

## ONCE AGAIN, WORDS MAKE A DIFFERENCE!



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By: [Richard M. Blau](#), Regulated Products Section Chair

Sazerac Company, Inc., one of America's foremost alcohol beverage suppliers and the makers of ***Fireball Cinnamon Whisky***, is being sued in federal court for fraud and misrepresentation. The lawsuit alleges consumer confusion over another Sazerac product - the ***Fireball Cinnamon*** mini bottles that are low alcohol products made with whisky flavoring and added caramel coloring, but contain no distilled spirits.

The smaller *Fireball Cinnamon* bottles, which sell for 99 cents, derive their low alcohol content from a blend of malt beverage and wine, which allows the product to be sold in grocery chains and convenience stores across most of America. In contrast, Sazerac's flavored whisky products are called *Fireball Cinnamon Whisky*, and typically by law are sold only in liquor stores, bars and restaurants with the correct licensing to sell distilled spirits.

Federal law requires that an alcohol beverage product disclose its contents on the product label, and that labels not be misleading. The *Fireball Cinnamon* label states that the product is a "malt beverage with natural whisky & other flavors and caramel color," In compliance with federal and state liquor laws, Sazerac obtained a Certificate of Label Approval (COLA) from the U.S. Alcohol and Tobacco Tax and Trade Bureau (TTB) for its low-alcohol *Fireball Cinnamon* prior to marketing the product.

So, why the lawsuit? The plaintiff in the case of Marquez v. Sazerac Company argues that Sazerac created consumer confusion for several reasons. First, there are two types of small-sized *Fireball*-branded products: one that contains whisky and one that does not, but they both look quite similar. Moreover, both products are sold in the same sized packaging (50 ml bottles), and both cost approximately \$1 per bottle. Which the plaintiff argues adds to the confusion.

Additionally, Ms. Marquez claims Sazerac used deceptive wording on the low alcohol product's label to obfuscate the fact that *Fireball Cinnamon* contained no whisky. The *Fireball Cinnamon* label states: "**MALT BEVERAGE WITH NATURAL WHISKY & OTHER FLAVORS AND CARAMEL COLOR.**" According to the complaint filed in the U.S. District Court for the Northern District of Illinois:

13. Using the words "With Natural Whisky & Other Flavors" is a clever turn of phrase because consumers who strain to read this will see how it "Natural Whisky" is distinct from "Other Flavors."
14. They will think the Product is a malt beverage with added (1) natural whisky and (2) other flavors.
15. What the label means to say is that the Product contains "Natural Whisky Flavors & Other Flavors," but by not including the word "Flavors" after "Natural Whisky," purchasers who look closely will expect the distilled spirit of whisky was added as a separate ingredient.

The federal lawsuit seeks over \$5 million in damages on behalf of Ms. Marquez and consumers who purchased *Fireball Cinnamon* and live in Alaska, Arizona, Arkansas, Idaho, Illinois, Iowa, Kansas, Mississippi, North Dakota, South Carolina, Utah or Wyoming.

The law firm behind the suit is known for suing big food and beverage companies alleging misleading advertising. In October of 2021, the same lawyers sued Kellogg for not having real strawberries in *Strawberry Pop-Tarts*; months before the Pop-Tarts lawsuit, they sued Frito-Lay for not having enough lime juice in the snack food company's *Hint of Lime* chips. According to published news reports, the same law firm filed over 400 similar lawsuits as of 2021; Sazerac's *Fireball Cinnamon* is their latest target.

How will this litigation turn out? The complaint was only filed on January 7, 2023, so it is way too early in the litigation process to predict a result. However, the overwhelming majority of these cases settle before trial.

Regardless of the adjudicated result, there is an important lesson to be derived from this litigation. Alcohol beverage producers should approach the COLA process with a mindset that involves more than just technical compliance with federal labeling requirements such as font size and mandatory disclosures. Label designers must wake up to the reality that litigation awaits any who fail to assess the clarity – and by the obverse the risk of confusion – associated with a label.

A copy of the **Marques v. Sazarac Company, Inc.** complaint is accessible online at: <https://www.classaction.org/media/marquez-v-sazerac-company-inc.pdf>

For more information regarding alcohol beverage labeling requirements, as well as best practices, contact GrayRobinson's [Nationwide Alcohol Industry Group](#) by telephone at 866.382.5132 or via email at [beveragelaw@gray-robinson.com](mailto:beveragelaw@gray-robinson.com).



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