

## Brewers Beware

### Article #9 of Hopping on the Brewery Bandwagon Series

The recent wave of litigation surrounding misrepresentation and deceptive advertising claims by alcohol companies has swept up the large American brewer MillerCoors LLC ("MillerCoors"). The lawsuit against MillerCoors serves as an important reminder to brewers of all sizes that their advertising matters, including what they put on their beer labels.

Recently, there has been an increase in class-action lawsuits against distilleries by plaintiffs claiming they were misled by labels indicating the distillers' alcohol is "handmade" or "handcrafted." Maker's Mark, Tito's Handmade Vodka and Jim Beam (or their parent companies) are all facing such claims in various jurisdictions across the country. In early May, a federal district court in Florida considering false advertising and misrepresentation claims pending against the parent company of Maker's Mark whiskey dismissed the case, finding that the plaintiffs were "unable to articulate a consistent, plausible explanation of what they understood 'handmade' to mean" as applied to liquor produced in small batches and then mass-marketed across the country. *Salters v. Beam Suntory, Inc.* Addressing the plaintiffs' argument that Maker's Mark used its "handmade" label in a misleading way to liken its product to increasingly popular craft beers, the court found that even if the whiskey maker's use of "handmade" was "some ill-defined effort to glom onto a trend toward products like craft beer[,] the statement is the kind of puffery that cannot support claims of this kind."

The suit against MillerCoors—based on several California laws (e.g., deceptive and misleading advertising, unfair competition, etc.)—alleges that MillerCoors misrepresented its Blue Moon brand of beer as a craft beer or microbrew. Also, the suit alleges that MillerCoors misrepresented or omitted facts relating to MillerCoors and Blue Moon Brewing Company, such as misrepresenting who actually brews the Blue Moon sold in stores. As a result, according to the complaint, consumers purchased Blue Moon when they "would not have otherwise purchased it, or would have only bought it at a lower price." The plaintiff notes in the lawsuit that he and others are willing to pay a premium for "high quality, small batch, craft beers." Further, he alleges that consumers pay \$2.00 to \$3.00 more for a six pack of craft beer, rather than a "six pack of macrobrewed, or mass produced beer."

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The plaintiff, Evan Parent, a self-proclaimed "beer aficionado and home-brewer," frequently bought Blue Moon beer believing it was a craft beer. His belief stemmed from Blue Moon's advertising that it was a craft beer, "its placement among other craft beers," and its premium price. It was not until Parent's friends informed him that Blue Moon was mass produced and he confirmed these facts himself that he realized Blue Moon was not the craft beer he thought it was.

Just who is a craft brewer according to Parent? He cites the Brewers Association's— whose purpose is to "promote and protect American craft brewers, their beers and the community of brewing enthusiasts"—qualifications to be an American craft brewer. According to Parent's complaint, those qualifications include such requirements as (1) producing "less than six million barrels of beer annually;" (2) being "less than 25 percent owned or controlled by a non-craft brewer;" and (3) making "beer using only traditional or innovative brewing ingredients."

Parent points out that MillerCoors does not fit this description. MillerCoors, according to Parent, barrels billions of gallons of beer annually and has several breweries nation-wide. Parent acknowledges that Blue Moon Brewery Company is a small brewery in Coors Field. However, Parent goes on to note that the Blue Moon beer sold in stores is not brewed by this company. That beer, Parent alleges, is being manufactured by several of MillerCoors' breweries, along with several other MillerCoors brands, across the United States.

Parent's lawsuit states MillerCoors goes to "great lengths to disassociate Blue Moon beer from the MillerCoors name." For example, MillerCoors does not appear on the Blue Moon bottle, nor is there a MillerCoors reference on the Blue Moon website. To be fair, Parent states that Blue Moon does appear on the MillerCoors' website. In addition to alleging that MillerCoors fraudulently claims that "Blue Moon is brewed by Blue Moon Brewing Company," he states that MillerCoors uses the trademark "artfully crafted" to "falsely portray Blue Moon as a craft beer." MillerCoors use of "false and deceptive marketing," Parent alleges, misleads consumers and allows MillerCoors "to charge up to 50% more for Blue Moon beer than it charges for other MillerCoors products." Thus, according to Parent, MillerCoors obtains the benefits of having a major top selling beer, "while at the same time avoiding the loss of sales that would undoubtedly come with" Blue Moon being a "macrobrew and/or a MillerCoors beer."

Unsurprisingly, since Parent brought this suit as a class-action, the stakes for MillerCoors are large. MillerCoors recently removed the case to federal court



based in part on the fact that the damages, without attorneys' fees, exceed \$5 million.

It will be interesting to see what strategy MillerCoors takes with regard to Parent's lawsuit. MillerCoors does not have to respond to Parent's lawsuit until July 13, 2015. It is still to be seen whether MillerCoors will take a similar approach to Maker's Mark and attempt to have the case quickly dismissed.

Although this lawsuit concerns a large American brewer, it should not be taken lightly by smaller brewers. The big takeaway of this lawsuit is that brewers of all sizes need to be careful about what they put on their beer labels and how they advertise their beers more generally.

If you would like to know more about how advertising and labeling laws can affect you, please contact your Reinhart attorney or any member of the firm's Food and Beverage Team. Reinhart's Food and Beverage Team can provide you with consulting and litigation expertise relating to FDA regulations, food labeling and packaging compliance, food recalls, food safety issues, supply chain analysis and much more. Finally, Reinhart's Food and Beverage Team is part of a full service law firm that can ensure all aspects of your business are addressed when working with Reinhart.

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