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Spirits Industry Under Fire:

What You Need to Know
About Class Action Litigation

by Thomas J. Cunningham and Simon A. Fleischmann

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Most players in the spirits industry are aware of the current wave of class action litigation filed against several companies. Starting in mid-2014, plaintiffs' class action attorneys filed a number of high-profile cases against Tito's Handmade Vodka, Templeton Rye Whiskey, and the makers of Tin Cup bourbon and Angel's Envy. No one was safe – from major brands like Jim Beam and Maker's Mark to start-ups like Whistlepig and Breckenridge, the plaintiffs' lawyers seemed to be everywhere. Cases were filed in state and federal courts across the country, from major venues in Southern California, Florida, and Chicago to much lesser known venues like Des Moines, Iowa.

Why were these cases filed? How and why were these particular defendants selected? What are these plaintiffs complaining about? How are the courts dealing with these cases? How are the defendants responding? How should your company respond if you become a target? And more important, how can you avoid becoming a target in the first place?

This booklet answers these questions and more, including how class action litigation works and what motivates the plaintiffs' class action bar. Understanding why these cases were filed and how they are being handled in court will help you better avoid becoming a target, and if you become a target despite your best efforts to avoid it, will put you in the best position to exit expensive and potentially ruinous class action litigation with the least amount of pain possible.

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Part 1

WHERE DID THESE CASES COME FROM? Historically, plaintiffs class action lawyers get ideas for new claims from a variety of sources: state attorney general investigations, FTC consent judgments, investigative journalism, regulatory agency warning letters, their own imagination, and commonly what we will refer to as the “herd mentality” where the filing of one case leads to copycat cases against the same or other similar defendants. We believe this particular set of cases developed under the herd mentality.

As you will see, plaintiffs’ class action attorneys thrive on ambiguity.

In 2011, a plaintiff named Christopher Rapcinski filed a lawsuit against Beam Suntory, the owner of the Skinny Girl brand. The original case was quickly followed by eight more cases. The Skinny Girl cases arose out of a series of cases unrelated to the spirits industry regarding claims that food and beverage products were “all natural.” The Food & Drug Administration does not regulate the term “natural” or provide any definition for it. As you will see, plaintiffs’ class action attorneys thrive on ambiguity.

What does it mean for a product to be “all natural”? Plaintiffs class action attorneys love such terms. First, the word “all” means everything, 100%. Not one molecule of this product is “unnatural.” If they can find even a single molecule that is not “natural,” they can claim that consumers were misled into purchasing the product, and that they overpaid for it. Second, the word “natural” is open to interpretation. Just what is “natural” and what isn’t is subject to argument, which is why the FDA doesn’t define it. Unfortunately, that failure to define the term is what leads to litigation.

Most of the Skinny Girl cases have been resolved. A couple of those cases survive today and their future is uncertain.

The Skinny Girl litigation led to a lawsuit against the company that owns the Tito’s Handmade Vodka brand, Fifth Generation, Inc. in 2014 in San Diego, California. Unlike the Skinny Girl case, the plaintiff in the Tito’s case did not argue that the product was not 100% natural; Tito’s made no such claim. However, Tito’s includes the word “Handmade” in its name and its name is prominently featured on its label and in all its marketing material. The plaintiff alleged that the Tito’s product is not “handmade” at all, but rather in massive column stills, to the tune of 500 cases an hour. As one reporter quipped: “that’s a lot of hands.”

Similar to the Skinny Girl cases, however, the plaintiff argued that he paid a premium for Tito’s vodka based on his belief that he was purchasing a “handmade” product that was not in fact “handmade.” Had he known the product was not truly “handmade,” he argued, he would have paid less or bought something else.

Again the herd mentality kicked in and several additional cases were filed against Fifth Generation, repeating the allegations of the first case. The plaintiffs' class action attorneys were lining up at the trough to be fed.

Plaintiffs' class action attorneys by and large don't care whether your product is truly "handmade" or made in "small batches" or is "craft."

Some producers of craft spirits may be smugly thinking to themselves that Tito's is getting what it deserves. After all, many craft producers are rightly concerned that mass producers of products masquerading as "craft" are unfairly competing, and they may be quietly (or not so quietly) cheering the plaintiffs in these cases. They would be wise to not be so smug.

Plaintiffs' class action attorneys by and large don't care whether your product is truly "handmade" or made in "small batches" or is "craft." They trade in what is essentially blackmail and terrorism. If they have a basis for alleging that your product is *not* what you claim it to be, even if you fervently believe that it is, they will sue you. Very few cases go to trial. Especially class action cases, which can easily kill a company. They have the power to put you out of business simply by making a claim. Therefore, you are likely to pay them to simply drop their claim, even if it's bogus.

Following the initial Tito's case, the plaintiffs' bar shifted its focus from vodka to whiskey, starting with a fast growing rye: Templeton Rye. Templeton Rye is made using MGP 95/5 rye whiskey as its foundation, to which a proprietary formula is added to match the flavor profile of the original recipe used by a family in Templeton, Iowa during prohibition, and cut to proof in Iowa using Iowa water. Despite the fact that Templeton featured a "lifecycle" video on its website, shot in part on site at the MGP distillery in Indiana, the plaintiff contended that Templeton's claim that its product was "produced and bottled in Iowa" was deceptive.



Both the Tito's case and the Templeton case generated a significant amount of media attention, including articles in Forbes magazine and USA Today. The media attention on the Tito's and Templeton cases quickly led not just to copycat cases against each of the companies that produce those products, but also against a number of other producers of bourbon and rye whiskeys.

But the type of spirit is immaterial. Plaintiffs are focused on ryes and bourbons at the moment *only because those spirits are currently very popular*. These are high growth products, which means many people are purchasing them, which in turn increases potential class sizes, the amount of potential class settlements, and, of course, the attorneys' fees plaintiffs' attorneys hope to recover. It would be a mistake to think you will not be the focus of a plaintiffs' attorneys' attention because you don't produce a vodka, rye or bourbon.



Part 2

WHAT ARE THESE CASES ABOUT? Plaintiffs' class action attorneys thrive on ambiguity in terms. If they can plausibly argue that consumers believe a term means one thing when the producer intended it to mean something else, they have a good case that they can file in court and use to force an *in terrorem* settlement. Many terms are subject to interpretation and might mean different things to different people.

Many terms are subject to interpretation and might mean different things to different people.

What does it mean to say a product is "handmade?" The plaintiffs in the cases against Maker's Mark and Jim Beam say you can't claim the product is handmade if a machine was involved in the process at all. But a still is arguably a "machine." And you can't distill a spirit without a still. So does that mean that no distilled spirit can ever be accurately described as "handmade" or "handcrafted?" Does it matter whether the still involved is a pot still or column still? One of the primary arguments plaintiffs make in the Tito's case is based upon the volume of product produced by Tito's column stills. Does it matter how much volume is produced?

In the Templeton case, plaintiffs argue that Templeton falsely claims that its product is "made in Iowa" and that it is produced in "small batches." But Templeton buys whiskey from MGP and ships it to Iowa, where it is finished with a proprietary flavor specifically engineered to match the flavor profile of the "rye whiskey" produced in the Templeton, Iowa area during prohibition. These ingredients are agitated in a small vessel with Iowa water to create the finished product known as "Templeton Rye," all in Templeton's facility in Iowa. So is it true or false that the product is "made in Iowa"? Does it matter that Templeton describes the entire process on its website in a video shot in part on site at MGP in Indiana?

While an attorney might hire an expert witness to offer a court an opinion about what "small batch" means in the spirits industry, the other attorney will have no difficulty hiring an equally knowledgeable expert to testify that it means something else.

Just like the term "natural," no one regulates the term "small batch." And just like the plaintiffs' exploitation of the word "natural" in the Skinny Girl litigation, they are able to exploit the term "small batch" in cases against the producers of spirits. While an attorney might hire an expert witness to offer a court an opinion about what "small batch" means in the spirits industry, the other attorney will have no difficulty hiring an equally knowledgeable expert to testify that it means something else. Which means the only way to resolve the issue is to present the testimony to a jury.

These are all issues the courts will need to consider in these cases, assuming they are not settled. Which is not a safe assumption. In fact, nearly all class action cases are settled, because the cost of settlement is usually far lower than not just the potential exposure in the case, but even the cost to defend them. If it costs more to litigate and win than it does to settle, most defendants will elect to settle. This is especially true if the defendant can settle while saving face by neither admitting nor denying the allegations of the plaintiffs, a common provision in class settlement agreements. Moreover, defendants must consider the damage done to their brands as litigation wears on. Even if they win the case, they suffer a black eye in the media and possibly with their customers. Plaintiffs' class action attorneys know this and exploit it.



Part 3

WHO IS DRIVING THESE CASES? Plaintiffs' class action attorneys are either inherently lazy or extremely efficient, depending on your perspective. For most of them, the goal is to maximize their fees by expending the least amount of effort. They are a creative breed of attorney, but after one comes up with a legal theory that pays off, others will tend to simply file copycat cases and "paint by numbers" to receive their reward.

If these cases are settled with any significant amount of attorneys' fees recovered, many more cases will likely follow.

Although not the first to file one of these cases, one attorney in particular has filed more cases than any other. Thomas Zimmerman is a plaintiffs' class action attorney in Chicago, Illinois. Chicago is the home of numerous notorious plaintiffs' class action attorneys. This is primarily the product of a number of well-established plaintiffs' class action firms that, over the years, have turned out lawyers who left those firms to start their own, spreading like a cancer.

Zimmerman was trained by Robert Holstein, the name partner in the Chicago firm of Holstein, Mack & Klein, a firm infamous for its handling of numerous high profile class action cases, including the litigation that followed in the wake of the Chicago Flood, silicone breast implant cases, and numerous others.

Zimmerman represents Mario Aliano and Mr. Aliano's restaurant, Due Fratelli. Aliano and his restaurant claim to have purchased a number of different brands of liquors – both individually for personal consumption as well as for resale in the restaurant. Zimmerman has sued Templeton, Whistlepig, Angel's Envy, and Tin Cup on behalf of Aliano and Due Fratelli. Mr. Aliano and his restaurants are what we call "serial plaintiffs;" they act as Zimmerman's plaintiffs and class representatives in numerous class actions and generally receive an incentive award of a few thousand dollars in the resulting settlements. In terms of sheer number of cases, Zimmerman is the leader.

Big settlements are like blood in the water – they will attract more sharks.

But he's hardly alone. Well-known plaintiffs' class action firms in California and Florida have filed a number of cases. Both are preferred states for plaintiffs' class action attorneys. Generally these states have courts that are considered favorable for plaintiffs, a reputation that is earned but not always true. Cases have also been filed in more "out of the way" jurisdictions by less experienced firms, such as one of the cases filed against Templeton filed in Des Moines. The lawyers who filed that case have gotten a taste of these cases and recently filed one (in Chicago) against Double Diamond Distillery, the producer of Breckenridge Bourbon.

If these cases are settled with any significant amount of attorneys' fees recovered, many more cases will likely follow. Any spirits producer who uses ambiguous terms on its label or in its marketing will likely be a target. More plaintiffs' attorneys will join the frenzy. Big settlements are like blood in the water – they will attract more sharks. This isn't in the interest of the industry as a whole, but it's difficult for a particular defendant to weather the expense of litigating a case to a conclusion and avoiding putting that blood in the water when the case can be settled for less than it might cost to litigate.



Part 4

WHAT ARE THE PLAINTIFFS SUING FOR? Generally these cases are designed to support a large attorneys' fee award to the plaintiffs' counsel, which typically range anywhere from 20% to 40% of the value of the class relief. In other words, a plaintiff who negotiates a \$1,000,000 settlement can expect to receive \$200,000 to \$400,000 for his efforts. Before negotiating their fees, however, counsel first seeks to negotiate a settlement or win a judgment in court that creates a fund for distributing monetary relief to the class, either by way of a direct cash payment to consumers or the transfer of a cash equivalent.

In most cases, the plaintiff will begin by asking for "disgorgement" of all of the proceeds of a product sold by the defendant. In other words, everything you made selling that product. The good news is that most courts will find that this is gross overreaching. The bad news is that the plaintiffs have fallback positions. They may ask for disgorgement of the profit earned on the product. And if that fails, they'll simply say that without the deceptive marketing, the product would have sold for less, and will seek to recover the difference between what it actually sold for and what they claim it would have sold for absent the allegedly false term. They will produce an expert witness to offer an opinion as to that value.

Agreeing to label changes may be a valuable bargaining chip for defendants negotiating a settlement, because the content of the label is generally the basis for the lawsuit in the first place.

But cash isn't the only way to provide a class with relief. Plaintiffs' counsel also typically sue to force changes to the defendant's business and marketing practices. A plaintiff who negotiates for an agreement to change a label or marketing material will argue that those things have value to a class. In their view, they forced a defendant to stop deceiving consumers, and that has value. They will have an expert witness who will testify as to the value of this non-cash relief. Non-cash relief can be beneficial for the defendant as well – the greater the value to a class in a settlement, the more likely it will receive court approval. Court approval is required for all class settlements. Agreeing to label changes may be a valuable bargaining chip for defendants negotiating a settlement, because the content of the label is generally the basis for the lawsuit in the first place.

A third reason plaintiffs' counsel may be suing you is for respect and publicity. Acting as lead counsel in a class action can be a significant moment in a lawyer's career. He or she may be pursuing a case in order to gain respect from judges, develop bona fides as an experienced class action attorney for future cases, gain notoriety with public interest groups and trade associations, or assume an increased profile among other plaintiffs'

lawyers. Understanding the personality and goals of your adversary is critical to developing a strategy for exiting complex and expensive litigation.



Part 5

WHO IS A LIKELY TARGET? Any company that is producing a spirit and using an ambiguous term on its label or in its marketing is a good target for a plaintiffs' class action attorney. The following terms have already been the subject of existing cases:

- Natural
- Organic
- Handmade
- Hand crafted
- Hand bottled
- Small Batch
- Low volume
- Old fashioned
- Rare
- Unique mash bill
- Prohibition Era Recipe
- Craft
- Small and independent company
- Claims of geographic origin

Anything that suggests the product is unique will draw attention. Claims about the source of the ingredients in a product, if they are unusual, invite scrutiny. Also, claims that a particular product was designed or created by a famous personality, or in a particular state or locality, are often the basis for these lawsuits. Making these claims increases the likelihood you will be sued.

If you use any of these terms on your label or in your marketing, it doesn't matter whether you believe they are true or not; you are likely to be sued. If you elect to continue to use these terms in connection with your product, you should take the steps outlined in the following section to minimize the likelihood you are sued. You should probably also prepare yourself for the fact that despite those efforts, you may be sued anyway, and that the defense, or, more likely, settlement of that case will be a cost of doing business.



Part 6

HOW CAN YOU AVOID BECOMING A TARGET FOR A CLASS ACTION LAWSUIT? Be transparent. The more you explain how your product is produced, where its ingredients come from, and what you do with those ingredients, the less interest a plaintiffs' class action attorney will have in pursuing a claim that you were deceptive.

Avoid the trigger terms. If you describe your product as "hand crafted" or "small batch" you can expect a challenge. Be scrupulously forthright about your product's origins. If your product is produced in a particular locale but using components obtained from somewhere else, make that clear.

It helps to have your labels and advertising reviewed by an attorney familiar with the class action litigation being filed against the industry.

Consider seeking craft certification from a reputable industry organization such as the American Distilling Institute. While a plaintiff can easily argue that your product is not a "craft spirit" given the term's lack of any legal meaning, the plaintiff cannot argue that your product is not a "Certified Craft Spirit" if in fact it has received that designation. The standards established by ADI for craft certification provide an objective measure by which the product can be called "craft," and is thus capable of being proven true (unlike a more generic claim that your product is a "craft spirit.").



Confirm that you have solid, verifiable support for every claim you make about your product on the label and in your marketing materials – before you make the claim. Knowing where you cross the line between "puffery" or making a claim that is merely subject to interpretation and making a claim that is deceptive is an art, not a science. That line is fuzzy. A claim does not need to be outright "false" to be actionable in a class action case. If it tends to be misleading or deceptive, even if strictly true, a plaintiffs' class action lawyer will likely seize upon it and file a lawsuit.

When deciding whether to make a claim about your product that exists in the gray area of marketing terms, consider the cost of litigation relative to the value of making the claim in question. Often times you will find that the product will maintain its character even without the risky claim.

Always have your label and marketing materials reviewed by regulatory compliance counsel, but also seek input from your litigation counsel. It helps to have your labels and advertising reviewed by an attorney familiar with the

class action litigation being filed against the industry. Attorneys familiar with these cases can give you a fair appraisal of the likelihood you will be sued for use of various terms and descriptions, and can make suggestions to make the description of the product more transparent and less likely to draw a class action plaintiffs' attorney's scrutiny.



Review old labels to make sure they continue to accurately reflect your product and process as your business grows and changes, and switch up the content on your label from time to time. Regularly changing your label will make it more difficult for plaintiffs' lawyers to argue that a nationwide class has been equally exposed to the same alleged marketing practices for a period of years. The more you can differentiate among class members, the easier it will be to defend yourself against class claims.

Part 7

HOW DO PLAINTIFFS' CLASS ACTION ATTORNEYS WORK? Plaintiffs' class action law firms operate somewhat like a factory. Many of them have teams of lawyers whose entire job is to come up with new theories, research defendants, and develop claims. These attorneys do not practice law in the traditional sense, but rather manufacture class action litigation. They spend their days reading newspapers and scouring the internet for information that might support class action litigation. They brainstorm ideas and come up with theories. Then they engage in financial analysis to estimate the value of a potential case and how much effort they will need to make to make a recovery.

Plaintiffs are persuaded to serve as class representatives because in most cases it's easy money with no risk.

Next, these firms need clients to be the "face" of the lawsuits and to serve as "class representatives." They recruit these people in various ways. Some of them develop websites designed to drive interested individuals who purchased a particular product to the firm. They are extremely sophisticated in their use of internet and social media marketing, and will engage in search engine optimization designed to drive people to websites where they recruit plaintiffs. For example, searches on Google that use terms like "liquor," "spirits," or "whiskey" in combination with "lawsuit" or "case" or "class action" will result in hits for sites like "www.topclassactions.com", which are aggregation sites for plaintiffs' class action attorneys.



Top Class Actions created a nationwide Attorney Network to connect consumers interested in filing lawsuits to attorneys.

If you'd like access to the hundreds of complaints Top Class Actions receives on a monthly basis **create an account**. Don't miss out on the next big class action lawsuit submitted by Top Class Actions users. Top Class Actions viewers have already helped lead multiple class action lawsuits to successful outcomes, with multi-million dollar settlements in many cases.



Have a case in mind but don't have the clients? Advertise on Top Class Actions. List your class action lawsuit today.

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Please head over to our Advertising section for details on listing your settlement or lawsuit at Top Class Actions.

In addition, plaintiffs' class action attorneys utilize vast networks of clients and former clients, as well as referral networks made up of other attorneys. They issue e-mails seeking referrals of clients and seeking persons to agree to serve as class representatives. They issue newsletters setting forth the claims they are looking to bring and the companies they are looking to sue.

Plaintiffs are persuaded to serve as class representatives because in most cases it's easy money with no risk. Class action plaintiffs usually take no economic risk at all. Their obligations are very limited. They may be required to appear and answer questions under oath about their purchase of the subject product, but that's about it. In many, perhaps most, cases, they don't even do that much. They almost never have to go to court. In most class action settlements they receive an award in the settlement for their "service" as a

named plaintiff of anywhere from \$5,000 – \$30,000. They risk nothing, and do next to nothing for that money. Mr. Aliano and his restaurant, discussed earlier, are examples of class action plaintiffs that have an existing relationship with a class action attorney and act as plaintiffs in several cases as a way to gain some extra money with little to no downside.



Plaintiffs’ attorneys’ fees are usually paid by the defendant as part of the settlement of the lawsuit. However, the fees must be approved by the court. A typical class action settlement agreement provides that the defendant will not oppose the plaintiffs’ attorneys’ fee petition up to a set amount. It is up to the plaintiffs’ attorney to persuade the court that he or she provided significant value to the class that justifies the amount of the fees being requested. Typically this amount comes to anywhere from 20% to 40% of the value provided to the class, with most fee awards in the 30% range.

Thus, the plaintiff’s attorney will typically try to create a fund that is large enough to justify a fee award substantially higher than the actual value of the time the attorney put into the case. Occasionally the fees awarded to plaintiffs’ counsel in class action litigation are astronomical, as evidenced by a recent \$17 million fee award in a Telephone Consumer Protection Act case settled for \$75 million. Most class action cases are settled for single digit millions of dollars with plaintiffs’ attorneys fees usually around \$1 or \$2 million, but those fees can vary significantly based on the particular circumstances of a given case.

Why would anyone agree to pay a plaintiffs’ class action attorney millions of dollars in fees to settle a class action? Especially if they think they have a strong defense? Because of the high cost of litigation together with the huge potential exposure if the defense fails. Defendants in class action litigation can easily spend millions of dollars in fees to their own attorneys in

defending these claims. Defending these claims requires a large expenditure of time and effort by management as well as experienced class action defense counsel.

Class action litigation is distracting and creates a burden on a company's staff. For example, immediately upon being sued a defendant has an obligation to implement a hold on the destruction of documents and information, including e-mails, texts and electronically stored information. In most cases the defendant's IT staff will need to be intimately involved in the process of ensuring information is not destroyed. Rather than doing their jobs, company employees get bogged down dealing with the lawsuit.

Usually a company responds to a complaint with a motion to dismiss, but the preparation of that motion will require defense counsel to fully understand the company's product. Getting counsel up to speed on the facts and background is expensive, and the research and preparation of a motion to dismiss the lawsuit is also expensive and time consuming.

If that motion does not result in the termination of the case (and few do), the company will then become embroiled in lengthy and difficult "discovery", in which the plaintiffs' attorneys will ask (and be entitled to receive) detailed documents from the company, many of which will contain competitively sensitive information that the company's lawyers will need to go to court to protect.

Plaintiffs' counsel will be entitled to take depositions of company personnel, who will need to set aside their normal job duties to spend time with the company's counsel, preparing for depositions and then appearing to answer questions under oath.

Essentially, you can't win. If you get sued, you've already lost, unless you happen to have a very deep pocket. And even then, you still lose.

All of which leads to more motion practice in court. There are two ways to "win" a class action lawsuit if you are not successful in having the case dismissed. First, you can obtain what is called "summary judgment." If you can convince the court that there is no real issue about any of the facts, and that the undisputed facts require the court to rule in your favor as a matter of law, the case will be over. Unfortunately, this requires you to go through time consuming, expensive discovery first. And while it is not especially rare for a company to win summary judgment, it is also not especially common.

Second, you can defeat the plaintiffs' effort to certify a class. If a plaintiff is suing for disgorgement of the proceeds of the allegedly deceptive marketing, which the plaintiff argues is \$5 per bottle, and you have sold 1,000,000 bottles of your product, the exposure is \$5 million if a class is certified that consists of everyone who purchased those 1,000,000 bottles. But if the court

decides that the case is not appropriate for class certification, the plaintiff's damages are \$5. The case is a serious threat if a class is certified, and no threat at all if one is not certified. So even if you were to lose the case on its merits, if no class is certified you still "win."

Unfortunately, arguing in opposition to class certification normally requires the defendant to go through some painful and expensive discovery, though not always. In certain cases we are able to present pre-emptive strikes against class certification. However, the circumstances in which such a motion is appropriate are limited, and many courts find them inappropriate under any circumstances. In the first case filed against Tito's, for example, the court ruled that it was premature to consider whether a case was properly asserted as a class action on a pre-emptive motion to strike.

Because of the typically high potential exposure and the high cost to defend these cases, the plaintiffs' attorneys don't really need to win. All they have to do is survive that initial motion to dismiss and they will be in a position to use their leverage to negotiate a lucrative settlement.

Essentially, you can't win. If you get sued, you've already lost, unless you happen to have a very deep pocket. And even then, you still lose. Unless you can get the case dismissed at your very first "at bat" – on a motion to dismiss – you will spend a large amount of money to litigate the case, or a slightly lesser amount to settle the case. The risk of loss will almost always be such



that you will be able to settle for an amount that makes economic sense. This is why class action cases almost never go to trial. Defendants either win them on dispositive motions or settle them. Plaintiffs' class action attorneys understand the economics that drive defendant settlement behavior and they exploit that reality. It is a dirty business. But it is also the reality of the judicial system.

Part 8

WHAT DO YOU DO IF YOU ARE SUED?

First, don't panic.

Second, call an attorney who is experienced in defending companies sued in consumer class actions. If you can find someone who has experience with companies in the spirits industry, that will save you time and money in getting the attorney up to speed.

Third, you need to make a list of your priorities for resolving the case. Has the case received media attention? Is it likely to receive media attention? If so, protecting your brand may be the highest priority. You should consider working with a PR firm with experience in "crisis management." The advertising or marketing firm you typically use is probably not the right choice for this job. You may be getting calls from the producers of television or radio programs seeking a comment, or from influential blog posters. You need to be out ahead of that and have a solid plan for responding. A PR firm versed in crisis management knows how to help you craft that plan and have it ready in case you get that attention.

The strategy you decide upon will depend upon the strength of your defenses, your appetite for risk, and your ability to fund the litigation.

Your highest priority might be to minimize expense in responding to the case. But it might be to defend an attack on claims about your product at all cost. How important is it to continue making the claim that forms the basis for the lawsuit? Self-evaluate label content under scrutiny; can you prove it is true, and how expensive will it be to prove it? Are you open to changing your label or your website or marketing materials? Sometimes a case can be resolved relatively quickly with some modest changes that cost nothing and aren't significant to you.

Once you have established your priorities, you need to formulate a strategy to resolve the litigation. That should start with a complete evaluation of the plaintiffs' counsel – another reason to hire counsel experienced and familiar with these cases. What are the plaintiffs' counsel motivations? What is their track record? Are they able to fund protracted complex litigation? Are they working with attorneys general? These questions will help you strategize about how to approach the other side and pursue a resolution.

For example, the strategy may be to first attempt a motion to dismiss, then negotiate a settlement. Sometimes, particularly where the plaintiff has an inflated idea of what the defendant is worth, it makes sense to pursue a settlement strategy immediately, before you even respond to the complaint. In other cases you may be willing to fight for a while and invest in a motion for summary judgment or an opposition to a motion for summary judgment.

The strategy you and your attorneys decide upon will depend upon the strength of your defenses, your evaluation of opposing counsel, your appetite for risk, and your ability to fund the litigation. You will need intelligence about the jurisdiction in which you have been sued, the judge to whom your case has been assigned, and the attorneys representing the plaintiff. How you approach the defense of the case will need to be tailored to these unique circumstances. You will need to re-evaluate your strategy at critical junctures in the case, to ensure that it remains aligned with your priorities.

After determining your strategy for the litigation, your attorneys will come up with the tactics necessary to implement that strategy and achieve your goals. Litigation is always full of uncertainty, but the better you are able to define your priorities and establish a strategy, the more confidence you will have that the tactics your attorneys develop to achieve the goals necessary to implement the strategy will be successful.

Finally, you need to accept the reality of class action litigation. Yes, it is economic terrorism. Yes, it is disgusting to pay a plaintiff's attorney a huge amount of fees when you haven't done anything wrong. But it's a fact of life, and the sooner you swallow your anger and accept it as a cost of doing business, the sooner you can come up with the best plan to put it behind you.



Part 9

ABOUT THE FIRM. Locke Lord has earned a solid reputation in complex transactions, litigation and regulatory work. We serve our clients' interests first, and these clients range from Fortune 500 and middle market public and private companies to start-ups and emerging businesses. Through its wide-ranging international footprint, Locke Lord has received numerous industry recognitions as a global leader in the middle market sector.

Locke Lord's team builds collaborative relationships and crafts creative solutions to solve problems — all designed and executed with long-term strategic goals in mind.

Locke Lord's team builds collaborative relationships and crafts creative solutions to solve problems — all designed and executed with long-term strategic goals in mind. Among Locke Lord's many strong practice areas are appellate, aviation, bankruptcy/restructuring/insolvency, business litigation and dispute resolution, class action litigation, consumer finance, corporate and finance transactions, employee benefits, energy, environmental, financial services, fund formation, health care and life sciences, insurance and reinsurance, intellectual property, international, labor and employment, mergers and acquisitions, privacy and cyber security, private equity, public finance, public law, real estate, regulatory, REIT, tax, technology, telecommunications, venture capital, and white collar criminal defense and internal investigations.

Locke Lord has offices in Atlanta, Austin, Boston, Chicago, Cincinnati, Dallas, Hartford, Hong Kong, Houston, London, Los Angeles, Miami, New Orleans, New York, Princeton, Providence, San Francisco, Stamford, Washington, D.C. and West Palm Beach.

Part 10

ABOUT LOCKE LORD'S FOOD & BEVERAGE INDUSTRY GROUP. Locke Lord attorneys from practice groups across the firm have been serving the food and beverage industry for decades. We have experience with virtually all facets of the industry, from the seeds from which grains are grown to the restaurant business. We represent suppliers, manufacturers, wholesalers, dealers, and retailers. We represent industry participants in transactions, the provision of regulatory compliance advice, and in all manner of litigation.

Beer, Wine & Spirits

Locke Lord has significant experience in the Beer Wine & Spirits industry. From craft brewers and distillers to major industry participants to distributors and retailers, we represent all facets of the industry.

Consumer Fraud Class Actions

The food and beverage industry is under siege by plaintiffs' class action lawyers, whose creativity in creating claims knows no bounds. Whether the claims relate to products described as:

- Natural
- Handmade
- Organic
- Small Batch
- Made in the USA (or a particular state)
- GMO Free

or similar claims, our lawyers have experience in resolving such claims. Our class action litigators are well-versed in the strategic decision making that major class action litigation involves, including the management of multi-jurisdictional matters. We have significant experience in developing a strategy that takes into account our clients' most important concerns, which may not always be "win at all costs." But when the strategy is "win at all costs," we provide our clients with a desired outcome.

Product Recalls

Attorneys in the Food & Beverage Industry Group have counsel manufacturers with respect to product liability prevention, regulatory compliance and recalls, as well as product warnings and labels.

Part 11

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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 Managing Partner of the Firm's West Palm Beach office. He also leads the Firm's Food & Beverage industry group and is a former member of the Firm's Executive Committee. He focuses his practice on the representation of clients in consumer-related class action litigation in both state and federal courts. Tom frequently engages in litigation involving consumer fraud and cases based on a myriad of state and federal consumer protection statutes. 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..



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Simon Fleischmann is a class action defense attorney focused on cases concerning the retail and consumer-finance industries. He is a founding member of the Firm's Food & Beverage Industry group, and the Litigation Section Leader for the Firm's Consumer Finance practice group.



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