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BITTER BEER FACE: ARE BEER CONGLOMERATES VIOLATING NEW YORK CONSUMER PROTECTION LAWS?

*Christopher R. Deubert**

This Article examines the potential legal implications under New York consumer protection laws of the growth in the beer industry: specifically, the battle between the craft beer industry and its large corporate competitors over labeling and advertising. This Article proceeds in four Parts: Part II summarizes the growth and consolidation of the craft beer industry; Part III explains federal regulation of beer labeling; Part IV explains New York State's regulation of beer labeling; and Part V examines the application of New York consumer protection laws to the labeling practices of the beer industry. This Article concludes with the determination that while the actions of certain breweries potentially violate New York law, private enforcement is challenging.

I. INTRODUCTION

Beer is big business in New York. In 2017, over 333 million gallons of beer were sold.¹ According to the New York State Brewers Association (“NYSBA”), the market share for New York-made beers is approximately five percent and “the share of all craft beers sold in New York would certainly be higher than that.”² While this number appears low, it represents exponential growth from a little more than a decade ago. The NYSBA counts 390 craft or microbreweries in the state, up

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1. Jan Conway, *Sales Volume of Beer and Wine in New York State from 2016 to 2017*, STATISTA (July 22, 2019), <https://www.statista.com/statistics/224495/per-capita-beer-and-wine-consumption-in-new-york-since-1994>.

2. See Don Cazentre, *Craft Beer Grows Nationwide: Is New York Keeping Up?*, NYUP.COM (Mar. 27, 2018), https://www.newyorkupstate.com/breweries/2018/03/craft_beer_grows_nation_wide_is_new_york_keeping_up.html.

from just thirty-eight when the Association was founded in 2003.³ Indeed, the trends in New York match those nationally. Retail sales of craft beer increased sixteen percent from 2015 to 2016 and ten percent from 2016 to 2017, now totaling \$27.6 billion and accounting for approximately twenty-four percent of the \$114.2 billion U.S. beer market.⁴ Those figures come from the Brewers Association, a national non-profit trade association of craft breweries whose mission is “[t]o promote and protect American craft breweries, their beers, and the community of brewing enthusiasts.”⁵

This Article discusses some of the potential legal implications of the growth in the beer industry, specifically, the battle between the craft beer industry and its large corporate competitors over labeling and advertising. This Article proceeds in four Parts: Part II, summarizing the growth and consolidation of the craft beer industry; Part III, explaining federal regulation of beer labeling; Part IV, explaining New York state’s regulation of beer labeling; and Part V, examining the application of New York consumer protection laws to the labeling practices of the beer industry.⁶ This Article concludes with the determination that while the actions of certain breweries potentially violate New York law, private enforcement is challenging.⁷

II. THE GROWTH AND CONSOLIDATION OF THE CRAFT BEER INDUSTRY

To understand the significance of the issues at hand, it is helpful to first examine the reasons for the explosive growth in craft beer popularity. There might be a variety of reasons, but the Brewers Association’s concepts related to craft beer likely provide insight. According to the Brewers Association, a craft brewer must be: (1) small, producing six million barrels of beer or less per year; and (2)

3. See Editorial Dept., *New York State Brewers Association Announces 326 Craft Breweries Across New York State*, BEER CONNOISSEUR (Feb. 6, 2017), <https://beerconnoisseur.com/articles/new-york-state-brewers-association-announces-326-craft-breweries-across-new-york-state>; *Governor Cuomo Announces Record Number of Breweries in New York State*, N.Y. ST. (Feb. 14, 2018), <https://www.governor.ny.gov/news/governor-cuomo-announces-record-number-breweries-new-york-state>.

4. *National Beer Sales & Production Data*, BREWERS ASS’N, <https://www.brewersassociation.org/statistics-and-data/national-beer-stats> (last visited Jan. 25, 2020); see Mike Snider, *Craft Beer Sales Continue Growth, Now Amount to 24% of Total \$114-Billion U.S. Beer Market*, USA TODAY (Apr. 2, 2019, 1:24 PM), <https://www.usatoday.com/story/money/business/2019/04/02/beer-sales-stay-flat-craft-beer-grows-share-114-b-us-market/3341312002>.

5. *Who We Are*, BREWERS ASS’N, <https://www.brewersassociation.org/who-we-are> (last visited Jan. 25, 2020).

6. See *infra* Parts II–V.

7. See *infra* Part VI.

independent, meaning that less than twenty-five percent of the brewery is owned or controlled by a beverage alcohol industry member which is not itself a craft brewer.⁸ Moreover, the Brewers Association articulates that innovation, community engagement, traditional ingredients, independence, and connecting with customers are important to the craft beer industry.⁹

These qualities are borne out in the data. A 2015 Nielsen study found that fifty-three percent of beer drinkers aged twenty-one to thirty-four said it was important that their beer be local.¹⁰ Then, a 2017 study found that fifty-five percent of beer drinkers said brewery independence was either somewhat or extremely important to them in buying their choice of beer.¹¹

New York has many breweries that meet these criteria. Indeed, the NYSBA has dozens of craft brewer members from all over the state, including, but not limited to: Moustache Brewing Co. on Long Island; SingleCut Beersmiths in Queens; Saranac Brewery in Utica; Brewery Ommegang in Cooperstown; and Big Ditch Brewing Company in Buffalo, with many more great ones in between.¹²

As alluded to earlier, the growth of the craft beer industry has generally come at the expense of the non-craft beer industry, i.e., the macrobreweries. In the American beer industry there are two major players: Anheuser Busch InBev (“AB InBev”) and MillerCoors (collectively, “Big Beer”). AB InBev is a publicly traded Belgian company with annual revenues of over \$54 billion.¹³ Its product line consists of some of the most recognizable and purchased beers in the country, including Budweiser, Bud Light, Corona, Michelob, Stella

8. *Craft Brewer Definition*, BREWERS ASS’N, <https://www.brewersassociation.org/statistics-and-data/craft-brewer-definition> (last visited Jan. 25, 2020).

9. *Id.*

10. *Tapped In: Craft and Local Are Powerful Trends in the Beer Aisle*, NIELSEN (July 14, 2015), <http://www.nielsen.com/us/en/insights/news/2015/tapped-in-craft-and-local-are-powerful-trends-in-the-beer-aisle.html>.

11. Keith Gribbins, *Business Insider Argument Is Totally Flawed, Majority of People Consider Craft Brewer Independence ‘Important’*, CRAFT BREWING BUS. (Sept. 7, 2017), <https://www.craftbrewingbusiness.com/news/business-insider-argument-totally-flawed-majority-people-consider-craft-brewer-independence-important>.

12. See BIG DITCH BREWING CO., <http://www.bigditchbrewing.com/home> (last visited Jan. 25, 2020); BREWERY OMMEGANG, <https://www.ommegang.com> (last visited Jan. 25, 2020); MOUSTACHE BREWING CO., <http://www.moustachebrewing.com> (last visited Jan. 25, 2020); SARANAC BREWERY, <https://www.saranac.com/contact> (last visited Jan. 25, 2020); SINGLECUT BEERSMITHS NYC, <https://singlecut.com> (last visited Jan. 25, 2020); see also *Members Archive*, N.Y. ST. BREWERS’ ASS’N., <https://newyorkcraftbeer.com/members> (last visited Jan. 25, 2020).

13. AB INBEV, 2018 ANNUAL REPORT 54, 73, 84 (2018), https://www.ab-inbev.com/content/dam/universaltemplate/ab-inbev/investors/reports-and-filings/annual-and-hy-reports/2019/190321_A B%20InBev%20RA2018%20EN.pdf.

Artois, Beck's, Hoegaarden, and Modelo, among others.¹⁴ MillerCoors is a subsidiary of Molson Coors, a publicly traded multinational brewing company formed from the gradual consolidation of the Molson, Miller, and Coors breweries.¹⁵ Molson Coors had revenue of nearly \$1.1 billion in 2018.¹⁶ MillerCoors also has a well-known line of products, including Coors Light, Miller Lite, Miller High Life, Blue Moon, Molson, Peroni, Keystone, and Grolsch.¹⁷

So how has Big Beer responded to the competition? Not surprisingly, they have bought many successful microbreweries, just as happens in many other industries. Perhaps most notably to New York consumers, in 2014, AB InBev bought Blue Point Brewing Company, a successful Long Island microbrewery, for a reported \$24 million.¹⁸ Goose Island Brewery from Chicago and Lagunitas Brewing Company in California are other notable examples of craft breweries purchased by Big Beer.¹⁹

While these consolidations may be regrettable to craft beer aficionados, there is nothing inherently troubling about these purchases. While many antitrust lawsuits have been brought against the beer conglomerates—many of which have been unsuccessful²⁰—the above

14. *Id.* at 54.

15. *See Is MillerCoors Publicly Traded and Can I Get a Financial Report?*, MILLERCOORS, <https://www.millercoors.com/node/29> (last visited Jan. 25, 2020); *Our History*, MOLSON COORS, <https://www.molsoncoors.com/en/our-story/our-history> (last visited Jan. 25, 2020).

16. Press Release, Molson Coors, Molson Coors Reports 2018 Full Year and Fourth Quarter Results (Feb. 12, 2019), <http://ir.molsoncoors.com/news/press-release-details/2019/Molson-Coors-Reports-2018-Full-Year-and-Fourth-Quarter-Results/default.aspx>.

17. *Our Great Beers*, MILLERCOORS, <https://www.millercoors.com/beers/great-beers> (last visited Jan. 25, 2020).

18. Victor Ocasio, *Blue Point Balances Expansion, Local Roots After Acquisition*, NEWSDAY (Dec. 16, 2016, 6:00 AM), <https://www.newsday.com/business/blue-point-balances-expansion-local-roots-after-acquisition-1.12764174>.

19. Jason Nottle, *The Deal That Shook Craft Beer Five Years Ago Is Still Reverberating*, MARKETWATCH (Apr. 21, 2016, 1:29 PM), <https://www.marketwatch.com/story/the-deal-that-shook-craft-beer-five-years-ago-is-still-reverberating-2016-04-21>; James F. Peltz, *Heineken Buys Full Ownership of California Craft Brewer Lagunitas*, L.A. TIMES, (May 4, 2017, 2:30 PM), <https://www.latimes.com/business/la-fi-heineken-lagunitas-20170504-story.html>. For an excellent history on the acquisition of Goose Island and similar breweries, see JOSH NOEL, BARREL-AGED STOUT AND SELLING OUT: GOOSE ISLAND, ANHEUSER-BUSCH, AND HOW CRAFT BEER BECAME BIG BUSINESS 307-10 (2018) (eBook).

20. *See, e.g., DeHoog v. Anheuser-Busch InBev*, 899 F.3d 758, 760, 766 (9th Cir. 2018) (dismissing action challenging AB InBev's acquisition of SABMiller); *United States v. Anheuser-Busch InBev*, No. 13-127 (RWR), 2013 WL 7018607, at *1 (D.D.C. Oct. 24, 2013) (approving settlement of antitrust lawsuit arising out of AB InBev's acquisition of Grupo Modelo); *Lubbock Beverage Co., v. Miller Brewing Co.*, No. CIV.A.5:01-CV-124-C, 2002 WL 31011266, at *1-2 (N.D. Tex. June 4, 2002) (granting summary judgment to Miller on distributor's antitrust claims); *Anheuser-Busch, Inc. v. G.T. Britts Distrib., Inc.*, 44 F. Supp. 2d 172, 172-73, 176-77 (N.D.N.Y. 1999) (dismissing distributor's antitrust counterclaims); *New York v. Anheuser-Busch, Inc.*, 811 F. Supp. 848, 849-50 (E.D.N.Y. 1993) (dismissing state's antitrust claims).

data demonstrates that the craft beer industry is doing well and that consumers are flush with choices of beer.²¹

What may be troubling, however, is what the Big Beer companies have done with their newly acquired microbreweries after the purchase. It appears that Big Beer has taken steps to remain separated from their craft beers in the eyes of consumers. After purchasing the craft breweries, AB InBev and MillerCoors have generally avoided any association with their new subsidiaries. The craft beers' labels and websites generally have remained as they did prior to the purchase, omitting any reference to their conglomerate corporate parent.²² Nor do the Big Beer websites include any mention of their now subsidiary microbreweries.

Similarly, in addition to buying craft breweries, these large beer manufacturers have begun making their own beers designed to look like craft beers.²³ These beers also generally avoid disclosure of their corporate parent. One of the earliest craft beer attempts by Big Beer was MillerCoors' Blue Moon, a Belgian style wheat ale introduced in 1995 under the name Blue Moon Brewing Co.²⁴ In 2006, AB InBev began producing Shock Top, also a Belgian style wheat ale, to compete with Blue Moon.²⁵ Today, you will not find a reference to MillerCoors on Blue Moon's website, nor a reference to AB InBev on Shock Top's website.²⁶ Instead, Blue Moon's website looks like those of many microbreweries—focusing on the beer's roots, authenticity, and high quality.²⁷ Likewise, Blue Moon and Shock Top bottles and packaging are devoid of the names of their corporate parents.

It seems likely that these omissions are intentional. Big Beer knows that craft beer drinkers prefer the local, small business nature of the craft breweries and thus often purposefully choose to purchase craft beers instead of beer from Big Beer. For example, a 2017 survey by Nielsen found that sixty percent of American craft beer buyers believe that a beer's packaging or labeling is "very" or "extremely" important in convincing them to try the beer.²⁸ Big Beer thus further knows that if the

21. See *supra* text accompanying note 4.

22. See NOEL, *supra* note 19, at 307-09.

23. *Id.* at 302.

24. *Id.* at 54.

25. *Id.* at 118, 222.

26. See BLUE MOON, <https://www.bluemoonbrewingcompany.com/en-US> (last visited Jan. 25, 2020) (showing a lack of MillerCoors references); SHOCK TOP, <https://www.shocktopbeer.com> (last visited Jan. 25, 2020) (showing a lack of AB InBev references).

27. BLUE MOON, *supra* note 26.

28. CPG, FMCG & Retail, *Craft Beer Drinkers Often Judge a Beer by Its Packaging*, NIELSEN (May 25, 2017), <http://www.nielsen.com/us/en/insights/news/2017/craft-beer-drinkers-often-judge-a-beer-by-its-packaging.html>.

labeling or advertising of their craft beer products revealed the corporate parent, consumers would no longer buy that “craft” beer. Indeed, following its 2011 purchase of Goose Island, AB InBev specifically decided that “[t]he words Anheuser-Busch would appear nowhere on the label.”²⁹

As will be explained below, Big Beer’s labeling and advertising practices concerning their craft beer subsidiaries potentially violate New York’s consumer protection statutes prohibiting deceptive acts and practices and false advertising.³⁰ Before turning to possible claims under New York law, it is important to understand the regulation of beer labeling and advertising.

III. FEDERAL REGULATION OF BEER LABELING

Beer producers are subject to federal statutes and regulations governing, among other things, the labeling and advertising of their products.³¹ The Federal Alcohol Administration Act (“FAAA”) prohibits various practices considered to be unfair competition.³² Of specific relevance, the FAAA prohibits producers of malt beverages, which generally includes beer,³³ from engaging in “deception of the consumer” and requires these producers to “provide the consumer with adequate information as to the identity and quality of the products.”³⁴ The FAAA directs the Secretary of the Treasury to proscribe regulations implementing the law.³⁵

Pursuant to the FAAA, the Alcohol and Tobacco Tax and Trade Bureau (“TTB”), a bureau of the Department of the Treasury, has further

29. NOEL, *supra* note 19, at 203.

30. See *infra* Parts IV–V.

31. See 27 U.S.C. § 205 (2012) (prohibiting various types of business policies and dealings by those who distribute or produce alcohol).

32. *Id.*

33. The statute defines “malt beverages,” as:

beverage[s] made by the alcoholic fermentation of an infusion or decoction, or combination of both, in potable brewing water, of malted barley with hops, or their parts, or their products, and with or without other malted cereals, and with or without the addition of unmalted or prepared cereals, other carbohydrates or products prepared therefrom, and with or without the addition of carbon dioxide, and with or without other wholesome products suitable for human food consumption.

Id. § 211(a)(7). This definition includes products typically considered to be “beer.” See Classification of Brewed Products as “Beer” Under the Internal Revenue Code of 1986 and as “Malt Beverages” Under the Federal Alcohol Administration Act, 73 Fed. Reg. 41,259, 41,260 (proposed July 18, 2008) (to be codified at 27 C.F.R. pts. 7, 16, and 25); ALCOHOL & TOBACCO TAX & TRADE BUREAU, DEP’T OF THE TREASURY, TTB Ruling No. 2008-3 (July 7, 2008).

34. 27 U.S.C. § 205(e).

35. Classification of Brewed Products as “Beer” Under the Internal Revenue Code of 1986 and as “Malt Beverages” Under the Federal Alcohol Administration Act, 73 Fed. Reg. at 41,260.

regulations governing the labeling and advertising of malt beverages,³⁶ and beer specifically.³⁷ The FAAA regulations have detailed requirements governing the labeling and advertising of beer, including the name, type, address, alcohol content, size, and language.³⁸ The regulations also specifically prohibit the following practices potentially relevant to this discussion:

Misleading brand names. No label shall contain any brand name, which, standing alone, or in association with other printed or graphic matter, creates any impression or inference as to the age, origin, identity, or other characteristics of the product unless the appropriate TTB officer finds that such brand name, either when qualified by the word “brand” or when not so qualified, conveys no erroneous impressions as to the age, origin, identity, or other characteristics of the product.³⁹

Additionally, the regulations prohibit “[a]ny statement that is false or untrue in any particular, or that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter, tends to create a misleading impression.”⁴⁰ Furthermore, of possible relevance, the regulations state that “[i]f the brewer’s name, trade name or brand name includes the name of a city which is not the place where the beer was produced, the appropriate TTB officer may require the brewer to state the actual place of production on the label.”⁴¹

While the above regulations potentially regulate the type of conduct of concern here, neither the statutes nor the regulations provide for a private cause of action. The Supreme Court has explained that “private rights of action to enforce federal law must be created by Congress,” and “courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.”⁴²

IV. STATE REGULATION OF BEER LABELING

New York law also regulates beer labeling but less so than the FAAA and TTB.⁴³ New York’s labeling laws, in relevant part, prohibit “any statement, design, device or representation that is likely to mislead

36. See 27 C.F.R. §§ 7.20–7.29 (2019).

37. See *id.* §§ 25.1–25.4.

38. See *id.* §§ 7.20–7.29.

39. *Id.* § 7.23(b).

40. *Id.* § 7.29(a)(1); see also *id.* § 7.54(a)(5) (showing a substantially similar provision).

41. *Id.* § 25.142(c).

42. *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001).

43. See N.Y. ALCO. BEV. CONT. LAW § 107-a (McKinney 2019).

the consumer.”⁴⁴ While there has been litigation between breweries and the New York State Liquor Authority concerning the Liquor Authority’s disapproval of certain labels,⁴⁵ there is no indication that the law was intended to provide for a cause of action against a violator of the law.

V. POSSIBLE VIOLATIONS OF NEW YORK LAW

New York has two principal consumer protection statutes relevant to the instant situation: (a) section 349 of the N.Y. General Business Law, governing deceptive acts and practices; and (b) section 350 of the N.Y. General Business Law, governing false advertising.⁴⁶ The Attorney General is empowered to enforce both statutes via injunctions or civil lawsuits and penalties.⁴⁷ In addition, as will be articulated below, the statutes also provide for private causes of action. While an aggrieved beer purchaser may also pursue a common law fraud claim, here the focus is on their statutory claims.

A. *New York General Business Law § 349 (Deceptive Acts and Practices)*

Section 349 of the N.Y. General Business Law prohibits “[d]eceptive acts or practices in the conduct of any business, trade or commerce.”⁴⁸ The statute is applied broadly, “to virtually all economic activity,” “to provide[] needed authority to cope with the numerous, ever-changing types of false and deceptive business practices which plague consumers” in New York.⁴⁹

The Attorney General, whenever he or she

believe[s] from evidence satisfactory to him [or her] that any person, firm, corporation or association or agent or employee thereof has engaged in or is about to engage in any of the acts or practices stated to be unlawful he [or she] may bring an action on behalf of the people of

44. *Id.* at § 107-a(5)(c)(iii).

45. *See, e.g.,* *Bad Frog Brewery, Inc. v. N.Y. State Liquor Auth.*, 134 F.3d 87, 90-94, 101 (2d Cir. 1998) (holding that Liquor Authority’s denial of label displaying a frog “giving the finger” violated the First Amendment); *Integrated Beverage Grp. Ltd. v. N.Y. State Liquor Auth.*, 849 N.E.2d 960, 960 (N.Y. 2006) (holding that Liquor Authority “rationally disapproved the brand label registration applications”).

46. N.Y. GEN. BUS. LAW §§ 349, 350-a (McKinney 2012). Big Beer has faced these statutes before. In 1992, Coors unsuccessfully alleged Anheuser-Busch’s violation of them in advertising campaigns. *See Coors Brewing Co. v. Anheuser-Busch Cos.*, 802 F. Supp. 965, 966-67, 975 (S.D.N.Y. 1992).

47. *See* GEN. BUS. §§ 349(b), 350-c, 350-d.

48. *Id.* § 349(a).

49. *Karlin v. IVF Am., Inc.*, 712 N.E.2d 662, 665 (N.Y. 1999) (internal quotations and citations omitted).

the state of New York to enjoin such unlawful acts or practices and to obtain restitution of any moneys or property obtained directly or indirectly by any such unlawful acts or practices.⁵⁰

Additionally, as mentioned earlier, the statute specifically provides for a private cause of action by “any person who has been injured by reason of any violation” of the statute.⁵¹ According to the New York Court of Appeals, to state a claim under N.Y. General Business Law section 349, a plaintiff must allege: (1) the defendant has engaged in a deceptive act or practice that is “consumer oriented”; (2) that the act or practice is deceptive or misleading in a material way; and (3) that plaintiff has been injured as a result of defendant’s conduct.⁵² A deceptive act or practice is one that is “likely to mislead a reasonable consumer acting reasonably under the circumstances.”⁵³ A plaintiff does not need to prove that the defendant had an intent to defraud nor that plaintiff justifiably relied on defendant’s conduct.⁵⁴ And, lastly, an omission can constitute a deceptive act or practice.⁵⁵

Certain beer buyers seem to have a colorable claim under section 349. Big Beer’s packaging of their craft beers and subsidiaries and websites are clearly “consumer oriented.” Websites exist to inform consumers about products and persuade consumers to purchase them. Additionally, Big Beer’s failure to identify the craft breweries’ corporate parents is arguably materially misleading since at least some people would choose not to buy those beers if such information were disclosed. Lastly, such consumers are injured by their purchase of a product that they would not have bought had all material information been disclosed.

B. New York General Business Law § 350 (False Advertising)

N.Y. General Business Law section 350 prohibits “[f]alse advertising in the conduct of any business, trade or commerce.”⁵⁶ “The term ‘false advertising’ means advertising, including labeling, of a

50. GEN. BUS. § 349(a).

51. *Id.* § 349(h).

52. *Gaidon v. Guardian Life Ins. Co. of Am.*, 725 N.E.2d 598, 603-04 (N.Y. 1999) (citations omitted). A section 349 claim is governed by a three-year statute of limitations. *Corsello v. Verizon N.Y., Inc.*, 967 N.E.2d 1177, 1184 (N.Y. 2012) (citing N.Y. C.P.L.R. § 214(2) (McKinney 2019)).

53. *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 647 N.E.2d 741, 745 (N.Y. 1995).

54. *Small v. Lorillard Tobacco Co.*, 720 N.E.2d 892, 897 (N.Y. 1999).

55. *Stutman v. Chemical Bank*, 731 N.E.2d 608, 611 (N.Y. 2000); *Oswego Laborers’ Local 214 Pension Fund*, 647 N.E.2d at 745.

56. GEN. BUS. § 350.

commodity . . . if such advertising is misleading in a material respect.”⁵⁷ Misleading advertisements include failing to reveal material facts.⁵⁸

The Attorney General is empowered to initiate a civil action against “[a]ny person, firm, corporation or association or agent or employee thereof who engages in any of the [unlawful] acts or practices.”⁵⁹ Violators are subject to a “civil penalty of not more than five thousand dollars for each violation.”⁶⁰

Additionally, as mentioned above, the statute specifically provides for a private cause of action by “any person who has been injured by reason of any violation” of the statute.⁶¹ The elements of a claim under section 350 of the N.Y. General Business Law are substantially similar to those of a claim under section 349.⁶² To assert a section 350 claim, “a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice.”⁶³ As with a section 349 claim, a section 350 claim does not require an allegation of justifiable reliance.⁶⁴

The elements of a section 350 claim are substantially similar to the elements of a section 349 claim. Consequently, for the reasons stated above, a section 350 claim seems viable. Of course, Big Beer is not without its defenses.

C. *Big Beer’s Possible Defenses*

The Big Beer companies’ principle defense would likely be that the claims are barred by a safe harbor provision under the statutes. Section 349 provides that it

shall be a complete defense that the act or practice is, or if in interstate commerce would be, subject to and complies with the rules and regulations of, and the statutes administered by, the federal trade commission or any official department, division, commission or agency of the United States as such rules, regulations or statutes are

57. *Id.* § 350-a.

58. *Id.*

59. *Id.* § 350-d.

60. *Id.*

61. *Id.* § 350-e.

62. *Goshen v. Mut. Life Ins. Co. of N.Y.*, 774 N.E.2d 1190, 1195 n.1 (N.Y. 2002) (“The standard for recovery under General Business Law § 350, while specific to false advertising, is otherwise identical to section 349.”).

63. *Koch v. Acker, Merrall & Condit Co.*, 967 N.E.2d 675, 675 (N.Y. 2012) (quoting *City of New York v. Smokes-Spirits.com, Inc.*, 12 N.Y.3d 616, 621, 883 (2009)).

64. *Id.* at 676.

interpreted by the federal trade commission or such department, division, commission or agency or the federal courts.⁶⁵

Similarly, under section 350-d, “it shall be a complete defense that the advertisement is subject to and complies with the rules and regulations of, and the statutes administered by the Federal Trade Commission or any official department, division, commission or agency of the state of New York.”⁶⁶

As discussed above, beer producers are subject to regulation by the TTB. Assuming the Big Beer producers have received the necessary permits and approval from the TTB (which seems almost certain), the beer producers will likely claim that any alleged false advertising claims are barred by the above safe harbor provisions.

Nevertheless, there is one case directly on this issue that found otherwise. In 2016, in *Singleton v. Fifth Generation, Inc.*,⁶⁷ a consumer sued Tito’s Handmade Vodka (“Tito’s Vodka”) alleging violations of N.Y. General Business Law section 349 and fraud.⁶⁸ Singleton alleged that Tito’s Vodka’s website, labeling, and related advertisements were “deceptive, false and misleading because Defendant’s Vodka is not [actually] handmade.”⁶⁹ Tito’s Vodka argued that the claims were barred by the safe harbor provisions, citing Certificates of Label Approval from, and Brand Label Registration with, the TTB.⁷⁰ The United States District Court for the Northern District of New York rejected Tito’s Vodka’s argument for several reasons. First, the court found that the safe harbor provision was limited to claims brought pursuant to section 349, and not “claims that sound in similar theories of liability” (such as common law fraud).⁷¹ Second, the court found that it was “not clear whether the TTB has determined that each representation on Tito’s [Vodka’s] labels complies with the relevant regulations, as required to apply the safe harbor,” as there was no evidence that the “TTB investigated or ruled upon the representations” made on Tito’s Vodka’s bottles.⁷² Lastly, the Certificate of Label Approval “application form states that the issuance of a certificate does not relieve [the applicant] from liability for violations of the [FAAA]. . . suggesting that TTB approval is not intended to carry pre-emptive effect.”⁷³ In September

65. GEN. BUS. § 349(d).

66. *Id.* § 350-d.

67. No. 5:15-CV-474, 2016 WL 406295 (N.D.N.Y. Jan. 12, 2016).

68. *Id.* at *8, *13.

69. *Id.* at *1.

70. *Id.* at *2-8.

71. *Id.* at *4.

72. *Id.* at *8.

73. *Id.* Although acknowledging the case law is “mixed,” the court cited cases from several

2017, the court denied the plaintiff's motion for class certification, finding that the issues of injury and damages were too individualized.⁷⁴ The case was settled for an undisclosed amount in March of 2018.⁷⁵

D. Pursuing Private Litigation

Singleton demonstrates some of the challenges with private enforcement of these statutes. A consumer's alleged damages would likely be limited to the cost of the beer purchased by the consumer that the consumer would not have purchased had he or she been fully aware of the beer's affiliation with Big Beer. Even the heartiest beer drinker would likely only have damages in the thousands of dollars. Consequently, considering the relatively small amount of damages that any one individual would have suffered, the case only makes financial sense as a class action. Under New York law,

[o]ne or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
4. the representative parties will fairly and adequately protect the interests of the class; and
5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.⁷⁶

Of course, establishing a class in any case can be challenging. The proper plaintiffs here would be individuals who bought craft beers believing the beers were from local, independent breweries unaffiliated with Big Beer, only to later learn that in fact the craft beers were manufactured under, and owned by, Big Beer. It is possible that subclasses would need to be created based on either the particular Big Beer company or the beer at issue. Nevertheless, establishing that the class members were similarly duped into buying beer that they did not want could be difficult. Moreover, the beer buyers' damages would vary

other states that "declined to dismiss consumer fraud claims based on safe harbor provisions linked to TTB label approval." *Id.* at *6-7.

74. *Singleton v. Fifth Generation, Inc.*, No. 5:15-CV-474, 2017 WL 5001444, at *23 (N.D.N.Y. Sept. 27, 2017).

75. Rick Archer, *Tito's Handmade Vodka False-Ad Suit Settles*, LAW360 (Mar. 22, 2018, 6:36 PM), <https://www.law360.com/articles/1025051/tito-s-handmade-vodka-false-ad-suit-settles>.

76. N.Y. C.P.L.R. § 901 (McKinney 2006).

depending on the quantity of beers purchased and their cost. These factors weigh against class certification.

Potential damages are further limited by New York law. To state a claim under New York's consumer protection statutes "the transaction in which the consumer is deceived must occur in New York."⁷⁷ Thus, potential damages are limited to the total number of fraudulently induced transactions that occurred in New York. Moreover, while the statutes provide for treble damages, there are relatively low caps: up to \$1000 under section 349 and up to \$10,000 under section 350.⁷⁸

All of the above diminishes the likelihood of private enforcement of New York's consumer protection laws against Big Beer. The statutes do, however, provide that "[t]he court may award reasonable attorney's fees to a prevailing plaintiff,"⁷⁹ in case an ambitious attorney wanted to pursue the matter.

IV. CONCLUSION

Beer is an important part of the New York economy and culture. With microbreweries in hundreds of New York municipalities, the economic and cultural effects can be very local. Beer drinkers, old and new, have responded by supporting their local microbreweries.⁸⁰ Not surprisingly, the large beer companies have sought to protect their market share through acquisitions and new products.⁸¹ This Article makes the case that the actions of Big Beer potentially violate New York law.⁸² Nevertheless, private enforcement seems challenging.

Either the Brewers Association or the NYSBA might be best suited to fill that gap. Indeed, during the Craft Brewers Conference in May 2018, Brewers Association President Bob Pease encouraged craft breweries to incorporate an approved seal on their labels and packaging indicating that the product is from an independent craft brewery.⁸³ Pease claimed that the Big Beer companies "seek to blur the lines of independence and confuse the beer drinker."⁸⁴ Moreover, he explained that "[t]his new certified mark is a unifying symbol that tells beer

77. *Goshen v. Mut. Life Ins. Co. of N.Y.*, 774 N.E.2d 1190, 1195 (N.Y. 2002).

78. N.Y. GEN. BUS. LAW §§ 349(h), 350-e(3) (McKinney 2012).

79. *Id.* §§ 349(h), 350-e(3).

80. See Don Cazentre, *Beer Boom: New York State Says It Now Has Record Number of Breweries*, NYUP.COM, (Feb. 14, 2018), https://www.newyorkupstate.com/drinks/2018/02/beer_boom_new_york_state_says_it_now_has_record_number_of_breweries.html.

81. Ocasio, *supra* note 18.

82. See *supra* Part V.

83. Justin Kendall, *CBC: Brewers Association Tackles Independence, 'Big Beer' on Day 1*, BREWBOUND (May 1, 2018, 3:23 PM), <https://www.brewbound.com/news/cbc-brewers-association-tackles-independence-big-beer-day-1>.

84. *Id.*

drinkers the true story of our independence and who makes their beer.”⁸⁵ Pease’s comments are in line with the Brewers Association’s stated positions in favor of “transparency in labeling,” part of the Brewers Association’s various lobbying initiatives and positions.⁸⁶ If labeling and lobbying do not work, litigation might.

85. *Id.*

86. *Position Statements*, BREWERS ASS’N, <https://www.brewersassociation.org/government-affairs/position-statements> (last visited Jan. 25, 2020).