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Consumer Class Actions Against Liquor Producers Follow Familiar Path

by Thomas J. Cunningham & Simon A. Fleischmann

Plaintiffs' class action attorneys tend to follow trends. They are a savvy breed of attorney, at once creative and lazy (or efficient, depending on one's perspective). One attorney discovers a statute, claim, or industry, and if he or she has some success, the others pile on. For example, Congress passed the Telephone Consumer Protection Act (TCPA) in 1991, but TCPA litigation didn't really take off until about 2010. In the past five years, it has become a juggernaut.[1]

At about the same time the TCPA cases began to grow, the plaintiffs' bar began filing suits against food manufacturers based on claims that their products were "all natural" or "organic" as well as other claims made on labels and in marketing material. The number of food-labeling lawsuits has steadily grown over the years and has proven to be a reliable source of income for some attorneys.[2] Similarly, suits against the manufacturers of other types of products that make geographic origin claims have also grown significantly in recent years. Most notorious are California's "Made in the USA" regulations, which have led to numerous class-action cases and settlements.[3]

Genesis of Beer, Wine, and Spirits Class-Action Cases

In 2011, the plaintiffs' bar discovered the beer, wine, and spirits industry. A lawsuit accused the maker of Skinnygirl liquor, which was labeled as "all natural," of consumer deception. At least eight other suits asserting the same claim quickly followed. Those lawsuits generated few copycats. A suit filed in September 2014 in the Superior Court of California against Tito's Handmade Vodka, however, caught the attention of others in the plaintiffs' bar.[4] That original case led to several more being filed against the maker of Tito's, which in turn inspired suits against Templeton Rye Spirits.[5] The original Templeton case was followed by two more.[6] These three sets of class-action cases against the makers of Skinnygirl, Tito's Handmade Vodka, and Templeton Rye, which achieved a sort of "critical mass," received a fair amount of media coverage.

Through the fall of 2014 and into 2015, many more cases were filed against the makers of Whistlepig,[7] Tincup Whiskey,[8] Maker's Mark,[9] Jim Beam,[10] Angel's Envy,[11] Breckenridge Bourbon,[12] and others. Plaintiffs' lawyers targeted both large companies like Beam Suntory and small companies like Whistlepig. The products included rye, bourbon, and vodka. But the action was not limited to spirits companies. The makers of Kirin, Beck's, and Blue Moon beer were sued as well.[13]

The Issues Raised in the Beer, Wine, and Spirits Industry Class Actions

The issues in these cases focus on somewhat ambiguous and hard-to-define terms, including "handmade," "handcrafted," and "small batch." For example, lawsuits accused Tito's and Maker's Mark of mass producing

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products they describe as "handmade." Templeton was sued in part because it described its product as "small batch." The problem with these marketing claims is that, like the word "natural," they have no legally-defined meaning, and whether they have any commonly accepted meaning is subject to debate.

Other cases focus on claims of geographic origin, such as some of the lawsuits against the beer manufacturers. Anheuser-Busch was sued for implying that Beck's beer is imported from Germany and again for allegedly implying that Kirin beer is imported from Japan. The packaging and marketing of Beck's indicated the product "Originated in Germany" with "German Quality" while "Brewed under the German Purity Law of 1516." Plaintiffs alleged Beck's was in fact brewed in the United States and that these claims were deceptive.

Plaintiffs argue in these cases that the marketing messages cause consumers to pay more for the product than they would if they knew the truth. They claim that if consumers were aware that Tito's produces 500 cases per hour in its facility, or that Kirin is brewed in the United States, they would either not purchase those products or would pay less for them. Plaintiffs seek to recover the difference they claim in value between a product whose origins are fully disclosed, and the premium amounts allegedly paid based on deceptive claims.

Progress in the Litigation

The case against Kirin was settled. Anheuser-Busch agreed to place a statement on its label and packaging that reads: "Brewed under Kirin's strict supervision by Anheuser-Busch in Los Angeles, CA and Williamsburg, VA." In addition, class members could receive up to $50 each. Each class member filing a claim could receive:

- For each six pack of 12 oz. bottles or cans: $.50.
- For each 12 pack of 12 oz. bottles or cans: $1.
- For each individual bottle or can: $.10.

If the class member could provide proof of purchase, the class member's household could receive up to $50. Reimbursement is limited to $12 per household if the class member could not provide proof of purchase.

Several of the Skinnygirl class actions were also settled, but on an individual basis. In two of the cases, the court denied class certification because, among other reasons, there was no way to ascertain who would be a class member.[14] A court denied class certification in a third case on the basis of lack of typicality.[15]

Spirits defendants have generally litigated rather than settle. On March 18, 2015, the judge in the original Tito's case denied the defendants' motion to dismiss.[16] Tito's argued that the court should dismiss the case because the federal Alcohol and Tobacco Tax and Trade Bureau (the "TTB") had approved the label. TTB regulations prohibit false or misleading labeling.[17] TTB's approval, Tito's argued, meant that TTB had already found the label was not false or misleading, and the plaintiff could not challenge the TTB's decision in that regard. But the court ruled that the law did not require the court to defer to TTB's label approval. The court stated that Tito's had presented no evidence that TTB had "specifically investigated and approved" the "Handmade" claim.

Tito's also argued that no reasonable consumer could have been deceived about how vodka is produced, as alcohol consumers understand that production requires a still, and that a still could arguably be considered a "machine." But the court disagreed, reasoning that the distinction between an "old fashioned pot still" and a modern column still was a meaningful distinction, and one that a reasonable consumer might find significant when deciding to purchase a bottle of vodka.

In contrast, on May 1, 2015, a federal judge dismissed the complaint in *Salters v. Beam Suntory, Inc*.[18] The court found implausible the plaintiffs' claim that the term "handmade" misled them into purchasing Maker's Mark: "[N]o reasonable person would understand 'handmade' in this context to mean literally made by hand. No

reasonable person would understand 'handmade' in this context to mean substantial equipment was not used." The large-scale production necessary to produce Maker's Mark for the national market that it commands was of particular importance to the court in assessing the reasonableness of the plaintiffs' claims.

Future Battleground: Opposing Class Certification

Defendants may have more success opposing class certification in these cases than prevailing on motions to dismiss. Certainly that was the experience of Beam Suntory in defending the Skinnygirl cases. One significant impediment to certification in consumer fraud class actions is a plaintiff's ability to suggest an objective, feasible method by which class members can be identified, *i.e.* that the class is ascertainable. Courts have not universally embraced the U.S. Court of Appeals for the Third Circuit's *Carrera*[19] and *Marcus*[20] opinions, but the trend in most federal circuits is toward their approach to ascertainability. Plaintiffs in suits involving small-scale consumer products, such as beer, wine, or spirits, generally do not retain their purchase receipts—which *Carrera* and *Marcus* noted as being the most objective and verifiable proof of class membership. Courts that faithfully apply the ascertainability requirement in alcohol-product class actions should reject certification on that ground.

Not only will plaintiffs struggle to convince courts that class members can be identified, they face another tall hurdle: consumers do not purchase spirits for common reasons, a problem plaintiffs have been unable to overcome in class action cases involving other kinds of products.[21] For example, in *In re Pom Wonderful LLC Marketing and Sales Practices Litigation*, a judge in the Central District of California decertified a class of consumers that purchased pomegranate juice from the defendant, allegedly based on false claims made in advertising about the product.[22] The court denied the plaintiffs' motion for class certification primarily based on the absence of any records of who purchased the product:

> In situations where purported class members purchase an inexpensive product for a variety of reasons, and are unlikely to retain receipts or other transaction records, class actions may present such daunting administrative challenges that class treatment is not feasible.[23]

The court found that with regard to claims that consumers purchased Pom products based on the allegedly false claims in the advertising, no class could be ascertained. The court reasoned that: 1) "millions of consumers paid only a few dollars per bottle;" 2) "[f]ew, if any consumers, are likely to have retained receipts;" 3) "[n]o bottle, label, or package included any of the alleged misrepresentations" (all the alleged misrepresentations were in the advertising for the product); and 4) "consumer motivations" to purchase the product "likely vary greatly, and could include a wide variety of sentiments such as 'I was thirsty,' 'I wanted to try something new,' 'I like the color,' 'It mixes well with other beverages,' or even 'I like the taste.'"[24] Spirits defendants could—and should—utilize the same arguments in their suits.

Where Is Spirits Industry Litigation Headed?

If the numerous courts currently considering motions to dismiss in these cases rule in favor of defendants and cases are dismissed, plaintiffs will likely take those decisions to the federal courts of appeals, while defendants in cases where motions to dismiss are denied will likely seek to stay or delay their cases pending rulings in any such appeals. But if judges consistently deny the defendants' arguments for dismissal, expect to see either class-certification fights similar to those in the Skinnygirl litigation or class settlements. A trend toward class settlements will breed more litigation against the industry. Denial of certification in a few more cases will likely encourage the itinerant plaintiffs' class-action bar to move on to something else. After all, if these cases do not prove lucrative for them, they will not waste more time on them.

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Endnotes

[1] *See, e.g.*, Snell and Mino, *Telephone Consumer Protection Act Cases are on the Rise*, BloombergBNA Legal, Feb. 14, 2013, available at http://www.bna.com/telephone-consumer-protection-act-cases-are-on-the-rise/.
[2] *See*, *e.g.*, James D. Smith and Sara Ahmed, *When Is Food "Unlawful" Or Not "Merchantable"?: Court Ruling Further Confounds Labeling Suit Defendants*, Washington Legal Foundation Legal Backgrounder (Apr. 25, 2014), available at http://www.wlf.org/upload/legalstudies/legalbackgrounder/042514LB_Smith.pdf.
[3] *See, e.g.*, *Clark v. Citizens of Humanity, LLC*, No. 3:14-cv-01404 (S.D. Cal. Apr. 8, 2015) (order denying motion to dismiss first amended complaint).
[4] *Gary Hofmann v. Fifth Dimension, Inc.,* No. 37-2014-00031150-CU-NP-CTL (Superior Court of California—San Diego). The correct name of the company that produces Tito's Handmade Vodka is "Fifth Generation, Inc." The *Hofmann* case was subsequently removed to the U.S. District Court for the Southern District of California.
[5] The other Tito's cases include *Shalinus Pye and Raisha Licht v. Fifth Generation, Inc., et al.,*4:14-cv-00493-RH-CAS (N.D. Fla.); *Mario Aliano and Due Fratelli, Inc. v*. *Fifth Generation, Inc., et al.*, No. 2014 CH 16201 (Circuit Court of Cook County, Illinois) and *Mark McBrearty and Paul Cantilina v. Fifth Generation, Inc. et al.*, No. 2:14-cv-07667-SDW-SCM (D.N.J.).
[6] The original case was *Christopher McNair v. Templeton Rye Spirits, LLC*, No. 2014 CH 14583 (Circuit Court of Cook County, Illinois). The two subsequent cases were *Mario Aliano and Due Fratelli, Inc. v. Templeton Rye Spirits, LLC*, 2014 CH 15667 (Circuit Court of Cook County, Illinois) and *Ryan Glen Townsend and Timothy Douglas Seils v. Templeton Rye Spirits, LLC*, No. 05771 CV 048581 (Iowa District Court for Polk County, Iowa).
[7] *Mario Aliano and Due Fratelli, Inc. v. Whistlepig, LLC and Goamericago Beverages, LLC*, No. 2014 CH 18519 (Circuit Court of Cook County, Illinois).
[8] *Mario Aliano and Due Fratelli, Inc. v. Proximo Spirits, Inc.*, No. 2014 CH 17429 (Circuit Court of Cook County, Illinois).
[9] *Safora Nowrouzi and Travis Williams v. Maker's Mark Distillery, Inc.*, No. 14 CV 2885-JAH-NLS (S.D. Cal.) and *Salters and Waseem v. Beam Suntory, Inc. and Maker's Mark Distillery, Inc. d/b/a Maker's Mark*, No. 4:14cv659 RH CAS (N.D. Fla.).
[10] *Scott Welk v. Beam Suntory Import Co., et al.*, No. 3:15-cv-00328 (S.D. Cal.).
[11] *Mario Aliano and Due Fratelli, Inc. v. Louisville Distilling Company, LLC*, No. 2014 CH 17428 (Circuit Court of Cook County, Illinois).
[12] *George Cady, et al. v. Double Diamond Distillery, LLC d/b/a Breckenridge Distillery*, 2015 CH 03632 (Circuit Court of Cook County, Illinois).
[13] *Marty, et al. v. Anheuser-Busch Cos. LLC*, No. 13-cv-23656 (S.D. Fla.) (Beck's); *Parent v. MillerCoors LLC*, No. 2015-13913 (Superior Court of California, San Diego County) (Blue Moon); *Suarez, et al. v. Anheuser-Busch Cos. LLC*, No. 2013-33620-CA-01 (Circuit Court of the Eleventh Judicial Circuit of Florida) (Kirin).
[14] *Langendorf v. Skinnygirl Cocktails, LLC, et al.*, No. 11 cv 7060, 2014 WL 5487670 at *2 (N.D. Ill. Oct. 30, 2014) (citing *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2014)); *Stewart v. Beam Global Spirits & Wine, Inc.*, Civil No. 11–5149 (NLH/KMW), 2014 WL 2920806 at * 2 (D.N.J. June 26, 2014) (citing *Carrera v. Bayer Corp.*, 727 F.3d 300, 305–08 (3d Cir. 2013); *Hayes*, 725 F.3d at 354–56; *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592–94 (3d Cir. 2012)).
[15] *Rapcinsky v. Skinnygirl Cocktails, LLC*, No. 11 Civ. 6546(JPO), 2013 WL 93636 (S.D.N.Y. Jan. 9, 2013).
[16] *Hofmann v. Fifth Generation, Inc.*, No. 14-cv-2569 JM (JLB) (S.D. Cal.) (Docket No. 15).
[17] 27 C.F.R. §§ 5.34(a), 5.42(a).
[18] *Salters and Waseem v. Beam Suntory, Inc. and Maker's Mark Distillery, Inc. d/b/a Maker's Mark*, No. 4:14cv659 RH CAS (N.D. Fla. May 1, 2015).
[19] *Carrera v. Bayer Healthcare Corp.*, 727 F.3d 300 (3rd Cir. 2013).
[20] *Marcus v. BMW of North America*, 687 F.3d 583 (3rd Cir. 2012).
[21] *See e.g.,* Philip M. Busman, *et al.*, *Effective Tactics for Opposing Certification from Recent Food Labeling Class Actions*, Washington Legal Foundation Legal Backgrounder (Aug. 1, 2014) (available at http://www.wlf.org/upload/legalstudies/legalbackgrounder/080114Busman.pdf).
[22] No. ML 10-02199 DDP, 2014 WL 1225184 (C.D. Cal. Mar. 25, 2014).
[23] *Id.* at *6 (citation omitted).
[24] *Id.*

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