Seventh Circuit Remands after District Judge Makes Injunction Stickier in Light Beer Corn Syrup Dispute

Article By:

Lawrence I Weinstein

Carl Mazurek

The Seventh Circuit has remanded a lawsuit concerning beer advertising to the district court for failure to follow required procedures in issuing a preliminary injunction – the latest development in the case's torturous procedural history. On May 24, 2019, Judge William Conley of the Western District of Wisconsin issued a preliminary injunction banning Anheuser-Busch from suggesting in its advertising that Miller Lite and Coors Lite contain corn syrup. With an interlocutory appeal from the May 24 opinion pending, Judge Conley issued an opinion on September 4, 2019 modifying the injunction, and then on September 6, 2019, modified the modification. The September decisions were noteworthy for expanding the enjoined activity to encompass Anheuser Busch's use of packaging featuring the literally true statement "no corn syrup."

Anheuser-Busch launched the advertising campaign at issue during Super Bowl LIII with a television commercial featuring claims that Miller Lite and Coors Lite are "made with" or "brewed with" corn syrup. The campaign also included billboards and print ads stating that Bud Light has "100% less corn syrup"' than either rival brand, as well as Bud Light packaging prominently featuring the statements "no corn syrup" and "find out what's in your beer." MillerCoors argued that these ads deceive consumers into believing that Miller Lite and Coors Lite contain corn syrup and high fructose corn syrup in the finished product, when in fact corn syrup is merely used during the brewing process; according to MillerCoors, it is not present in the final products that reach consumers. MillerCoors sought an order enjoining Anheuser Busch from repeating the corn-syrup claims, blocking airings of all the ads in the corn syrup campaign, and compelling Anheuser-Busch to run corrective advertising. Judge Conley partially granted this request, enjoining Anheuser-Busch from running ads stating that Bud Light contains "100% less corn syrup," referencing corn syrup without context, and describing corn syrup as an ingredient in in Coors Light or Miller Light, but declining to enjoin ads stating that Coors Lite and Miller Lite "use" or are "made with" or "brewed with" corn syrup. He reserved decision as to whether the injunction should extend to barring the Bud Light packaging claims due to an insufficiently developed record on that issue.

Following further briefing, Judge Conley expanded the preliminary injunction to bar Anheuser-Busch from making the "no corn syrup" and "find out what's in your beer" claims on Bud Light packaging. In reaching this decision, Judge Conley found that the "no corn syrup" claim could imply that other

beers *do* contain corn syrup. Moreover, he noted that Bud Light together with Miller Lite and Coors Lite comprise nearly 100% of the "premium light beer" market, potentially leading a substantial number of consumers to infer from Bud Light's packaging that the MillerCoors products in particular contain corn syrup.

Judge Conley rejected Anheuser-Busch's argument that the claims on Bud Light packaging should be considered separately, rather than as part of the full advertising campaign. While Anheuser-Busch presented survey evidence supporting its argument that consumers did not link the Bud Light packaging to either other beer brands or any statement about corn syrup, MillerCoors' expert criticized the survey for not presenting the packaging in a retail setting next to MillerCoors products, and for the limited time given to respondents to inspect the packaging. Citing these criticisms, Judge Conley found MillerCoors had demonstrated some likelihood of success in proving that the Bud Light packaging, when displayed next to Miller Lite and Coors Lite packaging and considered in the context of Anheuser-Busch's full marketing campaign, would mislead consumers into believing the MillerCoors products contain corn syrup. However, in recognition of the fact that the Bud Light packaging did not make any express comparative statements, Judge Conley mitigated the injunction by giving Anheuser-Busch until March 2, 2020 to sell Bud Light using the packaging it had on hand as of June 6, 2019.

In Judge Easterbrook's 2-1 majority decision, the Seventh Circuit remanded on two procedural grounds. First, it held that all three district court decisions ran afoul of FRCP 65(d) by failing to set forth the injunctions in a document separate from the opinions. Second, the majority found that two of the district court decisions contravened FRCP 62.1 governing procedures for modifying an order that is before the court of appeals, and therefore that the district court lacked jurisdiction over the parts of the case that were on appeal. Judge Hamilton dissented, arguing that the appeal was ready for a decision on the merits, and that the court of appeals should not stand in the way of fast-moving litigation on the basis of procedural issues that prejudiced neither party.

The September decisions are likely to raise eyebrows for the finding that truthful statements on packaging that are not rendered misleading by any other content on the packaging can be found misleading purely by reference to other advertisements in an advertising campaign. They serve as a warning to advertisers to consider advertising claims holistically, examining not only the literal truth of individual claims, but also the potential messages implied by the campaign's messaging as a whole. The Seventh Circuit's decision, meanwhile, underscores the importance for litigants of ensuring that court orders conform to procedural requirements. Otherwise, they may find the speedy resolution of their cases impeded for non-substantive reasons.

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