

**MillerCoors hops to victory using effective disclaimers**

**Examination/opposition  
Geographical indications/appellations of origin**

**United States - Knobbe Martens Olson & Bear LLP**

June 08 2017

In *Nelson v MillerCoors LLC*, 15-CV-7082, 2017 WL 1403343, F Supp 3d (EDNY 2017), plaintiff Leif Nelson filed a putative class action suit against defendant MillerCoors LLC under claims of:

- unfair or deceptive acts under the Illinois Consumer Fraud and Deceptive Business Practices Act;
- deceptive acts or practices under the New York General Business Law;
- false advertising under the New York General Business Law;
- negligent misrepresentation;
- fraud;
- breach of express warranty; and
- in the alternative, unjust enrichment.

The court granted a motion to dismiss this case under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim on which relief can be granted.

The defendant owns Foster's Beer, an Australian-style beer brand. Foster's Beer was created in 1887 in Melbourne, Australia. Historically, Foster's Beer has exported cans to the United States with labels referring to the brand's Australian heritage. The cans have included images such as a red kangaroo and the Southern Cross constellation. Beginning in 2011, Foster's USA LLC began brewing all Foster's Beer sold in the United States in US facilities. In 2012 MillerCoors acquired Foster's USA LLC. Throughout this period, the Foster's Beer can design remained virtually unchanged.

The plaintiff launched a class action suit alleging that the defendant was deceiving consumers into believing that they were purchasing imported beer rather than domestic beer because the Foster's Beer can design remained unchanged even after its brewing operations were moved to the United States. The plaintiff claimed that consumer confusion was compounded by the defendant's marketing campaigns, which included:

- use of the "Foster's Australian for Beer" slogan;
- use of "How to Speak Australian" television advertisements; and
- the Foster's Beer website, which made additional references to the brand's ties with Australia, the brand's Australian history and references such as Foster's Beer being "the largest-selling Australian beer brand in the world".

As a preliminary matter, the court rebuffed the plaintiff's arguments that this issue was not appropriate for a motion to dismiss. The court confirmed that it may determine as a matter of law that an allegedly deceptive advertisement would not have misled reasonable consumers. In its motion, the defendant requested the court to take judicial notice of several documents, including the certificates of label approval (COLA) applications which the defendant had submitted to the US Alcohol and Tobacco Tax and Trade Bureau. The court agreed to take judicial notice of the COLA applications because the plaintiff had also relied on the images from the COLA applications in his complaint. Therefore, the court decided to take judicial notice of the COLA applications because there were no disputes as to authenticity and they were a matter of public record.

The court then spent the bulk of its opinion dealing with the issue of disclaimers and the allegedly deceptive practices. It agreed with the defendant's arguments, finding:

*"the idea that consumers purchase products based on certain of a label's statement or images (e.g., pictures of a constellation and a kangaroo) but are blind to others (e.g., a statement in plain English of where Foster's Beer is brewed) in close proximity on that label strains credibility."*

The court further stated that the Second Circuit had clearly found that "the presence of a disclaimer or similar clarifying language may defeat a claim of deception". In this case, the court found that the defendant had used an effective disclaimer because the Foster's Beer labels explicitly disclaimed the place of production with the text: "BREWED AND PACKAGED UNDER THE SUPERVISION OF FOSTER'S AUSTRALIA LTD, MELBOURNE, AUSTRALIA BY OIL CAN BREWERIES, ALBANY GA AND FORT WORTH TX." In addition, the Foster's Beer's website also indicated: "© Oil Can Breweries, Fort Worth, TX." The court stated that whether a disclaimer defeats a claim of deception requires analysis of "factors such as font size and placement of the disclaimer as well as the relative emphasis placed on the disclaimer".

In its decision, the court found that every single alleged misrepresentation that the plaintiff pleaded reliance on, across every single medium, was accompanied by language indicating that the beer was brewed in the United States. The court therefore concluded that the images of the kangaroo and a constellation and an allusion to the historic roots in Australia were not deceptive and no reasonable consumer would be deceived into believing that Foster's Beer sold in the United States was brewed in Australia.

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