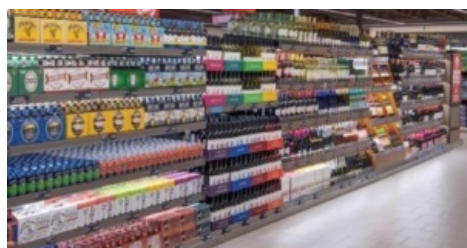


# Beverage Makers Served A Reminder By Kombucha False Advertising Case

Kristi L. Wolff, Cristina Ferretti

October 20, 2022

Anyone who has strolled the supermarket alcohol aisle in recent months may fairly stand in awe of the proliferation of boozy and not-so-boozy drinks in pretty packages, with small cans and pastel colors making it difficult to immediately discern whether they contain alcohol and, if so, how much. According to [Nielsen data](#), in 2021, off-premise sales of no- and low-alcoholic beverages were \$3.1 billion, up from \$291 million the year before, with 30% predicted growth by 2024. As more low and no-alcohol products come to market, beverage makers will have to navigate the jurisdictional and labeling regulations, which can be tricky, as illustrated by a recently-filed false advertising case involving allegedly boozy kombucha.



On October 6, 2022, Sean Burke and a purported class of consumers filed a lawsuit against Tribucha, Inc. in the U.S. District Court for the Eastern District of North Carolina, alleging that Tribucha Kombucha (“Tribucha”) was deceptively advertised as non-alcoholic because it contained more than 0.5% alcohol by volume and failed to comply with labeling requirements for alcoholic beverages.

Plaintiffs allegedly purchased Tribucha at local retailers in their respective states, “with the belief and on the basis that” Tribucha was not alcoholic, based on label statements, store placement, and other factors. Based on lab tests allegedly showing that the Tribucha beverages contained more than 0.5% alcohol by volume, plaintiffs assert claims for violations of state consumer fraud acts, breach of implied and express warranties, fraud, unjust enrichment, and violations of federal and state labeling laws.

## Why does this matter?

Regardless of whatever merit there may or may not be to the allegations, the *Burke* case illustrates how tricky the jurisdictional lines and labeling requirements for low and no-alcohol products can be and how important it is that manufacturers understand compliance before bringing a product to market. Here are some guidelines and resources for navigating this space:

- Kombucha that is at or above 0.5% alcohol by volume *at any time* is subject to [TTB regulation](#).

By contrast, kombucha that is never at or above 0.5% alcohol by volume is subject to FDA's regulations, but not TTB. State and local requirements may also apply.

- TTB regulates wine with 7% or more alcohol by volume, malt beverages, sake, and spirits. State and local requirements may also apply.
- FDA regulates a range of de-alcoholized wine and wine with less than 7% alcohol by volume along with certain beers. This is why many new entrants to the low and no-alcohol category feature nutrition facts panels and other familiar food labeling elements, along with disclosures regarding alcohol content and a surgeon general's warning. And, of course, state and local rules may also apply.

In addition to tricky regulatory schemes, companies entering this space should note the relatively small margin for error regarding alcohol by volume. The difference between being in compliance with FDA regulation versus subject to but out of compliance with TTB regulation can literally be measured in tenths of a percent. And with that....enjoy your weekend!

\* \* \* \*

Find Kelley Drye's Ad Law Access App and more [here](#).

