

Honey I Shrunk the Whisky? Class Action Alleges Fraud over Mini Bottle Labeling

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An Illinois consumer recently filed a putative class action complaint against the makers of Fireball Whisky, claiming that the alcohol producer's mini bottles deceived consumers into buying products labeled as "whisky," even though the beverage derives its alcohol content from malt. The distinction between "whisky" and "whisky-flavored" is the basis of many of the plaintiff's assertions.

"Fireball Cinnamon"

Fireball Cinnamon Whisky^[1] is known for its distinctive cinnamon flavor. It can be bought in various sizes, including small "shot-sized" bottles. The smaller bottles are almost-exact duplicates of the full-sized bottles, employing the same font, color-scheme, and shape, except that they are labeled "Fireball Cinnamon" and not "Fireball Cinnamon **Whisky**." The description on the label identifies the small bottles as containing a "Malt Beverage With Natural Whisky & Other Flavors and Caramel Color" and contains whisky flavoring, among other ingredients.

The Complaint

Filed in the US District Court of the Northern District of Illinois, the complaint asserts that the whisky manufacturer misrepresents the small bottles' content, to the detriment of consumers.

Notably, the complaint alleges that:

- The manufacturer relies on consumers' assumptions that the small bottles hold the same beverage as the large bottles (a cinnamon-flavored distilled spirit), misleading consumers into paying a price premium for a less-expensive malt beverage;
- The manufacturer intended to capitalize on the fact that consumers are likely to mistake the bottles as smaller sizes of the whisky, taking "advantage of consumers' cognitive shortcuts made at the point-of-sale";
- The content description on the smaller bottle reads: "With Natural Whisky & Other Flavors."

Consumers will read “Natural Whiskey” as distinct from “Other Flavors” instead of assuming that the “whisky” reference is to whisky flavoring;

- Consumers would not purchase the smaller product if they were aware of its contents.

The Defendant’s Key Arguments

In early March, the whisky’s manufacturer filed a motion to dismiss for failure to state a claim. Their brief argues that:

- The plaintiff lacks standing because she did not purchase the product at issue, since it is not offered for sale in Illinois;
- Because the Federal Alcohol and Tobacco Tax and Trade Bureau (TTB) approved and certified the labels at issue, they are not false or misleading;
- An average consumer would not plausibly be confused by the labels at issue, thus the complaint failed to plausibly plead a deceptive act.

Takeaway

The suit against the whisky manufacturer is part of a growing trend of mislabeling case in the food and beverage space. Flavor-content labels have been the subject of several class action suits in the [recent past](#). As we’ve seen, misleading labeling claims can lead to class actions with potentially hefty price tags. If you have questions on how such claims could impact your business, please reach out to any member of the ArentFox Schiff Food and Beverage Team.

FOOTNOTES

^[1] The spelling of “whisky” throughout the alert reflects the name of the brand at issue and is an accepted alternate spelling of “whiskey.”

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