

FOOD & BEVERAGE LITIGATION UPDATE

BEER + SPIRITS | TOP STORIES 2019

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LEGISLATION, REGULATIONS & STANDARDS

Hemp Not Allowed In Alcohol Beverages, TTB States

May 2, 2019

The U.S. Alcohol and Tobacco Tax and Trade Bureau (TTB) has issued an industry circular stating that it “will return for correction any applications for formulas containing ‘hemp’ ingredients (other than ingredients derived from hemp seeds or hemp seed oil)” until the U.S. Food and Drug Administration (FDA) indicates that the ingredients’ use would not violate the Federal Food, Drug, and Cosmetic Act. The circular, addressed to wineries, breweries, distilleries and importers, states that TTB consults with FDA on ingredients’ safety and notes that, despite the change in the definition for “marijuana” in the 2018 Farm Bill, “FDA stressed that food companies that wish to use cannabis or cannabis-derived ingredients in their foods are subject to the relevant laws and regulations that govern all food products, including those that relate to the requirements for food additive approval and substantiation of evidence for Generally Recognized as Safe (GRAS) status.”

Canada to Revise Beer Compositional Standards

June 20, 2018

The Canadian Food Inspection Agency has proposed changes to its compositional standards of beer, ale, stout, porter and malt liquor “to allow for innovation within the beer category while still preserving product integrity and to better reflect the tastes and needs of consumers.” The proposed amendments would update the definition of beer to allow the use of microorganisms beyond yeast in the fermentation starter culture and remove the requirement that the final product “possess the aroma, taste and character commonly attributed to beer.” In addition, herbs and spices would be permitted for use in product formulation, and beer would be limited to no more than 4 percent by weight of residual sugars to distinguish beer from malt-based beverages.

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"Suicyder" Complaint Upheld

November 15, 2019

The Portman Group, a U.K. alcohol industry self-regulatory group, has upheld a complaint against the Bearded Brewery for the name of its high-alcohol cider, Suicyder. A member of the public complained about the beverage name's reference to suicide, calling Suicyder "clearly irresponsible" because it purportedly targets young men—"the group at highest risk of suicide"—and uses associated iconography, such as the tagline "juice from the noose." The company asserted that the "name of the cider was based on a wordplay with the intention being to indicate the strength of the alcohol content" and explained that the tagline was a reference to the founders' previous work with the Forestry Commission that required them to use a noose to dismantle unsafe trees.

The panel was unpersuaded by tagline explanation, noting that "a consumer would have to understand this inside knowledge to displace the main connotation portrayed by the product name and imagery on the front label," which were "unequivocally creating a direct link to suicide." Agreeing with the complaint, the panel found the marketing "highly irresponsible" and concluded that "the product name 'Suicyder', when used in combination with imagery that depicted a hanging method of suicide, created a direct link between suicide, alcohol and dangerous behaviour." Bearded Brewery "decided not to work with the Portman Group advisory service to amend their product in line with the Panel's ruling," so Portman Group issued a retail alert bulletin requesting that retailers avoid placing orders for stocks of Suicyder after January 20, 2020.

Advertising Complaint Upheld Against U.K. Hemp Rum Co.

October 17, 2019

The U.K. Advertising Standards Authority (ASA) has upheld a complaint against The Cornish Rum Co. against its ads marketing Dead Man's Fingers Hemp Rum. The complainant asserted that two Instagram posts and an ad in a trade magazine used language linking the hemp-infused rum to cannabis, including "Delicious mixed with coke or ginger ale—serve chilled, man. Coming to a joint near you." Another Instagram post featured an image of an outdoor ad reading "Warning: Our Hemp Rum May Cause the Munchies" along with "an image of a skull which was smoking and wearing a hat with a cannabis leaf print." The trade magazine ad included the text "Dealers Wanted."

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Shook offers expert, efficient and innovative representation to clients targeted by food lawyers and regulators. We know that the successful resolution of food-related matters requires a comprehensive strategy developed in partnership with our clients.

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ASA dismissed the portion of the complaint arguing that the ad was intended to appeal to an audience under 18, finding that the images “were not references associated with youth culture and that overall the colours and imagery used gave each of the ads an adult tone.” The ad board took issue with the wording on the ads, however, finding unpersuasive the alcohol company’s arguments that the words used were not referencing cannabis because “joint” was “a slang term for a place or establishment,” “munchies” was “a slang term for hunger generally” and “dealers” was “used as a slang term for someone who bought or sold any goods or products.”

Further, the images had “a subversive feel”; the skull image “was smoking a cigarette, and, because of the cigarette’s shape, we considered it would be understood by consumers to contain cannabis.” ASA “concluded that because the ads featured imagery and wording associated with the illicit drug cannabis, the ads linked alcohol to illicit drugs and therefore breached the Code.” ASA also upheld the portion of the complaint challenging the use of the phrase “blow your mind,” finding that “alcohol ads must not imply that alcohol had therapeutic qualities” or cannot “be portrayed as capable of changing mood, physical condition or behaviour or as a source of nourishment.”

LITIGATION & TRADEMARK DISPUTES

“Grains Of Paradise” Lawsuit Dismissed

February 7, 2020

A Florida federal court has dismissed a lawsuit alleging that Bacardi U.S.A.’s Bombay Sapphire contains a botanical classified as an adulterant in the state. *Marrache v. Bacardi U.S.A.*, No. 19-23856 (S.D. Fla., entered January 28, 2020).

“Numerous class actions have greatly benefited society, such as *Brown v. Board of Education*, *In re Exxon Valdez*, and *In re Agent Orange Product Liability Litigation*,” the court’s decision began. “This is not one of those class actions.” The plaintiff “does not allege that the bottle of gin he bought containing grains of paradise caused him any health issues or other harm,” the court noted. “He instead alleges that the product was ‘worthless’ because it was adulterated with grains of paradise.”

The court found that the 1868 Florida law prohibiting grains of paradise in alcohol was preempted by federal regulations finding that the

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botanical is generally regarded as safe. The plaintiff argued that the 21st Amendment granted states the right to regulate liquor, but the court disagreed, finding that the Supreme Court has stated that the amendment “does not in any way diminish the force of the Supremacy Clause.” The court dismissed the complaint without leave to amend.

Anchor Brewing Asserts Rights to “Steam Beer” Trademark

May 17, 2019

Anchor Brewing Co. has filed an opposition against D.G. Yuengling & Son Inc.’s application to register “James River Steam Brewery” as a trademark, arguing that the proposed mark will confuse consumers familiar with its product Anchor Steam. *Anchor Brewing Co. v. D.G. Yuengling & Son Inc.*, No. [91247967](#) (U.S.P.T.O., opposition filed May 3, 2019). Anchor asserts that it owns the rights to use “Steam Beer,” which describes “an indigenous style of beer known as California common beer.” The use of “James River Steam Brewery,” Anchor argues, “is likely to create the false impression that Applicant’s goods are provided by, related to, endorsed by, or associated with Opposer.”

Lawsuit Challenges Alcohol Content in Kombucha

April 17, 2019

A consumer has filed a putative class action alleging that O Organics and Lucerne Foods Inc. “greatly understate” the alcohol and sugar content of their kombucha. *Freedline v. O Organics LLC*, No. 19-1945 (N.D. Cal., filed April 10, 2019). The plaintiff argues that “the beverages contain more than three to five times the alcohol allowed for non-alcoholic beverages” and “are sold to unsuspecting children, pregnant women, persons suffering with alcohol dependence issues, and a host of other people for whom alcohol consumption may pose a grave and immediate safety risk.” The complaint cites lab testing purportedly showing levels of alcohol by volume between 1.63 and 2.63 percent.

The plaintiff alleges violations of California’s consumer-protection statutes as well as breach of warranties, fraud, unjust enrichment and negligent misrepresentation, and he seeks class certification, damages, restitution and attorney’s fees.

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Court Dismisses Liquor Co.'s Suit Aiming for Approval to Market with Health Claims

August 22, 2019

A D.C. court has dismissed Bellion Spirits LLC's lawsuit aiming to compel the Alcohol and Tobacco Tax and Trade Bureau (TTB) to permit the company to market its products as containing "NTX, a proprietary blend of ingredients that they contend mitigates alcohol's damage to DNA." *Bellion Spirits LLC v. United States*, No. 17-2538 (D.D.C., entered August 1, 2019). TTB denied Bellion's application to make the health claims because it purportedly found inadequate substantiation after consulting with the U.S. Food and Drug Administration (FDA). Bellion filed suit, arguing that TTB could not work with FDA without express statutory authority. The court disagreed, finding that TTB has exclusive regulatory authority to make final decisions on alcohol, but nothing prohibits the agencies from consulting with each other. The court also dismissed Bellion's First Amendment argument, which maintained that its claims about NTX are true; the court noted that it must be deferential to TTB's finding that the claims are unsubstantiated.

In-N-Out Sends Brewer Cease-And-Desist For "In-N-Stout"

August 21, 2018

In-N-Out Burger has reportedly warned brewery Seven Stills that its forthcoming In-N-Stout beer violates the company's trademarks and trade dress. Seven Stills promoted the beer, a "Neapolitan milkshake stout," on its social media with a photo of a can featuring red lettering and a yellow arrow similar to In-N-Out's logo. The brewery also posted a photo of the cease-and-desist letter, encouraging viewers to "find the puns."

"Please understand that use of our marks by third parties ailes us to the extent that this could cause confusion in the marketplace or prevent us from protecting our marks in the future," the letter states. "We hope you appreciate, however, that we are attempting to clearly distill our rights by crafting an amicable approach with you, rather than barrel through this. ... Please contact us as soon as possible, so this does not continue to ferment. Thank you for your time and consideration, and we look forward to resolving this in good spirits."

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Defendant Distillery Wins Trademark “Bourbon War”

June 15, 2018

The U.S. Court of Appeals for the Sixth Circuit has affirmed summary judgment in favor of Peristyle LLC, finding that its use of the term “Old Taylor” falls under the Lanham Act’s fair use defense. *Sazerac Brands, LLC, v. Peristyle, LLC*, No. 17-5933/5997 (6th Cir., entered June 14, 2018). The “Old Taylor” mark references Colonel Edmund H. Taylor, Jr., who built the Old Taylor distillery in 1887, and although production at the facility ceased in 1972, Sazerac Brands owns the trademark rights to “Old Taylor” and “Colonel E.H. Taylor.” Peristyle was formed to renovate the medieval castle-style building, listed on the National Register of Historic Places as the “Old Taylor Distillery.” Although Peristyle has not resumed bourbon production at the facility, it has used the name “Old Taylor Distillery” in its marketing materials.

Noting that a defendant seeking shelter under the fair use defense must show use of the mark in a “descriptive or geographic sense” and do so “fairly and in good faith,” the court found that the “record confirms that Peristyle never used Old Taylor in a non-descriptive fashion.” As for good faith, the court found, “[a]ll along, the company recognized that the Old Taylor trademark belonged to Sazerac and that Peristyle would have to develop its own name to brand its products. Once it decided on a name, Peristyle’s fliers featured that name: Castle & Key.” The court also ruled that Sazerac’s false advertising claim failed, finding that Peristyle never made a “false or misleading” description or representation of fact.

Superpower Beer and Juice Can Coexist, TTAB Rules

August 7, 2018

The Trademark Trial and Appeal Board (TTAB) has dismissed The Wonderful Co.’s opposition to Comrade Brewing Co.’s application to register “Superpower” as a mark used in relation to beer. *Wonderful Co. v. Comrade Brewing Co.*, No. 91230877 (T.T.A.B., entered August 2, 2018). The Wonderful Co. uses its mark “Antioxidant Superpower” to describe its POM pomegranate juice, which it alleged will be sold in the same aisle as beer in some stores. TTAB was unpersuaded, finding that consumers are not likely to view fruit juices and beer as produced by a common source under one brand’s mark. TTAB also found the term “antioxidant superpower” to be “somewhat suggestive of the identified goods, and thus conceptually is somewhat weaker than an arbitrary mark.”

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Kombucha Sugar, Alcohol Claims Dismissed

September 18, 2018

Two California courts have dismissed lawsuits brought by a competitor alleging kombucha companies misrepresented the amount of sugar and alcohol in their products. *Tortilla Factory LLC v. Rowdy Mermaid Kombucha LLC*, No. 18-2984 (C.D. Cal., entered September 11, 2018); *Tortilla Factory LLC v. Better Booch LLC*, No. 18-2980 (C.D. Cal., entered September 13, 2018). In April 2018, Tortilla Factory filed several lawsuits alleging that a number of its competitors, including Rowdy Mermaid Kombucha and Better Booch, misrepresent the alcohol and sugar content in their beverages in violation of federal law.

The court in *Rowdy Mermaid* found that Tortilla Factory did not suffer an injury from Rowdy Mermaid's conduct; while the plaintiff argued that the companies are "vying for the same dollars from the same consumers," it failed to argue that "the two companies' products are sold in the same stores, through the same channels, or even in the same geographic areas," the court found. "Moreover, Plaintiff has not alleged facts supporting its claim that Rowdy Mermaid's allegedly inaccurate alcohol content labeling caused consumers to purchase Rowdy Mermaid products instead of those products by Plaintiff or other companies. The Court does not need to adopt the presumption that there are two separate markets—one for kombucha below 0.5% alcohol and one for kombucha with greater than 0.5% alcohol—in order to come to this conclusion." Further, the court found that the alcohol issue was "best reserved" for the Alcohol and Tobacco Tax and Trade Bureau.

The Better Booch court found that Tortilla Factory had standing to sue, finding a "presumed commercial injury" because the companies are direct competitors. Better Booch argued that Tortilla Factory failed to plead the heightened standard for misrepresentation allegations, and the court agreed for the sugar-content allegation—finding "information and belief" insufficient to support the claim—but disagreed on the issue of alcohol content. "Tortilla Factory alleges that it employed a third-party to utilize the headspace gas chromatography combined with mass spectrometry from a third-party lab to test Better Booch's product, and that this test indicated that defendants' product contained roughly four to five times the limit for beverages considered non-alcoholic," the court noted. "These allegations thus answer the 'who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false.'" Accordingly, the court dismissed without prejudice the allegation as to sugar content but allowed the alcohol-content claim to continue.

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MEDIA

Scotch-Production Rules Changing, Wall Street Journal Explains

June 28, 2019

The Scotch Whisky Association (SWA) will allow distillers to use a variety of casks—including those previously used to age tequila and fruit spirits—to age Scotch whisky during its required three-year maturation, according to the *Wall Street Journal*. Regulations previously limited acceptable casks to those previously used to hold sherry, cognac, bourbon or port. Some distillers told the news outlet that the change would allow companies to create “new flavor experiences” for Scotch whisky drinkers, while others expressed apprehension. “Scotch needs to be judged by its color, taste and traditionality,” a former chief executive of the SWA told *WSJ*. “Clearly if you then had a whisky that tasted of tequila—if it used an ex-tequila cask—it would not be a Scotch whisky.”

Advocacy Group Targets DJ Khaled’s Alcohol-Related Social-Media Posts

April 13, 2018

After advocacy groups asserted that DJ Khaled promotes alcohol brands to minors on social media, the music producer has reportedly reduced the number of his posts that mention alcohol. The complaint also alleged that Khaled failed to disclose his endorsement relationship with the brands, which include Diageo’s Ciroc vodka and Sovereign Brands’ Belaire sparkling wine. The contested posts include a Snapchat video of Khaled pouring alcohol into a bowl of cereal and an Instagram post featuring alcohol bottles displayed behind Khaled. Reportedly, many of Khaled’s followers are minors and he is the national spokesperson for educational nonprofit Get Schooled.

Several news sources reported that Khaled’s posts may violate federal law—including Federal Trade Commission rules governing branded content—and industry self-regulation standards, as the Distilled Spirits Council of the United States prohibits alcohol ads appearing on platforms in which at least 28 percent of the audience is under 21. Diageo, which reportedly ended Snapchat advertising after the U.K. Advertising Standards Authority ruled that Captain Morgan posts featuring a cartoon pirate appealed to minors, told news outlets that it was “working to ensure any issues are appropriately addressed.”



ABOUT SHOOK

Shook, Hardy & Bacon is widely recognized as a premier litigation firm in the United States and abroad. For more than a century, the firm has defended clients in some of the most substantial national and international product liability and mass tort litigations.

Shook attorneys are experienced at assisting food industry clients develop early assessment procedures that allow for quick evaluation of potential liability and the most appropriate response in the event of suspected product contamination or an alleged food-borne safety outbreak. The firm also counsels food producers on labeling audits and other compliance issues, ranging from recalls to facility inspections, subject to FDA, USDA and FTC regulation.



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