

## Gerber Urges MDL Panel To Consolidate Baby Formula Suits

By **Greg Ryan**

*Law360, New York (September 20, 2012, 10:35 PM ET)* -- Gerber Products Co. reversed its position Thursday on the consolidation of proposed class actions claiming baby formula containing probiotics is not as healthy as marketed, asking a federal judicial panel to transfer all of the cases to New Jersey.

Plaintiffs in 10 suits in New Jersey, California and Washington allege that Gerber markets its infant products containing so-called probiotic and prebiotic bacteria as healthier than other baby food, but that there is no reliable scientific data to back up those claims. In fact, scientists cannot say for sure whether increasing one type of bacteria in the human intestine may in fact be harmful, the plaintiffs say.

One of the plaintiffs has asked the U.S. Judicial Panel on Multidistrict Litigation to transfer the cases to the Eastern District of Washington, while others are seeking a transfer to the District of New Jersey. Gerber filed a motion with the panel opposing consolidation in August, saying it had moved to dismiss or transfer the non-New Jersey cases to New Jersey.

However, an attorney for Gerber, Carmine Zarlenga of Mayer Brown LLP, told the panel in a hearing in New York that a change in circumstances had prompted the company to favor consolidation: Four of the five non-New Jersey courts had stayed proceedings until the panel made a decision on consolidation.

"What I'm concerned about is [the non-New Jersey plaintiffs] will view a denial [of consolidation] as some indication they should keep their cases there," Zarlenga said.

U.S. District Judge John Heyburn II, the chairman of the panel, said he doubted the courts outside New Jersey would react so dramatically to a denial of consolidation.

"I don't think in any given case that our denial of consolidation sends a message to the district courts ... that they should not follow the rules that courts should cooperate together," Judge Heyburn said.

U.S. District Judge Paul Barbadoro asked attorneys at the hearing why the panel should consolidate such a small number of cases when the parties themselves could informally coordinate them or the courts could rely on the default rule of choosing the first-filed case.

Lindsey Taylor of Carella Byrne Cecchi Olstein Brody & Agnello PC said the parties had tried to sit down and coordinate the proceedings, but "they didn't get very far." A New Jersey federal judge consolidated the five proposed class actions in that state in May and named Carella Byrne as interim class counsel.

John Snyder of John H. Snyder PLLC, representing the plaintiff who wanted the suits consolidated in Washington state, said that the median time to trial in the Eastern District of Washington is 23 months, exactly half the time it takes in the District of New Jersey. The Washington district is not currently handling any multidistrict litigation, while New Jersey is handling more than a dozen MDLs, he said.

"Economy would be served by holding it in the Eastern District of Washington," Snyder said.

The panel typically issues its consolidation decisions in the weeks following a hearing.

The plaintiffs are represented by Carella Byrne Cecchi Olstein Brody & Agnello PC, the Law Offices of Ronald A. Marron and The Weston Firm.

Gerber is represented by Dale Giali and Carmine Zarlenga of Mayer Brown LLP.

The case is In re: Gerber Probiotic Products Marketing and Sales Practices Litigation, MDL number 2397, in the U.S. Judicial Panel on Multidistrict Litigation.

--Additional reporting by Martin Bricketto. Editing by Jeremy Barker.

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