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Hannah Simms
*University of Kentucky*

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# "HANDMADE" OR "MADE BY HAND": ASSESSING ALCOHOL LABELING PRACTICES AND EVALUATING A POPULAR CONSUMER CLASS ACTION

*Hannah Simms**

## I. INTRODUCTION

The total number of bourbon barrels in the state of Kentucky surpassed 5.6 million in 2014 – greater than the entire human population (4.4 million) of the Bluegrass State.[1] A number of those barrels will eventually be bottled as one of the most iconic and recognizable bourbons produced in Kentucky – Maker's Mark. Distilled in Loretto, Kentucky, Maker's Mark credits its unique product to the four fundamental elements of water, wheat, wood and wax.[2] While the average bourbon drinker may not be able to identify Maker's Mark bourbon based on the taste alone, they are certain to recognize the familiar bottle with red wax dripping down the neck and die-cut labels affixed to the sides.[3] It was the language used on these Maker's Mark bottles that landed the distillery in a Florida courtroom in May of 2015.[4]

The makers of this popular Kentucky bourbon are not the only alcohol manufacturer that has found itself embroiled in a labeling controversy in recent years.[5] In addition to Maker's

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* Articles Editor, KY. J. EQUINE AGRIC. & NAT. RESOURCES L., 2016-2017; B.A. Political Science, 2014, University of Kentucky; B.A. International Studies, 2014, University of Kentucky; J.D. expected May 2017, University of Kentucky College of Law.

[1] *Bourbon Facts,* KENTUCKY DISTILLERS' ASS'N, http://kybourbon.com/bourbon_culture-2/key_bourbon_facts/ [https://perma.cc/78F5-FC5M] (last visited Dec. 29, 2015).

[2] *So What Makes Maker's Mark Maker's Mark?,* MAKER'S MARK, https://www.makersmark.com/history/truths/4-ws [https://www.makersmark.com/taste/4-ws?tag=Truths] (last visited Dec. 29, 2015).

[3] *Id.*

[4] *See* Salters v. Beam Suntory, Inc., No. 4:14cv659-RH/CAS, 2015 U.S. Dist. LEXIS 62146, at *3 (N.D. Fla. May 1, 2015).

[5] *See generally* Christine A. Scheuneman & Elaine Y. Lee, *Courts Are Distilling the Essence of 'Handmade' Spirits,* LAW360 (June 22, 2015, 11:41 AM),

Mark, the labeling practices of Tito's, Templeton Rye, WhistlePig, Tincup, Angel's Envy and Breckenridge Bourbon have come under fire for their use of descriptive terms like "handmade," "small-batch," and "handcrafted."[6] As the popularity of these consumer class actions, based in state deceptive and unfair practice acts, continues to rise (as evidenced by the increasing number of similar actions being litigated across the country), the judicial system is providing no discernable end in sight. Inconsistences and direct contradictions in decisions from very similar cases will surely propel consumers and lawyers to continue trying their hand at this legal gamble.

In the same way the bourbon industry is a vital part of Kentucky's identity and economy, so is the entire alcohol industry important to the economy of the United States. In 2013 alone, the alcoholic beverage industry in the United States generated nearly $456 billion in total economic activity.[7] The industry's impact on the United States is also evident in its creation of 4.3 million total jobs that pay some $103 million in wages.[8] Both Kentucky and the United States would benefit from clarifying the discrepancies that are dividing our courts on the resolution of these consumer protection alcohol labeling class action lawsuits.

The relevant cases that are pending in district courts around the country, as well as those that have been decided, reveal two major splits in authority. First, courts have been entirely inconsistent on whether or not to apply safe harbor provisions contained in a majority of state deceptive and unfair practice laws.[9] If the safe harbor provisions are applied, as advocated by the liquor manufacturers, courts will dismiss the actions for failure to state a claim on which relief can be granted because the provision insulates the manufacturer from liability as to the label.[10] Alternatively, prospective plaintiffs and some courts feel that these provisions should not be applied because of

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http://www.law360.com/articles/668364/courts-are-distilling-the-essence-of-handmade-spirits [https://perma.cc/6LJ7-2K2Q].

[6] *See id.*

[7] *Economic Contribution of Alcohol Beverage Industry*, DISTILLED SPIRITS COUNCIL OF THE UNITED STATES (2013), http://www.discus.org/assets/1/7/ContributionFactSheet2.pdf [https://perma.cc/FPT9-CGN9].

[8] *Id.*

[9] *See generally* Scheuneman, *supra* note 5.

[10] *See id.*

the informal nature of the label approval process and the lack of information about what is actually considered by the relevant government agency when approving an alcohol label.[11]

The second divide in the case law appears less frequently than the safe harbor issue but is discussed in a number of the labeling class actions. An alternate theory offered by liquor manufacturers involves a court finding that no reasonable consumer would be deceived by or misunderstand the meaning of the descriptive terms used on the liquor labels.[12] This issue has come up in cases where manufacturers file motions to dismiss based on failure to state a claim, arguing that the plaintiffs' claims about the meaning of the terms would not be shared by a reasonable consumer, leaving no allegations suggesting the use of the terms to be unfair or untrue.[13] While at least one court has dismissed a labeling class action based on this reasonable person standard, others have denied the motion, finding allegations of deception to be supported with enough facts to survive dismissal on the issue.[14] These courts look at a number of factors to determine the sufficiency of the claims.

This note will describe the most common cause of action pled by consumers in this particular kind of class action and will detail a number of cases to highlight the major inconsistencies plaguing court decisions. After discussing the relevant law for the safe harbor and reasonable consumer authority splits, this note will posit that while most of these cases should survive a motion to dismiss based on the reasonable consumer standard, courts should be giving more deference to label approvals and applying safe harbor provisions of state deceptive and unfair practice acts. This will help insulate liquor manufacturers from liability to consumers as a result of using an approved label. This note will conclude with suggesting a few actions that the Tax and Trade Bureau ("TTB"), responsible for promulgating alcohol regulations, could take to alleviate the harm to liquor manufacturers that comes from defending these class actions.

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[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*

## II. SETTING THE STAGE: REPRESENTATIVE CASES AND THEIR PROBLEMATIC CAUSE OF ACTION

Alcohol producers across the country, from Kentucky to Vermont to Texas, have become embroiled in controversies involving their labeling practices. Lawsuits have also been filed in a number of different jurisdictions, including California, Florida, and Illinois. Understanding the underlying arguments made by the parties to these cases and noting some of the similarities and differences in facts and controlling law is crucial to develop a complete picture of the existing and future jurisprudence of the growing controversy surrounding alcohol labeling practices.

### *A. Representative Cases: From Florida to California*

Two Florida consumers who purchased bourbon in their local liquor store filed a lawsuit against Maker's Mark and its parent company, alleging that labels on Maker's Mark bottles stating that the product was "handmade" were false and misleading.[15] The plaintiffs asserted seven claims against Maker's Mark, including violations of the Florida Deceptive and Unfair Practices Act, false advertising, bait-and-switch advertising, breach of express and implied warranties, negligent misrepresentation, and unjust enrichment.[16] The Florida judge granted Maker's Mark's motion to dismiss the suit, holding that no reasonable person would have understood the use of the term "handmade" to mean the bourbon was literally made by hand at every step of the distillation and bottling process.[17] The court reached this decision through a textual analysis of the term "handmade" and an evaluation of the plaintiffs' claims regarding what they believed Maker's Mark was conveying about the product through the use of the word on the label.[18]

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[15] Salters v. Beam Suntory, Inc., No. 4:14cv659-RH/CAS, 2015 U.S. Dist. LEXIS 62146, at *3 (N.D. Fla. May 1, 2015).

[16] *Id.*

[17] *Id.*

[18] *Id.*

In a similar case involving another popular spirit, vodka, plaintiffs in California filed a complaint in federal court alleging that Fifth Generation's product, called Tito's Handmade Vodka, displayed a label that was false and misleading.[19] The complaint alleged that the label was false because while it said "handmade," the alcohol product was actually produced through a "highly mechanized process that is devoid of human hands."[20] The plaintiffs asserted four causes of action, including negligent misrepresentation and violations of California's Unfair Competition Law, false advertising law, and Legal Remedies Act.[21]

The judge denied Fifth Generation's motion to dismiss the action, holding that there was a possibility that a reasonable consumer could be misled by the manufacturer's use of the word "handmade."[22] The court acknowledged that under the plaintiffs' causes of action, whether or not a business practice is deceptive generally presents a question of fact, and as such, cannot be decided on a motion to dismiss.[23] The court demonstrated an understanding that under certain circumstances, it is permitted to find that a person was not deceived as a matter of law but reiterated that the term at issue was sufficiently undefined as to permit the continued existence of the cause of action.[24] This court also found that a federal agency's approval of the was not sufficiently formal to entitle deference to the agency and protection of the liquor manufacturer through the application of safe harbor provisions.[25]

The facts of these two cases are substantially similar to a number of other cases discussed in this note. The crucial similarities are the presence of a labeling controversy as a result of the use of some term or statement describing the product or

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[19] Hofmann v. Fifth Generation, Inc., No. 14-cv-2569 JM (JLB), 2015 U.S. Dist. LEXIS 65398 at *2 (S.D. Cal. Mar. 18, 2015).

[20] *Id.* (citing Doc. No. 1, Exh. A ¶ 2).

[21] *Id.* at *4.

[22] *Id.* at *22.

[23] *See id.* at *19.

[24] *See id.* at *19-21.

[25] *Id.* at *19.

process.[26] In an effort to avoid later confusion, it should also be noted that many of the relevant cases involve the same plaintiff or defendant. For example, Fifth Generation is the defendant in at least three actions relevant to this discussion.

### *B. Common Cause of Action: State Deceptive and Unfair Practices Act Violations*

Many of the cases pertinent to this discussion involve multiple causes of action, including false advertising, bait-and-switch advertising, and negligent misrepresentation. However, claims under state deceptive and unfair practice acts are one of the primary sources of the inconsistencies seen in court decisions. The plaintiffs in the representative cases discussed above both allege violations of their respective state's Deceptive and Unfair Practices Act.[27]

The deceptive and unfair practice laws found in most states are not uniform, but many contain substantially similar elements, including the safe harbor provisions that are important to this discussion. These statutes were adopted to protect consumers' commercial dealings and to police "unfair or deceptive trade acts or practices that amount to unfair competition."[28] Most states' acts allow for injunctive relief as the remedy that is prescribed for consumers harmed under the act.[29]

Courts that have interpreted the scope of the term "unfair or deceptive acts or practices" often find that the scope of these acts extends beyond common law theories for recovery, like deceit and fraud.[30] These acts are also commonly applied to acts or practices that "affect the public interest."[31] Common elements required to find a violation of the state acts include "absence of statutory language regarding the necessity of an intent to deceive

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[26] *See Salters*, 2015 U.S. Dist. LEXIS 62146, at *3-4; *Hofmann*, 2015 U.S. Dist. LEXIS 65398, at *3.

[27] *See Salters*, 2015 U.S. Dist. LEXIS 62146, at *3 (N.D. Fla. May 1, 2015); Hofmann, 2015 U.S. Dist. LEXIS 65398 at *2.

[28] Donald M. Zupanec, Annotation, *Practices Forbidden By State Deceptive Trade Practice And Consumer Protection Acts*, 89 A.L.R.3d 449, §2(a) (1978).

[29] *Id.*

[30] *Id.*

[31] *Id.*

. . . and absence of statutory language regarding the necessity of actual deception."[32] These states' deceptive and unfair practice statutes are often meant to be intentionally broad so as to provide an enhanced level of consumer protection, and, thus, the exact definitions of what constitutes unfair, deceptive, or fraudulent practices are not included.[33] This results in courts conducting a case-by-case analysis of the facts to determine what does and does not rise to the level of deceptive or unfair practices.[34] Add this to the lack of guidance on how to define of many of the descriptive terms being used on labels, and variations in case law are inevitable.

## III. COLAS AND SAFE HARBORS CIRCUIT SPLIT

In a number of the pending or decided actions relevant to this discussion, liquor manufacturers attempted to argue that they were protected from the consumers' claims under state safe harbor provisions. The common argument is that the Alcohol Tobacco Tax and Trade Bureau's, more commonly referred to as the Tax and Trade Bureau, approval of the disputed label and issuance of a Certificate of Label Approval ("COLA") insulates the manufacturer from claims based on the contents of the label.[35] For example, Maker's Mark would argue that the TTB approved the label placed on the bottles that contained the word "handmade," so Maker's Mark is protected from any consumer action regarding the contents of the label because of a safe harbor provision in the applicable jurisdiction's deceptive and unfair practices act.

While this argument, on its face, might seem to hold some weight, federal courts cannot seem to agree on its validity. In *Hofmann v. Fifth Generation, Inc.*, the United States District Court for the Southern District of California ruled that Fifth Generation did not sufficiently show that the California safe

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[32] *Id.*

[33] *Id.*

[34] *See id.*

[35] *See generally Hofmann*, 2015 U.S. Dist. LEXIS 65398, at *16-17 (arguing plaintiffs cannot recover because "TPP" pre-approved label); Aliano v. WhistlePig, LLC, No. 14 C 10148, 2015 U.S. Dist. LEXIS 64401 *1,, at *23 (N.D. Ill. May 18, 2015) (arguing safe harbor provisions applies because label approved by TPP).

harbor provisions applied to the plaintiff's claims.[36] The court's decision contemplated the informal nature of the agency action at issue here: the label approval. The court was also concerned with whether or not the TTB's approval process actually contemplated the accuracy or meaning of the word "handmade."[37]

Similarly, in *Aliano v. WhistlePig LLC* the United States District Court for the Northern District of Illinois was not persuaded by WhistlePig's safe harbor argument for the very same reasons previously mentioned by the California court.[38] The court expressed concerns with the lack of evidence presented that the accuracy of the disputed term "hand bottled at WhistlePig Farm" had been independently investigated or confirmed by the TTB.[39] The court also considered the lack of evidence showing the TTB had established criteria for evaluating the use of that specific term.[40]

### *A. Congressional Delegation of Power to Regulate Labeling Procedures and the Labeling Process*

The TTB is the government agency charged with regulation and approval of alcohol labeling practices.[41] This agency's grant of legal authority can be traced back to the Twenty-First Amendment to the United States Constitution when Congress repealed prohibition and, shortly thereafter, enacted the Federal Alcohol Administration Act ("FAA").[42] The Secretary of the Treasury was given the power to promulgate regulations regarding alcoholic beverages under the FAA and preceded to delegate that authority to the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF").[43] The Homeland Security Act of 2002 reorganized the ATF to be under the

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[36] *Hofmann*, 2015 U.S. Dist. LEXIS 65398, at *19.

[37] *Id.*

[38] *Aliano*, No. 14 C 10148, 2015 U.S. Dist. LEXIS 64401, at *26.

[39] *Id.*

[40] *Id.*

[41] Cruz v. Anheuser-Busch, LLC, No. CV 14-09670 AB (ASx), 2015 U.S. Dist. LEXIS 76027 *1,, at *8 (C.D. Cal. June 3, 2015).

[42] U.S. CONST. amend. XXI; 27 U.S.C. § 201 et seq. (Prohibition was repealed by the Twenty-First Amendment in 1933 and the Federal Alcohol Administration Act was passed two short years later in 1935).

[43] *Cruz*, 2015 U.S. Dist. LEXIS 76027, at *7.

Department of Justice and created the TTB as the arm of the Treasury Department that would continue to carry out the necessary alcohol-related regulatory functions.[44] As it exists today, the TTB's mission is to "collect Federal excise taxes on alcohol, tobacco, firearms, and ammunition and to assure compliance with federal tobacco and alcohol permitting, labeling, and marketing requirements to protect consumers."[45]

The division of the TTB that is responsible for regulating alcohol labeling practice, and thus of the most importance to this discussion, is the Advertising, Labeling and Formation Division ("ALFD").[46] The mission of the ALFD is as follows:

> Ensures that formulas, labels, and advertisements for alcohol beverages are in compliance with Federal laws and regulations; ensures that labels provide consumers with adequate information on the identity and quality of alcohol beverage products; prevents consumer deception; and educates and provides guidance to industry and the general public on laws, regulations, and activities regarding ALFD's mission and functions.[47]

It is this division that processes a distiller's application for a Certificate of Label Approval ("COLA").[48] When asked to interpret the grant of authority for regulating the alcoholic beverage industry, courts have clearly established that it was Congress's express intent that the Secretary of the Treasury, and its various bureaus and divisions, have exclusive labeling authority of alcohol products.[49]

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[44] 6 U.S.C §§ 203 and 212(a)(1) (2016).

[45] *About TTB,* ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, http://www.ttb.gov/about/about-us.shtml [https://perma.cc/SE8L-WL9X] (last visited Dec. 29, 2015).

[46] *Advertising, Labeling and Formulation Division,* ALCOHOL AND TOBACCO TAX AND TRADE BUREAU , http://www.ttb.gov/offices/alfd.shtml [https://perma.cc/JQD9-CLX3] (last visited Dec. 29, 2015).

[47] *Id.*

[48] *Id.*

[49] Brown-Forman Distillers Corp. v. Mathews, 435 F. Supp. 5, 13 (W.D. Ky. 1976); *see also Cruz,* 2015 U.S. Dist. LEXIS 76027, at *7.

A basic understanding of the label approval process is helpful in evaluating the strength of a liquor manufacturer's argument that they should be protected from consumer claims under state safe harbor provisions because of the TTB's pre-approval of a specific label.[50] As previously stated, the TTB is tasked with interpreting and applying federal regulations regarding alcohol products.[51] The federal statute that discusses issuing COLAs states:

> Distilled spirits shall not be bottled or removed from a plant, except as provided in paragraph (b) of this section, unless the proprietor possesses a certificate of label approval, TTB Form 5100.31, covering the labels on the bottle, issued by the appropriate TTB officer pursuant to application on such form.[52]

TTB Form 5100.31 requires the applicant to declare "all statements appearing on [the] application are true and correct . . . and, that the representations on the labels attached to [the] form . . . truly and correctly represent the contents of the containers to which [the] labels will be applied."[53]

Once TTB Form 5100.31 is filed, a TTB officer has ninety days to review the application and notify the applicant as to whether the application has been approved or denied.[54] The regulations state that a COLA should be approved if it "complies with applicable laws and regulations."[55] Contained in the myriad of laws and regulations that govern alcohol labeling practices is one that prohibits the use of misleading brand names and false or untrue statements. The regulations state that "bottles containing distilled spirits...shall not contain any statement that is false or untrue in any particular, or that, irrespective of falsity, directly,

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[50] ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, *supra* note 46.

[51] ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, *supra* note 45.

[52] 27 C.F.R. § 5.55(a) (2016).

[53] *See* TTB Application for Certification/Exemption of Label/Bottle Approval, Department of the Treasury, Form 5100.31 (Oct. 2012), http://www.ttb.gov/forms/f510031.pdf [https://perma.cc/JP3K-9S5P].

[54] 27 C.F.R. § 13.21(b) (2016).

[55] 27 C.F.R. § 13.21(a) (2016).

or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter, tends to create a misleading impression."[56]

The approval process used internally by the TTB once they receive a COLA application remains somewhat of a mystery. The TTB has provided some established procedures available online to supplement labeling regulations, including formal instructions for testing of calorie, fat, carbohydrate, and protein content of alcohol beverages, as well as some other niche procedures.[57] What cannot be found online, however, is any description of the internal process a TTB officer goes through when determining whether or not to approve a COLA application.[58] There is also no available guidance for the industry on the meaning of common terms like "handmade" or "hand-crafted."[59] The general lack of knowledge about this crucial step in the labeling process has caused problems for liquor manufacturers who try to claim protection under state safe harbor statutes.[60]

*B. Contradicting Jurisprudence: The Split in Authority Over Safe Harbor Provisions*

The required TTB approval step has led to a major split in authority regarding the applicability of state safe harbor statutes to alcohol labeling consumer class actions. The majority, if not all, of defendants in these actions argue that federal agency approval of the disputed label through the issuance of a COLA implicates a safe harbor provision in the statute that bars the plaintiffs' claims.[61] Recall that these labeling class actions have been filed in a number of jurisdictions, and, therefore, turn on the

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[56] 27 C.F.R. § 5.42(a)(1) (2016).

[57] *Labeling Procedures,* ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, http://www.ttb.gov/labeling/labeling_procedures.shtml [https://perma.cc/94EG-RNEJ] (last visited Dec. 29, 2015).

[58] *See generally id.*

[59] *See* Yvonne M. McKenzie & Colleen C. Kelly, *State Safe Harbor Doctrines: A Life Preserver from False Advertising Claims Facing Alcohol Manufacturing?* 1-3, TRADE BUREAU OF NAT'L AFFAIRS, http://www.pepperlaw.com/resource/24066/5G2 [https://perma.cc/6FMA-D5Y5] (last visited Oct. 11, 2016).

[60] *See id.*

[61] *See generally id.* at 2.

interpretation of different state unfair practices statutes.[62] While these various deceptive or unfair practice statutes are in no way completely uniform, they possess substantial similarities that allow us to compare and contrast courts' interpretations.

There are a handful of cases that have barred plaintiffs' claims by recognizing the application of a safe harbor provision in the state statute, namely *Cruz v. Anheuser-Bush*, *Aliano v. Fifth Generation*, and *Pye v. Fifth Generation.*[63] *Cruz* involved a dispute over the use of the words "lite" and "light" on the labels of Anheuser-Bush's Rita products.[64] While the TTB has labeling regulations for malt beverages, like the Rita products, that are separate from the labeling regulations for distilled spirits, the safe harbor language being interpreted by the court in this case applies to claims about false or misleading practices relating to both varieties of alcohol product.[65] In *Cruz*, the District Court for the Central District of California found that the TTB's issuance of a COLA was an authorized formal rulemaking procedure, and because COLAs had been issued for Anheuser-Bush's product, the plaintiff's causes of action conflicted with that approval.[66] Accordingly, the court held that the safe harbor doctrine applied, and insulated Anheuser-Bush from liability.[67]

Similarly *Aliano*, out of the Northern District of Illinois, plaintiffs claimed that Fifth Generation violated the Illinois Consumer Fraud and Deceptive Trade Practice Act ("IFCA") because the label for Tito's Handmade Vodka used the terms "handmade" and "crafted in an old fashion pot still."[68] The court here, like the court in *Cruz*, looked at the repeated approval of Fifth Generation's COLA applications and held that the TTB's approval "triggers the safe harbor provision of the IFCA."[69] In

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[62] *Id.* at 2-3.

[63] *See* Pye v. Fifth Generation, Inc., No. 4:14cv493-RH/CAS, 2015 U.S. Dist. LEXIS 128594, at *1 (N.D. Fla. Sep. 23, 2015) (granting motion to dismiss in part based on application of safe harbor provisions of state statute); *see also Cruz*, 2015 U.S. Dist. LEXIS 76027; *see also Aliano*, 2015 U.S. Dist. LEXIS 128104 (granting motions to dismiss based on application of safe harbor provisions of state statutes).

[64] *Cruz*, 2015 U.S. Dist. LEXIS 76027, at *3.

[65] CAL. BUS. & PROF. CODE § 17200 (West 2016).

[66] *Cruz*, 2015 U.S. Dist. LEXIS 76027, at *15-19.

[67] *Id.* at *19.

[68] *Aliano*, 2015 U.S. Dist. LEXIS 128104, at *1.

[69] *Id.* at *11.

this case, Fifth Generation contended that a TTB representative had been on the property at the manufacturing facility a number of times, and the COLAs had been approved as "truthful and appropriate" following each visit.[70] This sequence of events seems to be part of what drove the court's decision in this case.

Finally, *Pye v. Fifth Generation* is another case, this time out of Florida, which involved claims under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") against Fifth Generation.[71] Just like *Aliano v. Fifth Generation*, this case concerns statements on the label of Tito's Handmade Vodka claiming the product to be "handmade" and "crafted in an old fashion pot still."[72] Here, the court found that the TTB's approval of Fifth Generation's COLA that displayed the disputed terms was approved by a TTB regulator, and as a result, the plaintiffs had failed to state a claim on which relief could be granted under FDUTPA because the Act's safe harbor provision applied.[73] The court went even further in stating that the safe harbor provision in FDUTPA applies to "any act or practice required or specifically permitted by federal or state law" and would still apply, even if a TTB regulator incompetently enforced the state or federal law.[74]

In stark contrast to the three cases just described, a number of cases with substantially similar facts and issues offer contradictory decisions regarding the applicability of state safe harbor provisions. Two cases out of the Southern District of California, containing almost identical facts, refuse to apply the safe harbor doctrine based on a lack of evidence showing that the TTB actually investigated the use of the disputed terms and a finding that the TTB's approval of COLAs constitutes an informal agency action.[75] *Hofmann v. Fifth Generation* is another claim that Fifth Generation's labeling of Tito's Handmade Vodka is false and misleading under state deceptive practice acts.[76] The

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[70] *Id.*

[71] *Pye*, 2015 U.S. Dist. LEXIS 128594, at *8.

[72] *Id.* at *1.

[73] *Id.* at *9-10.

[74] *Id.* at *9.

[75] *See Hofmann*, 2015 U.S. Dist. LEXIS 157378 at *8-10; Nowrouzi v. Maker's Mark Distillery, Inc., No. 14cv2885 JAH(NLS), 2015 U.S. Dist. LEXIS 97752, at *11 (S.D. Cal. July 27, 2015).

[76] *Hofmann*, 2015 U.S. Dist. LEXIS 157378, at *3-5.

*Hofmann* court's decision relied on a finding that the COLA approval was not "a formal, deliberative process akin to notice and comment rulemaking or an adjudicative, enforcement action," and, as such, it was an informal agency action that did not trigger safe harbor protection for the manufacturer.[77] In *Nawrouzi v. Maker's Mark Distillery*, the court analogized the facts of the case to *Hofmann* and adopted the very same reasoning, holding that the informal nature of the TTB action did not give rise to safe harbor protection for Maker's Mark.[78]

In a similar case out of the Northern District of Illinois, plaintiffs claimed that Louisville Distilling Company, owner of the Angel's Envy brand, violated the Illinois Consumer Fraud Act ("ILCFA") by using bottle labels that misrepresent characteristics of the Angel's Envy Finished Whiskey; specifically, that it was "hand crafted" and finished in small batches in Kentucky.[79] The court refused to apply the safe harbor provision of the ILCFA because there was no evidence that the TTB "actually reviewed and authorized every statement on the label."[80]

### *C. Safe Harbor Provisions Apply: The Formality of COLA Approval*

Evident in the cases described above, both those that apply the safe harbor provision and those that do not, is a total lack of understanding about the TTB's process for approving COLA applications. The courts that do not apply the doctrine are skeptical, and seem to be worried that the applications are merely rubber stamped rather than evaluated and scrutinized. It is not surprising that courts split on determining whether the COLA approval action is formal enough to justify triggering the safe harbor provisions because of the lack of information about what steps a TTB officer takes in determining whether to approve or deny a label containing terms like "hand-made," small-batch," and other popular terms being used across the

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[77] *Id.* at *20.

[78] *Nowrouzi*, 2015 U.S. Dist. LEXIS 157378, at *11-12.

[79] Aliano v. Louisville Distilling Co., LLC, 115 F. Supp. 3d 921, 929 (N.D. Ill. 2015).

[80] *Id.* at 933.

industry. Determining how the courts should evaluate the COLA approval process when deciding whether to apply safe harbors involves analyzing the formality of the TTB's actions to determine what kind of deference the court owes to the agency decision to approve a COLA.

In *United States v. Mead Corp.*, the Supreme Court held "that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and the agency interpretation claiming deference was promulgated in the exercise of that authority."[81] The *Mead* Court further clarified that Congress expects an agency to act with the force of law when it permits the agency to engage in formal adjudications, notice-and-comment rulemaking, or where there is some other indication that Congress intended to delegate lawmaking power to the agency.[82] The second prong of the *Mead* test is not at issue because the TTB issuing COLAs is well within the authority granted to them through the agency's organic statute, the FAA.[83]

The issue then becomes, what actions by the TTB did Congress intend to carry the force of law? This is ultimately important because if the COLAs carry the force of law, then courts should give those agency decisions the deferential standard from *Chevron v. NRDC.* This standard would be favorable to the liquor manufacturers in these labeling class actions because it would mean that the agency's informal decision to approve the label and all the words on it deserve a greater deference than what has been given by courts who refuse to apply the safe harbor provisions.[84]

If it can be determined that the COLAs were intended to carry the force of law, the *Chevron* test asks whether Congress has directly spoken to the precise question at issue. If the intent of Congress is not clear and unambiguous, the issue becomes

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[81] United States v. Mead Corp., 533 U.S. 218, 226-227 (2001).

[82] *Id.* at 227.

[83] *See* 27 C.F.R. § 13.21 (2006), *et seq.* (granting the Secretary of the Treasury exclusive authority to prescribe regulations pursuant to the FFA, which was subsequently transferred to the TTB).

[84] Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-844 (1984).

whether the agency's answer is based on a permissible construction of the statute.[85] Congress has not directly addressed the required considerations and process for COLA approval, so the TTB's decision to approve or deny the COLA certainly is permissible within the language of the statues granting the agency regulatory authority.

Courts should decide the labeling class action cases giving deference to the TTB's approval of COLAs, and as a result, apply state safe harbor provisions in favor of liquor manufactures. Congress intended for the TTB's actions to have the force of law, as evidenced by the language in the FAA, which serves as the organic statute for the agency.[86] Additionally, the TTB has promulgated regulations for the alcohol industry under the exercise of that authority.[87] Because both prongs of *Mead* are satisfied, TTB decisions require the court to apply the deferential standard from *Chevron*. Therefore, the only issue with determining TTB's approval of COLAs is whether or not there is a permissible interpretation of the agency's grant of authority. TTB's labeling division's mission statement says part of the purpose of the division is to "ensure that labels provide consumers with adequate information on the identity and quality of alcohol beverage products."[88] Additionally, the TTB's actual COLA application requires applicants to swear that all statements on the labels are true and correct, which provides evidence that the TTB is carrying out a reasonable interpretation of their duties and authority originally prescribed by Congress.[89]

## IV. REASONABLE CONSUMER CIRCUIT SPLIT

As if the split in authority over the safe harbor issue did not provide enough inconsistent case law to complicate a liquor

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[85] *Id.*

[86] *See* 27 C.F.R. § 13.21 (2006), *et seq.* (granting the Secretary of the Treasury exclusive authority to prescribe regulations pursuant to the FFA, which was subsequently transferred to the TTB).

[87] *See id.*

[88] ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, *supra* note 46.

[89] *See* TTB Application for Certification/Exemption of Label/Bottle Approval, DEPARTMENT OF THE TREASURY, Form 5100.31(Oct. 2012), http://www.ttb.gov/forms/f510031.pdf [https://perma.cc/5DY3-2S9T]; 27 C.F.R. § 13.21(b).

manufacturer's efforts to defend a labeling class action, there is yet another issue dividing courts and leading to conflicting outcomes. Some courts have decided these class actions based on another matter entirely. At least one court has completely dismissed a labeling consumer class action by finding that no reasonable consumer would have been deceived by the claimed untrue or misleading terms on labels. More courts have found enough facts to let the case progress, and in most situations, that is the advisable resolution.

### *A. Contradicting Jurisprudence: The Split in Authority Over the Reasonable Consumer*

Whether a liquor manufacturer's use of the term "handmade" would deceive a reasonable consumer has split two federal courts in California and Florida. The issue of whether something is false or misleading is a question of fact, and generally it takes very little to continue past this stage in litigation.[90] At this point in litigation, courts require allegations with enough factual plausibility suggesting the plaintiff's entitlement to relief.[91] In *Salters v. Beam Suntory,* the court was not persuaded by the facts the plaintiff provided to show deception was a result of the false or misleading presence of the term "handmade" on the Maker's Mark label.[92] The court looked at the large scale distribution of Maker's Mark as well as some details about the production process to determine that it was not reasonable for consumers to believe that the product was made by hand in the most literal sense, and the case was dismissed for failure to state a claim.[93]

In a complete departure from the *Salter* court's evaluation of what a reasonable consumer would think when they see the term "handmade," the court in *Hofmann v. Fifth Generation, Inc.*, denied a similar motion to dismiss and allowed the case to continue.[94] This court was reluctant to dismiss the action at this

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[90] *Salters,* 2015 U.S. Dist. LEXIS 62146, at *5.

[91] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007).

[92] *See generally Salters,* 2015 U.S. Dist. LEXIS 62146, at *6-7.

[93] *Salters,* 2015 U.S. Dist. LEXIS 62146, at *6-7.

[94] *Hofmann,* 2015 U.S. Dist. LEXIS 65398, at *2.

stage because it was not comfortable deciding, as a matter of fact, that a reasonable consumer would not have been deceived about the production process of Tito's by the term "handmade" being included on the label.[95] Important to this court was the concept that a consumer of Tito's who made a purchase because of beliefs about the "processes and origins" of the product could be harmed if the terms representing the origins were misleading.[96]

As previously mentioned, this split in authority is not generating as much attention as the safe harbor issue. Nonetheless, it exists, and it is frustrating the ability of a liquor manufacturer to be sure about the possible outcome of a claim they are defending.

*B. Minimal Pleading Requirements: Leading to the Survival of Labeling Class Actions*

The conflicting outcomes of *Salters* and *Hofmann* initially suggest yet another difficulty for liquor manufacturers defending themselves against a labeling class action. However, because of the minimal pleading requirements of *Twombly,* courts will often not dismiss as a result of finding that the plaintiff's claims were not indicative of a reasonable consumer.[97] The split in authority regarding a court's willingness to dismiss at this preliminary stage has the potential to lead to two equally undesirable outcomes. First, if courts in multiple jurisdictions begin to grant these motions from defendants in similar cases, worthy plaintiffs will be stuck with an unpredictable outcome.[98] On the other hand, because of the precedent set in California by the *Hofmann* decision, plaintiffs could start taking all similar causes of action to California in order to ensure a favorable outcome, and this would eventually lead to the law in this practice area for the entire country being made by federal court judges in California.[99]

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[95] *Id.* at *9-10.
[96] *Id.* at *11.
[97] *See generally Twombly,* 550 U.S. at 557.
[98] *"Handmade" Liquor: Federal Courts Offer Divergent Views in Two Similar Lawsuits,* WASH. LEGAL FOUND., http://wlflegalpulse.com/2015/06/22/handmade-liquor-federal-courts-offer-divergent-views-in-two-similar-lawsuits/ [https://perma.cc/JUB8-NVXC ] (last visited Nov. 2, 2015).
[99] *Id.*

## V. CONCLUSION

The alcohol beverage industry in the United States has a long and tumultuous history, from Prohibition to the present. However, this iconic industry has not only survived that history, but has prospered and taken its permanent place as a part of American culture. To maintain the profitability and posterity of the alcohol industry, the courts deciding these labeling class actions that have become a fad in recent years need to strive to achieve some consistency in their decisions. Ideally, this would occur by regularly denying motions to dismiss at preliminary stages based on finding the plaintiffs' claims regarding reasonableness of the consumer to be a question of fact. In stabilizing the more troublesome split in legal authority on this issue, courts should apply *Mead* and *Chevron* to find that COLAs issues by the TTB are formal enough to receive *Chevron* deference. Subsequently, courts should find the agency's decisions in issuing a COLA to be a reasonable interpretation of the agency's authority, thus triggering the safe harbor provision of most state deceptive and unfair practice acts that would shield liquor manufacturers from liability under the acts, and provide some much needed consistency to an area of law that is otherwise headed for derailment.

If the courts are unwilling or unable to address the situation, the responsibility to take action to protect the industry must shift to the TTB. The TTB could provide clarification of the COLA approval processes that seem to be a hang up for courts. The agency could also opt to issue definitive rulings that provide guidance to industry officials on the correct use or understood meaning of common terms used on labels. This would not only give TTB officers some direction when approving or denying COLAs, but it would also give manufacturers an opportunity to protect themselves and avoid these suits that involve costly litigation since they would have a better understanding of the acceptable use of the terms. If this problem continues unaddressed, liquor consumers and connoisseurs will come out the real losers, because whether manufacturers are forced to go through a costly re-labeling process or continue to litigate these issues in court, it is sure to affect the market price of our favorite beverages.