

District Court Issues Opinion in Old Charter Bourbon False Advertising Class Action

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On February 5, 2018, the US District Court for the Eastern District of Missouri issued an [opinion](#) in one of the many false advertising class actions brought against the industry in the past five years.

Penrose v. Buffalo Trace Distillery, E.D. Mo. 4:17-cv-00294-HEA, involves the labeling of Old Charter bourbon. For years, Old Charter sold an 8-year-old version and a 12-year-old version, with their labels very prominently displaying “8” and “12” (respectively) in several places. According to the complaint, in January 2014 Old Charter “8” was re-formulated to use less-aged bourbon, described by the court as “non-age stated” or “NAS” bourbon. The labels, however, continue to prominently display the number “8” in the same manner as the prior label. In addition, while the label previously stated “aged 8 years,” the NAS bourbon’s label states “gently matured for eight seasons.” The court’s opinion catalogues a number of alleged complaints by consumers that they were deceived into

purchasing the NAS product on the mistaken belief that the bourbon was still aged for eight years. Significantly, the complaint alleges that the price for Old Charter “8” remained the same after the reformulation.

Based on these facts, four plaintiffs brought no fewer than ten claims arising under false advertising and unfair competition statutes of four states (Florida, Missouri, New York and South Carolina), a host of common law theories, and the federal Magnuson-Moss Warranty Act. As is typical for these cases, the three defendants (Buffalo Trace Distillery, Old Charter Distillery Co., and parent company Sazerac) moved to dismiss. The court’s February 5 order grants in part and denies in part the motion, but the overall decision clearly represents a win for the plaintiffs.

1. The court denied the request to dismiss all the claims as a matter of law, explaining that, “The Court cannot conclude as a matter of law and at this stage of the litigation that the packaging is not misleading, particularly in light of Plaintiffs’ allegations that previously, Old Charter was aged 8 years.”
2. Like many other courts in similar cases, the court refused to hold that approval of the Old Charter labels by the Alcohol and Tobacco Tax and Trade Bureau (TTB) provides a “safe harbor” defense to the defendants.
3. Because the plaintiffs’ complaint did not set forth a written warranty, the court dismissed plaintiffs’ Magnuson-Moss Warranty Act claim without prejudice.
4. Examining the allegations, the court concluded that the complaint met the heightened pleading standards for fraud under Federal Rule of Civil Procedure 9(b). According to the court, the complaint adequately alleged “(i) the who: Old Charter; (ii) the what: the number 8 on the bottles of Old Charter in several spots; (iii) the when: purchases made beginning in January 2014 through the present; (iv) the where: on the label of Old Charter Bourbon; (v) and the how: by representing that Old Charter was aged 8 years.”
5. The court denied the defendants’ attempt to dismiss plaintiffs’ claim for unjust enrichment, explaining (in language that should cause the defendants concern) “it appears to this Court that it would be unjust to permit Defendants to retain the monetary benefit derived from Plaintiffs’ purchases if, in fact, its labels are false or misleading.”



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6. As noted above, the complaint alleged breaches of the laws of four states, seeking to certify a nationwide class. The court deferred a decision on whether the plaintiffs can represent a nationwide class, explaining that the issue is best handled at the class certification stage of the proceedings.
7. The plaintiffs essentially conceded their negligent misrepresentation claim, and it accordingly was dismissed without prejudice.
8. The court refused to dismiss plaintiffs' express warranty claim, explaining that the label could be construed as making an express representation that the bourbon was aged for eight years.
9. The court dismissed plaintiffs' breach of the implied warranty of merchantability claim, as nothing in the complaint alleged that Old Charter "8" bourbon did not meet the minimum standards of merchantability.
10. The court held that plaintiffs, who the complaint suggests will not purchase Old Charter "8" in the future, lack standing to seek injunctive relief.

While the court's February 5 order somewhat narrows the plaintiffs' case, the bulk of the claims were allowed to continue. Throughout the opinion, the court placed great weight on the combination of the "8" references on the label with the product's prior history of being a bourbon aged for eight years. Presumably, the court viewed this history as creating a consumer expectation that made their reliance on the "8" references reasonable.

The case will now likely proceed to the intrusive and expensive "discovery" phase unless the parties can agree to a settlement. Given the time and expense of litigation and the apparent sympathy the court's opinion displayed towards the plaintiffs' claims of deception, one must expect that the defendants will give settlement serious consideration.

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