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Marketing Class Action Lawsuits

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Marc Sorini

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Basic Legal Background

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False Adv'g Law

- Federal false advertising law (Lanham Act)
- State analogs
  - False advertising & deceptive practice statutes
  - Unfair trade practice statutes
- Common law claims

Class Action

- Permit small claimants to aggregate claims
  1. Numerosity
  2. Commonality
  3. Typicality
  4. Adequacy
- Claims driven by the plaintiffs bar

History of the Current Litigation Wave

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- Beginning in the mid-2000s, plaintiffs began targeting (non-alc.) food and beverage producers and marketers
  - Initially most of these suits challenged claims like “all natural ingredients” or “no artificial ingredients”
  - Northern District of California – “The Food Court”
- Cases targeting the alcohol beverage industry began gathering steam in 2012-13; favorite targets to date
  - Foreign beer brands actually produced in the U.S.
  - “Craft” spirits actually contract produced, “mass” produced, or otherwise allegedly not entitled to “craft” imagery and claims

Defining the Cases

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They have in common . . .

- Consumer plaintiffs
- Seek class certification
- Allege deception due to
  - Labeling; and/or
  - Advertising
- Seek substantial monetary awards
- Request trial by jury

Notable differences . . .

- Filed in many different jurisdictions (CA, FL, IL, MA, NY, etc.)
  - Most in CA, FL second
- Both state and federal courts (some removed)
- Statutory claims, common law claims, and combination of both asserted

Important Note on Litigation Posture

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- Most decisions to date decided as a matter of law at the Motion to Dismiss (12(b)(6) in federal parlance) stage
- A few of the Tito's Handmade cases have made it as far as Summary Judgment
- No final trials on the merits or jury verdicts to date
- No decisions on the merits on appeal yet
- Some cases have settled

“Handcrafted” and “Crafted” Cases

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- Marker’s Mark “handcrafted” cases
  - *Nowrouzi* (CA) and *Salters* (FL)
  - Motions to dismiss granted
- Jim Beam “White Label” “handcrafted” case
  - *Welk* (CA)
  - Motion to dismiss granted
- Blue Moon “artfully crafted” case
  - *Parent* (CA)
  - First motion to dismiss granted (motion pending regarding amended complaint)

"Handcrafted" and "Handmade" Plus Cases

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- Tito's Handmade cases ("handmade" plus "made old fashioned pot stills" and other claims)
  - Group 1: *Hofmann* (CA) and *Cabrera* (CA)
  - Motions to dismiss and summary judgement denied – going to trial unless settled
  - Group 2: *Pye* (FL) and *Singleton* (NY)
  - Motions to dismiss denied in part
  - Group 3: *Wilson* (AL), *Emanuello* (MA), *Grayson* (NV), and *McBrearty* (NJ)
  - Voluntarily dismissed, stayed, or no decision yet

"Handcrafted" and "Handmade" Plus Cases

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- Angel's Envy case regarding "handcrafted" and geographic claims
  - *Aliano* (IL)
  - Motion to dismiss denied in part
- Templeton Rye cases regarding "handcrafted" plus geographic claims (Templeton, Iowa) and other claims (Al Capone's original recipe, etc.)
  - *Aliano* (IL)
  - Confidential settlement

Geographic Misdescription Cases

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- Beck's Beer case – German?
  - *Marty* (FL)
  - Motion to dismiss denied in part
  - Final settlement
- Kirin Beer case – Japanese?
  - *Oliva* (CA)
  - Motion to dismiss denied
  - Final settlement following mediation
- Red Stripe case – Jamaican?
  - *Dumas* (CA)
  - Pending

Geographic Misdescription Cases

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- Busch Beer case – “Made in U.S.A.”
  - *Nixon* (CA)
  - Pending
- Coors Light case – Rocky Mountains?
  - *Lorenzo* (FL)
  - Pending
- Guinness case – Irish?
  - *O’Hara* (MA)
  - Pending
- Foster’s case – Australian for Beer Mate?
  - *Nelson* (NY)
  - Pending

Other Cases

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- Bud Light Lime-a-Rita case – “Light”?
  - *Cruz* (CA)
  - Motion to dismiss granted
- Bulleit Bourbon case – “Bulleit Distilling Company”?
  - *M’Baye* (CA)
  - Motion to dismiss denied in part

Tentative Takeaways

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- COLAs and other regulatory compliance a very limited shield
  - We already knew that compliance with federal regulatory standards did not protect marketers from a *federal* false advertising action (affirmed by *Pom Wonderful*)
  - *State* "safe harbor" doctrines offer limited protection
    - Where marketers followed clear and specific regulatory guidance (*e.g.*, TTB "light" standard, TTB policy on trade names), safe harbor sometimes found to apply
    - Where marketers merely received a general approval (*i.e.*, a COLA) based on regulator's general jurisdiction over false or misleading statements, safe harbor defense generally not applied

Tentative Takeaways

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- "Handmade" or "crafted" *standing alone*, often found to be non-actionable "puffery"
  - A consumer cannot reasonably believe a nationally-available (perhaps any?) distilled spirit is literally made by hand
  - As to vague connotations that "crafted" may invoke, it is "the kind of puffery that cannot support claims of this kind" (*quoting Salters*)
- But such claims plus more specific claims ("made in old-fashioned pot stills") mostly proceed past Motion to Dismiss stage
- Large brands may fare *better* in "crafted"-type lawsuits, as consumer reliance deemed less reasonable

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Thank you for your time and attention!

Marc Sorini