



## Food & Beverage ADVISORY ■

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### Open Bar? Shot at Dismissal of Cocktail-Themed Drinks Suit Now on the Rocks

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With ready-to-drink (RTD) alcoholic beverages continuing to gain popularity, it appears the plaintiff's bar is ready to take its shot at RTD producers. Although many are aware of a putative class action in New York federal court challenging a national brewer's "Ritas" RTD product line, few have taken note of an identical suit in Missouri federal district court brought by the same plaintiff's firm: *Browning v. Anheuser-Busch LLC*, No. 4:20-cv-00889 (W.D. Mo. May 13, 2021). In a significant development for the alcohol industry, that federal court recently denied a motion to dismiss claims challenging the alcohol used in cocktail-themed malt beverages.

The plaintiffs filed a proposed class action challenging the packaging and advertising of the defendant's Ritas RTD alcoholic beverages. Relying on product names like "Margarita," "Mojito," and "Rosé," the plaintiffs claimed they thought the drinks contained distilled spirits or wine. But the beverages do not; they are actually flavored malt beverages and contain one disclaimer on the *bottom* of the packaging that the RTD products are "malt beverages." Full of undistilled ire, the plaintiffs brought claims for violations of Missouri's consumer protection law, fraud, breach of warranty, and unjust enrichment.

The defendant moved to dismiss the complaint, a spirited attempt the court largely denied. Focusing on the Missouri consumer protection claim, the court first held that the plaintiffs alleged with particularity that the "overall appearance" of the Ritas beverages could deceive a reasonable consumer into believing the products contained distilled spirits or wine. The plaintiffs alleged that the use of the names "Margarita," "Mojito," and "Rosé," images of cocktail and wine glasses, and an ad campaign featuring a [woman in a wine cellar](#) could mislead a reasonable consumer to believe that the drinks include tequila, rum, or wine. The district court agreed, and in doing so, rejected the defendant's argument that no reasonable consumer could be deceived because Alcohol and Tobacco Tax and Trade Bureau regulations allow the use of cocktail names for malt beverages. It found that this regulation applies only to the extent that the beverage is *not misleading*.

The district court was equally unimpressed with the argument that whether the drinks contained distilled spirits or wine is not material to reasonable consumers, holding that the plaintiffs sufficiently alleged that the type of alcohol matters to consumers and affects how much consumers are willing to pay. The district court relied on similar reasoning to deny dismissal of the plaintiffs' fraud and breach of warranty claims. The district court took special note of the breach of warranty claims, concluding that the plaintiffs were not required to provide pre-suit notice and that the

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beverages' packaging and advertisements could plausibly constitute a promise that the beverages contained distilled spirits or wine. The district court also rejected the defendant's arguments for dismissal of the unjust enrichment claim, holding that the plaintiffs could plead the claim in the alternative and the plaintiffs' allegation that the brewer received revenue from the purchases was sufficient to allege the conferral of a benefit.

Finally, the district court rejected the arguments that the plaintiffs did not have standing for injunctive relief because there was no possible future injury, concluding that the plaintiffs are continually at risk of being deceived and thus could suffer future injury. It also concluded that the plaintiffs had standing to assert claims about products they didn't purchase because those products were similar enough to the products the plaintiffs did purchase.

The district court's ruling is a sobering reminder to producers of RTD alcoholic beverages to carefully consider how they name, package, and advertise their beverages and the type of alcohol contained in them. While the case law in this space still in its very early stages, this opinion suggests that a small "malt beverage" disclosure may not offer much protection—at least at the pleading stage—if a product's labeling and marketing arguably evoke an authentic cocktail. Perhaps more prominent disclosures about the type of alcohol contained in the products—or express disclaimers, for example, that the Margarita product "does not contain distilled spirits or wine"—would have given the district court greater pause. The broader takeaway is that technical accuracy in food and beverage labeling is not a silver-bullet defense if other elements of the packaging or marketing—the "overall appearance"—could plausibly confuse consumers.

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