the plaintiff's exposure expert.

In the latest case, Antoine argued over three days on behalf of the joint defense group taking aim at the plaintiff's new toxicology expert. Antoine made the case that the expert inappropriately amalgamated and averaged data from multiple defendants' products, leaving no way to assess defendant-specific exposure.

Last week, Los Angeles Superior Court Judge Lawrence Riff excluded the expert's exposure and dose opinions and granted summary judgment to Hain and its codefendants, Nurture, represented by a team from **DLA Piper**, and Plum, represented by a team from **Dechert**.

Lit Daily: What's at stake here for your client and their codefendants in these coordinate proceedings in California state court?

Courtesy photo

Nicole Antoine of Covington & Burling.

Nicole Antoine: We represent The Hain Celestial Group, a food and personal care products company that sells a popular brand of organic baby food called Earth's Best. Plaintiffs have sued Earth's Best, along with other baby food companies—including our codefendants in this case, Nurture and Plum, and our codefendants in the other coordinated cases, Gerber, Sprout, Beech-Nut and Walmart—alleging that incredibly low levels of heavy metals found in baby foods cause autism and ADHD. In financial terms, these coordinated proceedings present meaningful risk, should plaintiffs be successful. But more fundamentally, the claims made by plaintiffs in this litigation are antithetical to what our client and codefendants stand for and to good science. Because fruits, grains and vegetables

are grown in soil and water, effectively all foods (including the apple you might pick off a tree branch or the sweet potato you might buy in the store) contain trace levels of heavy metals. These levels are entirely safe. And because baby foods are often made up of vegetables, fruits or grains, they too may contain trace levels of heavy metals. There is no science showing that these levels are unsafe—let alone that they can cause autism and ADHD—and plaintiffs' theory relies on the same incredibly flawed science as the claim that vaccines cause autism. These fearmongering claims that the very low levels of heavy metals found in the food supply can cause autism hurt both our clients and the public.

How did this group of cases come to you and the firm?

Hain had been a longstanding firm client, but the company actually came to us after consulting with another client our mass torts team helped through a major exposure.

Who all is on the defense team, including the teams representing the codefendants still in the case here? How would you characterize your role on the broader team in this case?

We are very lucky to have a terrific joint-defense group in these cases with the best mass tort defense firms in the country. Our Covington team for Hain in this case consisted of **Michael Imbroscio**, who deposed the exposure expert and crossed him during the evidentiary exam, and **Elizabeth Fouhey**, who handled other key experts in the case. On the broader coordinated proceeding, we also have **Phyllis Jones**, **Madeleine Dolan**, **Nicole Agama** and **Sarah Haddon**. We worked closely with our codefendants' counsel, with whom we have strong working relationships following years of working together on these cases. Nurture is represented by **Loren Brown**, **Lyn Pruitt**, **Brooke Kim**, **Brenna Kelly**, **Mary Gately** and **Noorvik Minasian** from DLA. Plum is represented by **Hope Freiwald**, **Allie Ozurovich** and **Allison DeJong** from Dechert.

My role in these cases has been to focus on plaintiffs' exposure experts, who estimate the plaintiff's alleged exposure dose to heavy metals. Because estimating the amount of exposure is necessary to prove causation, these experts are typically one of the key lynchpins in plaintiffs' cases, and therefore provide a potential path to a summary judgment win. As part of that, I focus on really digging into the expert's opinions to identify both technical and conceptual flaws. But equally important, I focus on finding ways to then translate those flaws into something the judge (and jury) can easily and clearly understand, and on demonstrating why those flaws require exclusion (or a no-fault verdict).

How was the defense team able to knock out the exposure expert in the first case that was teed up for trial in these coordinate proceedings?

In the first case before Judge Riff on these issues, our team (including **Paul Schmidt**, who deposed the expert and handled the winning argument) identified two fatal flaws in the expert's analysis: first, that the expert proffered only a single, combined exposure dose, without breaking out the contribution from each defendant, and second, that the expert used elevated proxy values for heavy metal test results that then biased the expert's total dose estimate high. Judge Riff excluded the expert on both bases, and then also granted summary judgment in defendants' favor, explaining that fundamental principles of tort law require plaintiffs to prove causation based on the conduct of *each individual* defendant, which plaintiffs could not do using a single combined exposure dose.

What was the problem you identified here with the replacement exposure expert in this case?

At first glance, it appeared that the expert in this case had fixed the issue identified in the first case because he proffered purported "defendant-specific" exposure estimates. But once I dug into how the expert actually calculated those "defendant-specific" doses, it became clear that plaintiffs had not actually solved the problem, because the purported "defendant-specific" doses were still based on a total dose that combined all defendants' product data together. In other words, none of the expert's "defendant-specific" exposure estimates were based only

on that defendant's own heavy metals data, and instead attributed other defendants' data—i.e., other defendants' conduct—to that defendant. Once we identified that, we knew that this would be an issue that would concern the judge because it crossed the "tort law red line" we had identified in the prior case. The trickiest part was then putting how the expert's analysis worked into clear, understandable terms for the judge and explaining why that analysis still violated tort law.

Even though the judge told the plaintiffs that their methodology potentially crossed that "tort law red line" in California by "amalgamating" the data of all six defendant companies, he allowed the expert to explain his methodology at an evidentiary hearing and produce a "sensitivity analysis." What was your role in parsing that methodology and preparing the defense team for that evidentiary hearing?

That was a major turning point in the case, where we initially worried the judge would set aside the requirements of tort law and allow plaintiffs to pass with a "close enough" analysis. I handled taking apart the new methodology and strategizing with the rest of the joint defense team, including Brenna Kelly at DLA, on how to demonstrate that the "sensitivity analysis" did not solve the issue identified by the court. At the hearing, Mike handled the cross, and I handled the argument before the judge. Because of the importance and nuance of this issue, the judge had us return for multiple days of argument before finally ruling in our favor.

What can other defendants take from how you approached this expert issue?

Over the course of these cases, plaintiffs have repeatedly presented incredibly flawed exposure analyses that suffer from issues ranging from pervasive technical errors to egregious conceptual choices clearly intended to bias the exposure dose high. All of these flaws present strong grounds for exclusion under *Sargon* (and Rule 702). But we have found the most success in these cases in raising arguments that demonstrate that the expert's flawed choices are crosswise with the substantive law. Here, that meant demonstrating to the judge that the expert's purported dose analysis was not only scientifically flawed, but also that it was premised on a violation of a fundamental principle of tort law. And we are hopeful that we can leverage Judge Riff's strong opinions on this issue to obtain similar outcomes in other cases where plaintiffs likewise need to prove causation as to each individual defendant.

What can other associates take from your experience securing a key role in this deciding issue in this particular case?

Something associates often hear when they first start at the firm is to take ownership over their role in a case. The opportunities that I have been afforded have been in part a result of doing that–including digging in on the facts and law and thinking ahead to broader case strategy. But more than that, the opportunities I have received have been the result of working with an incredible group of people who raise each other up, constantly seek out opportunities for each other, and from whom there is so much to learn.

What will you remember most about this matter?

I will always remember the support of our incredible Covington team on this case, especially Mike, from whom I have learned so much and who has always sought out opportunities for me, and Elizabeth, who has been a tremendous colleague in working up these cases and who would have carried the day at summary judgment had we not succeeded on *Sargon*. I'm also incredibly grateful to our client, in particular **Kristy Meringolo** and **Michael Broz**, who have always supported our team and trusted in our recommendations, and to our codefendants Plum and Nurture and their counsel, who I know took a leap of faith in having an associate argue one of the key issues in the case.

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