

# Food for Thought: Sixth Circuit Affirms Dismissal of Class Action Complaints Against Anheuser-Busch for Intentionally Overstating Alcohol Content of its Malt Beverages

March 22, 2016

*In Re: Anheuser-Busch Beer Labeling Marketing and Sales Practices*, 644 Fed. Appx. 515 (6th Cir. 2016)

Consumers in seven states brought individual class action lawsuits alleging Anheuser-Busch intentionally overstated the alcohol content of many of its malt beverages on those beverages' labels. Plaintiffs had consumed one or more of the malt beverages and alleged that Anheuser-Busch employed process-control technology enabling it to precisely measure the alcohol content of its malt beverages. Plaintiffs claimed that the technology was not used to produce beverages with the alcohol-by-volume content as listed on the label. Rather, the technology was used to deceive consumers by adding extra water to dilute the alcohol content levels below that found on the labels and thus, allowed Anheuser-Busch to save money on production costs. Plaintiffs claimed they purchased the beverages in reliance on the labels and would not have purchased them had they known the alcohol content was much lower than stated. Litigation commenced in seven states: California, Colorado, Florida, New Jersey, Ohio, Pennsylvania, and Texas. The cases were ultimately consolidated in one multidistrict litigation in the Northern District of Ohio. After consolidation, plaintiffs sought to certify an additional class of plaintiffs from 48 states. In response, Anheuser-Busch moved to dismiss, arguing that any misstatement of alcohol content, even if intentional, fell within the tolerances permitted by the applicable federal regulation, 27 C.F.R. § 7.71(c). The Federal Alcohol Administration initially prohibited statements of alcohol content on malt-beverage labels.

However, 27 C.F.R. § 7.71 was enacted in 1992, and continues to govern how alcohol content must appear on labels. Anheuser-Busch's argument centered on that federal regulation, which allowed the alcohol content of malt beverages containing 0.5 percent or more alcohol by volume, a "tolerance of 0.3 percent" (either above or below the alcohol content stated on the beverages' labels). Each of the state laws in question in this case adopted that federal tolerance by incorporating § 7.71. So, Anheuser-Busch argued that because plaintiffs' general consumer protection and warranty claims conflicted with specific state and federal beverage labeling regulations, the compliance with the specific regulations precluded the general claims. Anheuser-Busch's primary argument was that if the court found that its over-reporting of alcohol content (even if intentional) was permitted under 27 C.F.R. § 7.71(c), the action must be dismissed. Most important was the fact that plaintiffs had not "disputed this premise in any of their briefings and plaintiffs' counsel explicitly conceded this point at oral argument." The District Court for the Northern District of Ohio dismissed the plaintiffs' complaint. It found the language of § 7.71(c) created a safe harbor for any brewer who did not exceed the tolerance and it did not matter if the deviation was intentional. The plaintiffs appealed and argued that the most reasonable construction of § 7.71 would allow unintentional variances but that "intentional dishonesty about the alcohol level remained prohibited." The plaintiffs also argued that the word "tolerance" is a technical term permitting only unintentional variations and that the district court's interpretation of § 7.71 is inconsistent with the purpose of the regulatory framework. The Sixth Circuit, in an unpublished opinion, affirmed the judgment of the district court. The appellate court concluded that federal alcohol regulations allow some labeling variation, even if done intentionally. The analysis began with the text of 27 C.F.R. § 7.71. Because in certain provisions intent-based exceptions were included when using the term "tolerance," but not in the context of malt beverage labeling, the appellate court determined that the term as used did not apply to only unintentional variances. In light of the lack of evidence that any legislature or regulator intended the word "tolerance" to mean anything other than "the allowable deviation from standard," the Sixth Circuit concluded the word as used bears its ordinary meaning. The plaintiffs' second argument was also rejected. According to plaintiffs, the relevant section was designed by Congress to prevent consumer deception. To that end, Congress prohibited misleading labels on alcoholic beverages. The Sixth Circuit disagreed and found that the plain meaning of § 7.71 would not conflict with the purpose of the regulatory scheme. The general prohibition against false or misleading statements could be reconciled with the specific allowance of a 0.3 percent tolerance because such small variances do not mislead consumers. Finally, the Sixth Circuit determined that the plain language of § 7.71 would suggest the relevant tolerance applied regardless of Anheuser-Busch's intent. Therefore, the appellate court determined that the district court properly held Anheuser-Busch did not violate § 7.71. In doing so, it was forced to address the issue of plaintiffs' forfeiture of an argument. As noted above, Anheuser-Busch asserted, and plaintiffs never contested, that if the district court were to find the alleged over-reporting of alcohol content was permitted, then the action must be dismissed. Specifically, the court noted, "What is missing from the plaintiffs' briefing was the argument that they make on appeal, namely, even if Anheuser-Busch complied with § 7.71, the plaintiffs' state-law and MMWA [Magnuson-Moss Warranty Act] claims would survive." It was determined that because

plaintiffs failed to clearly raise an argument in the district court, that argument was forfeited. "The upshot of this is that the plaintiffs could have drawn on state appellate authority to argue Anheuser-Busch's compliance with § 7.71 does not preclude particular state-law or consumer-protection or warranty claims...Nothing prevented the plaintiffs from raising in the district court the very argument that they seek to make for the first time on appeal." The Sixth Circuit concluded Anheuser-Busch was not prohibited from targeting the lower end of the tolerance set forth in 27 C.F.R. § 7.71. It also noted that because plaintiffs forfeited the argument that their claims would survive such an interpretation, the judgment of the district court was affirmed.

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