

A Dose of Relief: Federal Judge Dismisses Walgreens Infant Acetaminophen Class Action

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Judge Edward Davila of the U.S. District Court for the Northern District of California recently dismissed with prejudice a putative class action alleging Walgreens misled consumers into believing its store-brand Infants' Pain & Fever Acetaminophen is specially formulated for infants. In dismissing the suit, the court found the product's labeling would not be likely to confuse reasonable consumers. [*Eidmann v. Walgreen Co.*, No. 20-cv-04805-EJD \(N.D. Cal. Feb. 26, 2021\)](#).

The court noted that in 2011, in an industry-wide effort to prevent accidental infant overdoses, acetaminophen manufacturers reduced the concentration of liquid acetaminophen in infants' products to conform to that in children's products. As a result, Walgreens' store brand Infants' Pain & Fever Acetaminophen (the "Infants' Product") and Children's Pain & Fever Acetaminophen (the "Children's Product") both contain, and disclose, a concentration of 160 mg acetaminophen per 5 mL of product. The products are distinguished by depictions of the dosing mechanism; while the Infants' Product displays a drawing of a syringe with the instruction to "Use only with enclosed syringe," the Children's Product displays a dosing cup. The Infants' Product displays an age range of 2-3 years, while the Children's Product states it is for ages 2-11.

According to plaintiff, by selling the Infants' Product and Children's Product as two separate products, Walgreens misled consumers into believing the Infants' Product is specially formulated for infants. Plaintiff alleged this deceived consumers into paying a price premium, even though the products have the same concentration of active ingredient. Based on these allegations, plaintiff asserted Walgreens violated California's FAL, CLRA and UCL.

The court dismissed plaintiff's claims based on its finding that no reasonable consumer would understand the Infants' Product to be specially formulated for infants. In reaching this conclusion, Judge Davila relied heavily on another recent case out of the Northern District, [Lokey v. CVS Pharmacy, Inc.](#) In *Lokey*, the plaintiff alleged CVS's store-brand infant acetaminophen deceives reasonable consumers into believing that the product is specially formulated for children under two, as compared to its children's product. The *Lokey* court assessed the two products' packaging, noting that the front labels clearly disclose that the medicines are compositionally the same. Because of these clear disclosures, depictions of differing dosing mechanisms and images of children of differing ages could not plausibly suggest different formulations. The *Lokey* court therefore found that the labels were not likely to mislead a reasonable consumer.

Like in *Lokey*, Judge Davila observed that the acetaminophen concentration on both the Infants' Product and Children's Product was prominently listed in bolded lettering as "160 mg per 5mL" on the front of both packages. The concentration was also listed in bold lettering and in highlighted text in the "Drug Facts" section on the back of the products. In light of the clearly disclosed concentrations, the court found the depictions of differing dosing mechanisms on the product packaging would not mislead a reasonable consumer into believing the products have different formulations. Instead, Judge Davila found the infant-specific branding "more reasonably pertains to the infant-specific dosing mechanism included to administer the product."

The court also noted that the labeling for Walgreens' Infant Product and Children's Product displayed overlapping age ranges (2-3 years and 2-11 years) – allowing a consumer to readily compare the products and find not only that they contain the same acetaminophen concentration, but also that they can be used by children of identical ages.

This case serves as an important reminder that theories of deception grounded only in a plaintiff's unsupported assumptions are ripe for dismissal – especially when directly contradicted by reasonably prominent disclosures in the advertising itself. This case also highlights how advertisers seeking to reformulate products—often to improve them or make them safer for consumers—need to consider carefully whether doing so could somehow spur a class action from an overreaching plaintiff.

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