

Nestle, Dannon, Gerber Beat Baby Product Fluoride Suit

By **Juan Carlos Rodriguez**

Law360, New York (August 27, 2013, 8:08 PM ET) -- A federal judge last week tossed a lawsuit accusing Nestle USA Inc., Gerber Products Co. Inc. and The Dannon Co. Inc. of failing to warn consumers that their bottled water and baby food and formula products contain excessive amounts of fluoride, finding federal law preempts the claims.

Plaintiff Michelle Nemphos alleged the products' high fluoride concentrations caused aesthetic damage to her baby daughter's teeth, and that the companies did not properly warn consumers of that risk. But U.S. District Judge George L. Russell III said Nemphos' claims are preempted by federal law because the products are subject to regulations under the Food, Drug and Cosmetic Act, and that the relief she seeks would impose a state law duty that is not identical to the act's labeling requirements.

"The FDCA expressly preempts state food and bottled water labeling requirements that are nonidentical to its own requirements," Judge Russell said in his Aug. 21 opinion granting the companies' motions to dismiss. "[The act] 'prevent[s] state and local governments from adopting inconsistent requirements with respect to the labeling of nutrients.'"

The judge said Nemphos' claims are preempted because the baby products are subject to FDA regulations, and Nemphos is seeking to impose nonidentical labeling requirements upon them.

"The FDA has already established a series of requirements for bottled water specifically regarding fluoride," the judge said.

He said the FDA prohibits the addition of fluoride to food products other than bottled water, unless the product contains fluoridated public water as an ingredient.

"Infant formula and baby food are under the purview of FDA regulations ... and are thus subject to these restrictions. Nemphos does not allege that Nestle and Gerber violated these regulations or added fluoride to their infant formula and baby food products."

And he said federal law does not require products containing no added fluoride to bear information concerning dental fluorosis.

"The defendants' products adhere to these labeling requirements, where the FDCA does not demand the defendants warn of dental fluorosis. Granting Nemphos relief would thus impose an obligation upon them to warn customers of the risks of fluoride consumption, lest they remain susceptible to common law liability. The obligation to warn would be nonidentical to the FDCA's labeling requirements," the judge said.

The judge rejected Nemphos' argument that her claims were permissible through the Nutrition Labeling and Education Act's safety concern preemption exception, finding that the use of fluoride in the defendants' products does not implicate a safety concern.

He also dismissed Nemphos' fraud-based and warranty claims, finding they were insufficiently pled and that the implied warranty claim was time-barred. And he denied Nemphos leave to amend, finding it would be futile in light of the federal preemption issue.

"The court's ruling leaves no room for the state to exercise its police powers to protect its citizens. We disagree with the court's application of the relevant law to the issues in this case and appropriately plan to appeal the court's ruling," Nemphos' attorney Chris Nidel of Nidel Law PLLC said Tuesday.

Counsel for the companies did not immediately respond to requests for comment Tuesday.

Nemphos is represented by Christopher T. Nace of Paulson & Nace PLLC and Chris Nidel of Nidel Law PLLC.

Nestle and Gerber are represented by Lauren S. Colton and Michael L. Kidney of Hogan Lovells LLP.

Dannon is represented by Victoria J. Miller, Anthony Pavel, M. Elizabeth Bierman, Kristin M. Hadgi and Zachary M. Johns of Morgan Lewis & Bockius LLP.

The case is Michelle Nemphos v. Nestle USA Inc. et al., number 1:12-cv-02718 in the U.S. District Court for the District of Maryland.

--Editing by Rebecca Flanagan.