

## Walgreens Relieved Of Claims It Mislabeled Infant Pain Med

By Craig Clough

*Law360 (February 26, 2021, 8:14 PM EST)* -- A California federal judge tossed a proposed class action Friday alleging the label on Walgreens' Infants' Pain & Fever Acetaminophen is false and misleading and violates California consumer protection statutes, ruling that the product's "undisputed" labeling would not be likely to confuse reasonable consumers.

U.S. District Judge Edward J. Davila granted Walgreens' motion to dismiss the suit without leave to amend, saying plaintiff Cameron Eidmann already had an opportunity to amend the lawsuit and that "because the court's analysis is based in large part on the express disclosures on the infants' product packaging, which are undisputed, there are no further facts Eidmann can allege to cure the complaint."

Eidmann filed the suit in July, alleging violations of the California False and Misleading Advertising Law, California's Consumers Legal Remedies Act, and the unfair and fraudulent and unlawful prongs of California's Unfair Competition Law.

According to the suit, the packaging and marketing on the infants' product misleads consumers into thinking it is specially formulated and therefore deceives them into paying more than the cost of the children's version, even though they have the exact same level of the active ingredient.

The judge said both products in bold lettering state they contain 160 milligrams of acetaminophen per five milliliters, and are "distinguished by the depictions of the dosing mechanism," with the infant version showing a syringe that states the product should be used "only with enclosed syringe," while the children's product displays a dosing cup.

Eidmann said in the complaint that "the formulation of the two medicines is entirely identical" but the children's version costs nearly four times more, and selling the two products separately with different pricing is "unfair, unlawful, and deceptive."

Walgreens argued that Eidmann cannot show that a reasonable consumer would be deceived by the product, and cited a similar case brought against CVS Pharmacy Inc. also in the Northern District of California that was dismissed in November.

The judge in that case, *Lokey v. CVS Pharmacy Inc.*, said the packages clearly labeled the dosing amount in bold lettering and showed depictions of different dosing mechanisms, Judge Davila said in Friday's ruling.

"Thus, the infant specific branding is less suggestive of a formulation specially designed for infants, as Eidmann alleges, rather it more reasonably pertains to the infant-specific dosing mechanism included to administer the product," the judge said in relation to the fraud claims under the FAL, CLRA and UCL.

Citing standards established in the Ninth Circuit's *Ebner v. Fresh Inc.* ruling, the judge said it is not plausible that a "significant portion of the general consuming public" would be misled into believing the infants' product is specifically formulated for infants.

Counsel for the parties did not immediately respond to requests for comment.

Walgreens is not the only company to face allegations of duping customers into paying a higher price for infants' pain reliever medicine.

Aside from the CVS case, Dollar General reached a deal earlier this month to end false ad claims that it sold an infant pain reliever at three times the price as its chemically identical child version, and agreed to a \$1.8 million fund to reimburse customers and an injunction not to sell the product without clearer labeling.

Prestige Consumer Healthcare Inc. was also hit with similar allegations in November, while Johnson & Johnson announced a \$6.3 million deal in 2019 to resolve class claims that the company tapped into the anxieties of new parents to mislead them into paying more for Infants' Tylenol containing the same medicine as Children's Tylenol.

Eidmann is represented by Gillian L. Wade, Sara D. Avila and Marc A. Castaneda of Milstein Jackson Fairchild & Wade, and Hank Bates and David Slade of Carney Bates & Pulliam PLLC.

Walgreens is represented by Renée D. Wasserman, Alecia E. Cotton and Emily A. Wieser of Rogers Joseph O'Donnell.

The case is *Cameron Eidmann v. Walgreens Co.*, case number 5:20-cv-04805, in the U.S. District Court for the Northern District of California.

--Additional reporting by Mike Curley and Lauren Berg. Editing by Ellen Johnson.