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Thomas Cunningham is Co-Chair of the Firm’s litigation department, the leader of the Firm’s class action practice group, and former member of the Firm’s Executive Committee. He focuses his practice on the representation of clients in both state and federal courts. Mr. Cunningham frequently engages in litigation involving breach of contract, breach of fiduciary duty, fraud, fraudulent transfers, and bankruptcy litigation. He has tried dozens of cases, and has argued on numerous occasions before the Illinois Appellate Court and United States Court of Appeals for the Seventh Circuit.

CLASS ACTION LITIGATION HAS FOCUSED ON CLAIMS BY SPIRITS PRODUCERS ON LABELS, WEBSITES, AND IN MARKETING CAMPAIGNS

Editor’s Note: This is one in a continuing series of Q&As with Locke Lord lawyers on key legal issues confronting companies engaged in industries that have national and global impact.

In some cases class action plaintiffs are making claims based on an allegedly incorrect statement on a label. Does TTB approval of a label protect a producer against claims based on the content of the label?

TJC: There is a good argument to be made that TTB approval of a label “preempts” a plaintiff’s state law claim that statements on the label are unlawful. Unfortunately, this is an untested argument. No court has yet ruled on a spirit producer’s argument that TTB approval of a label precludes a claim by a consumer that the label is unlawful. There is some concern that this argument will be rejected because the consumer’s claim is not based on the Federal Alcohol Administration Act but rather on state consumer fraud statutes. However, there are some good authorities in analogous situations involving different products and federal regulatory approval of labels that can be used to support this argument in the litigation against spirits producers.

What is the difference between claims made based on a label and claims based on non-label marketing?

TJC: One significant difference is the level of control the producer exercises. The producer is solely responsible for the content of the label. But many of the claims in the lawsuits relate to statements about the product that were made by third-parties such as retail stores, bars, and restaurants. Also, while a producer may be able to make a preemption argument for statements on a label approved by the TTB, no such argument can be made with regard to non-label marketing, such as statements made on a producer’s website or in social media marketing campaigns.

Are third-parties such as bars and restaurants potentially liable for allegedly misleading claims about beer, wine, and spirits?

TJC: It depends on the circumstances, but yes, that is possible. Producers should ensure their contracts with third-parties who may promote their products contain clear indemnification provisions in the event the third-party makes an unauthorized statement about the product that is later alleged to be false or misleading. Depending on the specific facts, this may not provide a defense against a plaintiff’s claim, but may provide a means of passing the cost of litigation or a settlement along to a third-party who was responsible for the statements at issue.

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What are some of the litigation trends involving producers of beer, wine & spirits, including trends against both large producers as well as the craft industry?

TJC: Unfortunately, the plaintiffs' class action bar tends to follow trends. Right now the trend is to sue spirits producers for making claims about their products that are hard to prove true or false. For example, the term "small batch" is not a term of art defined in any law or regulation. It means different things to different people. Similarly, portraying a product as "craft" opens the door to argument by people who disagree about what that means. Several products are under fire for being described as "handmade." Any time there is room for argument about what such a term means, plaintiffs' lawyers will argue that their clients were misled.

What other words can get a producer into trouble in a class action lawsuit?

TJC: The recent class actions have focused primarily on the words "handmade," "small batch," and "made in." Use of those terms on labels and in marketing will likely continue to result in lawsuits being filed against spirits producers unless and until a company obtains a ruling in one of the cases that such a term is not deceptive or misleading. And even if a court makes such a ruling, it may be limited to the particular circumstances surrounding that particular product.