

Litigators of the Week: Covington Team Gets a Directed Verdict in First Trial Over Heavy Metals in Baby Food

Phyllis Jones, Michael Imbroscio, David Sneed and their colleagues at Covington & Burling convinced a federal judge in Texas to pull the plug on a trial against The Hain Celestial Co. last week due to a lack of expert evidence on general causation.

By Ross Todd
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Our litigators of the week are Phyllis Jones, Michael Imbroscio and David Sneed of Covington & Burling who represented The Hain Celestial Co., the maker of Earth's Best baby food, in the first trial to consider whether trace amounts of heavy metals in baby foods can cause neurodevelopmental disorders in children.

The lawsuit, brought on behalf of the family of a Texas boy who claimed that eating the company's baby food led to his Autism Spectrum Disorder, came in the wake of a February 2021 Congressional report finding internal testing from commercial baby food makers showed significant levels of toxic heavy metals, including arsenic, lead, cadmium, and mercury.

But last week, eight days into a jury trial in Galveston, Texas, U.S. District Judge Jeffrey Brown pulled the plug on the plaintiffs' case and granted Hain's motion for a directed verdict. Brown found a lack of expert evidence on general causation. The judge said that wasn't due to an oversight by the plaintiffs' lawyers, but because "the scientific facts are simply not there."



Courtesy photos

(l-r) Phyllis Jones, Michael Imbroscio, and David Sneed of Covington & Burling.

Lit Daily: Who was your client and what was at stake?

Phyllis Jones: We represent The Hain Celestial Co., a food and personal care products company that markets Earth's Best, a popular brand of organic baby food. Plaintiffs alleged that the trace levels of heavy metals found in Earth's Best baby food caused a child to develop severe neurodevelopmental disability that manifested as, among other things, autism. In its most basic terms, the case was really about our food supply. Because of

the way food is grown—in the soil, with water, and exposed to air—certain produce, grains, and the like have extraordinarily low levels of certain metals. That’s the case for anything we’d buy in the store and feed to our kids. Because all commercial baby food is basically just made up of fruits and vegetables and rice and other grains, and you can’t simply wash metals away, you also find very low levels in any commercial baby food. But it’s all safe, something we know because our families eat these things every day. That was a big part of our case presentation—making the point that no one, including plaintiffs’ counsel, would argue that simply eating food—e.g., buying a sweet potato, cooking it, and mashing it up for your toddler—would present any risk. The stakes were high. The case was highly sympathetic, and plaintiffs’ counsel put on a life care planning expert asserting that the plaintiffs’ future medical and related care [of the son] alone would be more than \$31 million, before accounting for damages for pain and suffering.

Who was on your team and how did you divide the work?

Mike Imbroscio: Phyllis led the team and opened, crossed the mother and plaintiffs’ three causation experts, and presented our live company witness. David handled the key treating physicians who were presented by video deposition and presented our autism expert. I presented our toxicology expert and handled most of the company witnesses in their video depositions. Our partner Ali Mojibi and special counsel Kathleen Paley spearheaded the expert work, and four associates Nicole Antoine, Clayton Bailey, Maddie Dolan and Elizabeth Fouhey worked literally around the clock on witness outlines, briefing and witness preparation. We also had a fabulous paralegal team. We’re especially proud of the diversity of our team, which included every kind of diversity, with everyone playing key roles. We were also aided

immensely by our Texas counsel, Brian Cano and Rochelle Prins at Fee, Smith & Sharp.

Ms. Jones, how did you approach the assignment of cross-examining the mother? What were you seeking to establish through her testimony?

Jones: We were very clear in opening that our defense did not depend on challenging either the seriousness of the condition at issue or how hard the family’s situation was. The plaintiffs are loving, devoted parents, as evidenced by their efforts to find answers and treatments that would help their son. Consistent with that, our goal was not to litigate or win the whole case through the cross, but simply to establish certain factual points that we could work into our broader story. We focused on two core objectives: (1) confirming that the plaintiff parents were eager to find an answer to why their son had developed severe autism, and (2) establishing through use of a limited set of medical records that the progression of his condition was consistent with what is commonly seen with children who have severe autism.

Associate Nicole Antoine made the argument for a directed verdict here largely on her own with three lawyers arguing on the plaintiffs’ side. Walk me through the decision to have her handle that assignment.

Imbroscio: We knew we had a strong directed verdict motion based on the trial record, and plaintiffs’ counsel brought in one of the best appellate lawyers in Texas to handle the argument. Given what was at stake for the company, it would have been understandable for the client to want one of the partners to step in and handle the argument. But our client’s general counsel, Kristy Meringolo, saw Nicole in action during the entire trial and trusted our recommendation that Nicole was the right person for the job. Indeed, we received plaintiffs’ opposition brief at 5 p.m. the night before the argument, and within a span of five hours Nicole

had put together a complete PowerPoint presentation dismantling the plaintiffs' brief, both factually and legally. We are blessed at Covington to have phenomenal young lawyers like Nicole, and we are always looking for opportunities to let them shine.

In delivering the ruling, Judge Brown said: "I do not believe the failure to present any expert evidence on general causation was a failure of lawyering, rather, such general causation is simply not supported by the science. Ethan's lawyers have made a valiant effort to persuade the court otherwise, but the scientific facts are simply not there." What was your reaction to hearing that?

Jones: It was a perfect encapsulation—and vindication—of the case we presented. We couldn't have said it better.

Were you able to speak with any jurors after the trial? If so, what did you hear from them?

Sneed: We spoke briefly with a few of them at the end of the trial. All of them shared the incredible sympathy for the plaintiffs that all of us on the defense team had, but they also seemed to be moved by the hard evidence that we featured related to the science.

What can your client and other baby food companies take from how this trial unfolded?

Sneed: I think one of the key lessons coming out of this trial is exactly what Judge Brown observed—the actual hard data simply does not support the allegation that baby food can cause autism or any other kind of neurodevelopmental disorder. Judge Brown's ruling represents a strong affirmation of how we have approached this case from the start: We have tried to explain the current scientific understanding of how and why neurodevelopmental conditions, like autism, develop as a fundamental, scientific rebuttal to plaintiffs' theory of food exposure as a cause.

What's the landscape look like in similar cases now? There's another teed up for trial in Los Angeles later this year, right?

Imbroscio: We are hopeful that the result in this case will help to alter the trajectory of the rest of the litigation, which includes many of the other major baby food manufacturers. We are part of a multi-defendant trial currently set for mid-October in Los Angeles, but we think those claims will confront the same fundamental lack of scientific support.

What will you remember most about this matter?

Sneed: My greatest takeaway from this trial will be the easy camaraderie and strong work ethic of the entire team, from Phyllis in the lead to the most junior paralegal. Each member of the team was empowered to have a voice and contribute as we perfected our trial strategy each evening and executed in the courtroom each day. The positive result in this case was the product of our entire team's willingness to do their part and work together.

Imbroscio: We felt we had the facts and science on our side, but the legal system can be unnervingly unpredictable. There can be extraordinary pressures to settle cases in these instances. But this case teaches the importance of standing by your convictions and having the courage to stare down that uncertainty and let the system work.

Jones: The unselfishness of the entire team. All the associates were working incredibly hard on their respective projects, but, every night, before any of them would go to bed, they'd ask the others, "Is there anything I can help you with before I head out?" I'm not even sure they knew I heard that, but it blew me away every time. Also, the gumbo—Galveston has some of the very best gumbo in the world, and I ate it just about every day of trial.