WINE AND HEALTH LAW PROGNOSIS

A View from the United States

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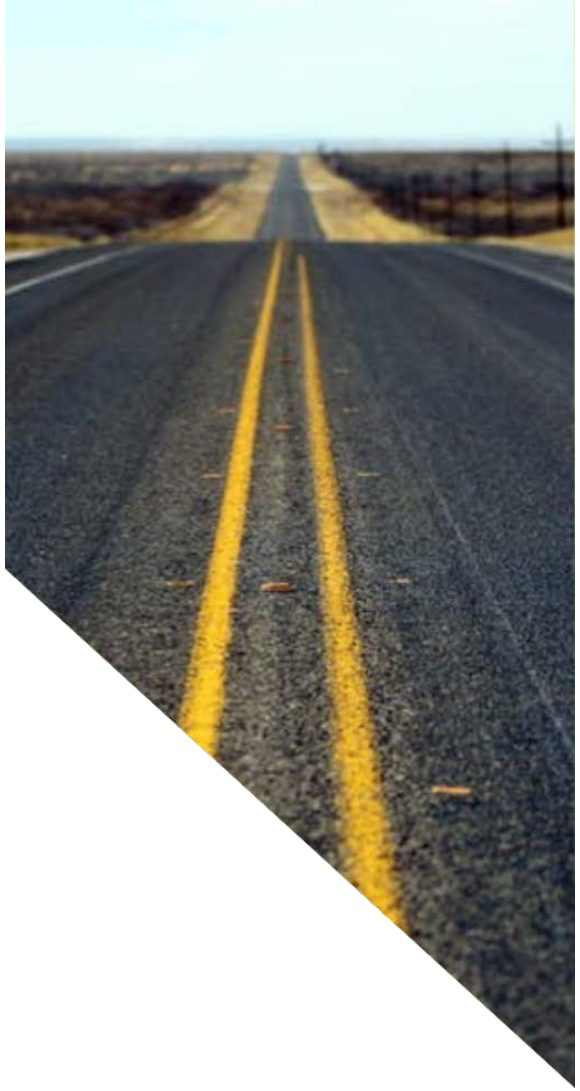
ROADMAP FOR DISCUSSION



- Background
- The Current Legal Landscape
  - Plain packaging
  - Mandatory health warnings
  - Prohibitions against health claims
  - Nutrition statements
- What's Next
  - Regulatory Proposals
  - The Specter of Civil Lawsuits

BACKGROUND

- Keep in mind that the U.S. remains rooted in the English **Common Law Tradition**
- Under Common Law **Tort** principles, a producer is liable, in money damages, for the harm caused by a negligently-produced or distributed product
- But alcohol beverages were subject to a major caveat – the "**common knowledge**" defense
- Under this defense, products that were widely known to be dangerous could avoid liability on the theory that the consumer understood and accepted the risks by purchasing or consuming the product
- William Blackstone, the celebrated 18th Century English jurist and judge, used "good whiskey" as his example of a product subject to the common knowledge defense

BACKGROUND

- By the 20th Century, the once hard-drinking nation attempted the most bold alcohol health measure possible – outright **Prohibition** (capitalized in the U.S. as a specific historic event) of –
  - "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and the territory subject to the jurisdiction thereof for beverage purposes . . ."
  - U.S. Const., Amendment 18, § 1
- Advocates frequently cited health justifications in their calls for Prohibition – calling alcohol beverages a "**poison**" that shortened lifespans and induced madness

BACKGROUND

- A full exploration (debate perhaps?) on the failure of Prohibition could fill the rest of this conference, but Prohibition's repeal in 1933 had several legacy implications –
  - Much of the power to regulate alcohol was left in the hands of **individual state governments**, with a federal overlay that primarily addresses product composition, labeling, advertising, and certain trade practices
  - Americans were wary of any comprehensive, "utopian" solution to the challenges and issues raised by alcohol beverage consumption
- Another notable 20th Century development started in the late 1940s, when state courts began embracing **strict liability** for injuries to consumers caused by products

BACKGROUND

Finally, some features of the U.S. legal system today bear particular note –

- Most U.S. jurisdictions adhere to the "**American system**" for attorneys fees, with each party bearing its own fees, regardless of case outcome (*i.e.*, no "looser pays" system)
- Our ethics rules permit liberal "**contingency**" arrangements – where lawyers take on a case for free and only receive compensation if the plaintiff receives a monetary judgement or settlement payment
- Our legal procedures authorize substantial and invasive "**discovery**" into the other side's records and officials – a time-consuming and expensive process

THE CURRENT LEGAL LANDSCAPE

- To date, regulatory, and not civil liability, considerations dominate a discussion of alcohol and health
- The U.S. has not moved towards a “plain packaging” regime and there have been no serious proposals to do so
- One reason, no doubt, is the **First Amendment** to the Constitution’s protection of “**commercial speech**” (more later)
- But another reason is that the U.S. still maintains a **pre-approval system** for the labels of all spirits, and most wines and beers
- Today the **Alcohol and Tobacco Tax and Trade Bureau** (“**TTB**”) still reviews and issues **Certificates of Label Approval** (“**COLAs**”) for product labels – the Agency received almost **195,000** individual applications in Fiscal Year 2018

THE CURRENT LEGAL LANDSCAPE

- A cornerstone of U.S. policy towards alcohol and health is the **Alcohol Beverage Labeling Act of 1988** ("**ABLA**"), which today is administered by TTB
- The ABLA mandates a government warning on containers of all alcohol beverages sold in the U.S. –
  - **GOVERNMENT WARNING**: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems.
- The statute and regulations impose an inflation-adjusted civil penalty (today **$21,039 per violation**) that, when calculated per bottle, is quite onerous

THE CURRENT LEGAL LANDSCAPE

- While the ABLA might be viewed as a negative for the industry, it actually provides alcohol producers with protection from civil lawsuits –
  - It codifies and contains a **congressional endorsement of the common knowledge defense**
  - It **preempts** (*i.e.*, supersedes and renders invalid) conflicting state and local laws that might impose additional or different warnings
- Indeed, a wave of lawsuits in the 1980s seeking to hold alcohol suppliers responsible for harms caused by **fetal alcohol syndrome** may have helped the enactment of the ABLA
- The U.S. Dept. of the Treasury (today through TTB) is tasked with making recommendations to Congress for additional topics to be addressed by the warning

THE CURRENT LEGAL LANDSCAPE

- The “plaintiffs’ bar” attempted to side-step the common knowledge defense in the 2000s, launching a series of **“class action” lawsuits** focused on industry advertising practices –
  - A “class action” allows many plaintiffs with small individual grievances to bring a single action to recover damages on behalf of the class
  - Today, class actions are conceived by lawyers, who recruit “representative plaintiffs” and stand to earn substantial fees from settlement payments or favorable judgements
- These advertising lawsuits, filed in 2003-05, were brought in over ten states, often using cut-and-paste complaints, and typically named the largest drinks suppliers, including one or two local entities (a beer wholesaler, a local producer, in one case a trade association) to keep the case in state (as opposed to federal) court

THE CURRENT LEGAL LANDSCAPE

- The advertising cases' theory was that **industry member advertising appealed to minors** and portrayed drinking in a glamorous way that did not highlight the negatives of drinking
  - The suits accused industry members and their associations of participating in a "long-running, sophisticated and deceptive scheme by certain . . . manufacturers to market alcoholic beverages to children and other under-age consumers"
  - *Hakki v. Zima* Compliant (filed in the District of Columbia, 2003)
- The lawsuits **attempted to disgorge revenue** from manufacturers and distributors derived from the sales of alcohol beverage consumed by persons under the legal drinking age and to compensate the parents of those underage consumers
- Courts uniformly **dismissed the lawsuits for "failure to state a claim"** (*i.e.*, inadequate as a matter of law), pointing to a lack of any legal obligation of industry members to the parents of children who violated the drinking age laws

THE CURRENT LEGAL LANDSCAPE

- TTB also stands at the forefront of regulating (effectively banning) health claims and health-related statements on alcohol beverage labels and in advertising
- Federal regulations **banned health and therapeutic claims** on alcohol beverages since the 1930s
- But beginning in the 1970s, the Supreme Court recognized "**commercial speech**" as speech protection by the Constitution's First Amendment
- Outright governmental bans on truthful and non-misleading commercial messages became harder and harder to defend in the courts

THE CURRENT LEGAL LANDSCAPE

- In the early 1990s, TTB's predecessor (the Bureau of Alcohol, Tobacco & Firearms – **ATF**), partially out of First Amendment concerns, approved wine labels with "**directional health statements**" –
  - "To learn more about the health effects of consuming wine, talk to your physician"
  - This followed the emerging scientific evidence (now under fierce attack) that moderate consumption had positive health impacts
- ATF quickly reversed course after the label approvals caused an uproar in the U.S. Senate, where several prominent Senators threatened to block President Clinton's judicial nominations if he did not reverse ATF's decision

THE CURRENT LEGAL LANDSCAPE

- TTB then set about amending its health claims regulations, now explicitly including directional health statements
- The current regulations are a masterful example of a government agency avoiding potential legal challenge
  - First, while the new regulations were pending, ATF fended off a lawsuit challenging their directional health statement about-face through the litigation doctrine known as "**ripeness**"
- Then, the new rules did not explicitly ban health claims or directional health statements
- Instead, they indicated that TTB would review each claim and recommend additional disclosures on the negative health effects of drinking to render the full statement balanced
- In practice, **TTB has not approved a single label** with a balanced health message – the outright ban remains in fact, but not in name

THE CURRENT LEGAL LANDSCAPE

- The "**nutritional statements**" required on most foods sold in the U.S are *required* on those alcohol beverages that fall outside TTB's Federal Alcohol Administration Act jurisdiction –
  - **Wines below 7% alcohol by volume** (today mostly "hard" cider)
  - **Beer made without malted barley or hops** (today primarily the very hot "hard seltzer" category)
- For other products, ATF and, early in its history, TTB historically took the position that nutritional statements were implied health claims, as they would make consumers look at alcohol beverage as akin to ordinary food

THE CURRENT LEGAL LANDSCAPE

- But in the 2000s TTB came under pressure to liberalize its stance
  - Some large distillers felt that greater nutrition fact labeling would advance their cause by highlighting the lower calorie and carbohydrate counts in distilled spirits versus beer or wine
  - Public health groups petitioned TTB in 2003 requesting that an "**alcohol facts**" disclosure become mandatory information on alcohol beverage labels
- TTB responded in part, issuing guidance amending its policies towards "light" and other calorie claims by providing the option to *voluntarily* provide this information in a panel form somewhat similar to the nutritional labeling panels required of most foods under the federal Food, Drug & Cosmetics Act
- More recently, the **Beer Institute**, the trade association for the largest brewers and beer importers, has embraced voluntary alcohol facts labeling

WHAT'S NEXT

- On the regulatory front, demands for more labeling disclosures appear to be gaining momentum
- On a societal level, the message of alcohol's health dangers has become a familiar theme in advocacy in favor of **legalizing cannabis**
- TTB's massive "**Notice 176**" rulemaking has proposed a re-codification of all its wine, beer, and distilled spirit labeling and advertising regulations
  - The Notice was published in November 2018, with the comment period closing on June 26, 2019
- In response, the Center for Science in the Public Interest ("CSPI"), the National Consumers League, and the Consumer Federation of America have **renewed their call for mandatory alcohol facts disclosures**

WHAT'S NEXT

- Notice 176 has also promoted calls for TTB to **re-visit the warnings mandated by the ABLA**
- In June a coalition of 14 consumer/public health groups, including notable organizations such as the Consumer Federation of America and the American Institute for Cancer Research, urged TTB to recommend a **mandatory cancer warning on alcohol beverage labels**
- TTB would need to make formal recommendations to Congress on changes in the existing federal warning, and lobbying by public health advocates could advance that process
- Another looming question is whether **California's Proposition 65**, which requires in-store and on-package warnings about "known carcinogens," will mandate cancer warnings for alcohol or whether this state law will be preempted by the ABLA

WHAT'S NEXT

- Looming large behind all of this is the **threat of civil lawsuits** arising from the growing knowledge of a link between alcohol consumption and certain cancers
- We see these taking one of three likely forms –
  - Class Actions
  - Multi-District Litigation ("**MDL**")
  - Non-Consolidated Individual Actions

WHAT'S NEXT

- Class actions would likely **focus on state consumer protection statutes**
  - Allege that labels and advertisements should have warned of cancer risk
  - Failure to include warnings rendered advertisements false and misleading
- They could seek
  - Refund of amounts spent on alcohol during class period
  - Injunctive relief (*e.g.*, label changes and warnings)
  - Attorneys' fees
- Most likely to be brought by individuals who have not yet had cancer
- Will face a considerable **preemption argument**; a new congressionally-mandated warning would make that preemption defense even stronger

WHAT'S NEXT

- Multi-district litigation ("MDL") could follow the recent precedent in the lawsuits alleging harm (cervical cancer) from womens' use of talcum powder
- MDL cases aggregate multiple individual actions (*e.g.*, 4,800 in the talcum cases)
- Actions may be consolidated and transferred between courts
- Allows for streamlined discovery as to common matters
  - But, individual cases are then tried individually – very expensive
- Cases may be staggered – *e.g.*, "bellwether" cases proceed first
  - Validate link between cancer and alcohol?
  - Positive "bellwether" results can devalue (or increase value) of successor cases

WHAT'S NEXT

- Individual cases could lead the way, but in the long term a large number of cases would likely yield to MDL procedures
  - Courts would view trying thousands of claims individually as cost-ineffective
  - Doing so would place additional burdens on U.S. courts
- But the industry needs to watch for claims, as the U.S. legal system is full of stories of liability being imposed even where issues such as underling science and causation seem muddled
  - For example, what if the plaintiff with breast cancer also had a history of breast cancer in the family?
  - Or what if the plaintiff's cancer is of a type not yet linked to alcohol consumption?

THANK YOU / QUESTIONS?

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