



# AT THE BAR WITH BOWDITCH

A Legal Blog for the Craft Brewing Community

## Tito's Vodka Is Not In The Clear Yet In California

BY AIVI NGUYEN • DECEMBER 16, 2015

In August of this year, Beam Suntory Import Co., the owner of Jim Beam and Maker's Mark bourbons, won the last of three federal lawsuits against it concerning the allegation that the words "handcrafted" and "handmade" on its labels were misleading. The courts in those cases found that no reasonable consumer could actually believe that the bourbons were handmade. Read my previous article covering the topic [HERE](#).

These decisions appeared to be a victory for all distilleries and alcohol manufacturers who tout their products as "handmade." However, this does not seem to be the case for Fifth Generation, Inc., the owner of Tito's Vodka – at least in California. Like Beam Suntory, Fifth Generation has been named in a number of federal class action suits, at least nine, alleging that the use of the term "handmade" on Tito's Vodka labels is false advertising.

Some of the cases against Fifth Generation have been thrown out entirely, like in Illinois. Some have been whittled down to only one remaining claim, like in Ohio where the only remaining claim is for promissory estoppel (that the use of the term "handmade" constitutes a "promise" on which people reasonably relied) and in Florida where a claim for breach of express warranty survives (that "handmade" is a warranty made about the vodka). However, in California, Fifth Generation's fight rages on.

In March, plaintiffs in a class action case against the vodka maker in California survived a motion to dismiss. The Court decided that, on the facts alleged, it could be possible for consumers to believe that the vodka is handmade in old-fashion pot stills.

Most recently, Fifth Generation filed a motion for summary judgment, arguing that because the Alcohol and Tobacco Tax and Trade Bureau (TTB) approved of its label that it is protected by a California safe harbor – essentially, that because a federal agency vetted its label, it must not be false. However, the court shot that argument down, holding that the safe harbor only applies to instances where the TTB's actions are "the result of a formal, deliberative process akin to... an adjudicative enforcement action." The judge found that the review process by the TTB with respect to

whether the vodka is “handmade” is vague and subjective. What is notable about this ruling is that it opens the door for all TTB approved labels to be questioned, with companies no longer being able to simply argue that they are immune from scrutiny because the TTB approved their label.

It looks like Fifth Generation may have to actually prove that the use of the term “handmade” is not misleading because no one actually is misled. How it will prove this will be interesting.