

Brizzy v. Vizzy: Molson Coors Obtains Cheers-Worthy Trademark Ruling at Fifth Circuit

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PRACTICES Intellectual Property, Trademark and Advertising, Trademark Litigation, Intellectual Property Litigation

It was a good day at the bar for Molson Coors—the Fifth Circuit Bar, that is. The beverage titan Molson Coors Beverage Company (“Coors”) secured a significant victory in the Fifth Circuit in a trademark dispute with Future Proof Brands, LLC (“Future Proof”) over the two companies’ competing hard seltzer brands, “Vizzy” and “Brizzy.” On December 3, 2020, a three-judge panel affirmed the denial of Future Proof’s motion for a preliminary injunction, which sought to prevent Coors from using the “Vizzy” brand name for its seltzers. But while Future Proof stumbled early on the injunction front, the decision was not a total black-out loss for the Austin-based beverage company. The Fifth Circuit disagreed with the district court’s ruling that Future Proof’s BRIZZY mark was descriptive, holding instead that the mark was suggestive and therefore inherently distinctive. As a result, Future Proof’s mark will be entitled to greater protection moving forward in the litigation—a ruling that may help ease Future Proof’s hangover from the denial of the injunction.

A Dizzying Dispute

Beverage companies Future Proof and Coors sell competing hard seltzer products: Future Proof sells “Brizzy” hard seltzer, while Coors markets hard seltzers under the brand name “Vizzy.” In February, Future Proof sued Coors, alleging that Coors’ use of VIZZY was likely to cause consumer confusion, thereby infringing on its mark, BRIZZY.

Future Proof moved for a preliminary injunction to enjoin Coors from “selling and marketing products confusingly similar to” BRIZZY. To establish entitlement to a preliminary injunction, Future Proof was required to demonstrate (1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction were not granted, (3) that its substantial injury outweighed the threatened harm to Coors, and (4) that granting the injunction would not disserve the public interest.

Ultimately, the district court determined that Future Proof had not clearly carried its burden of establishing a substantial likelihood of success on the merits, as is necessary to demonstrate that a preliminary injunction is appropriate; as a result, the district court denied the motion based solely on the first factor without considering the remaining three factors.

In assessing whether Future Proof was able to demonstrate a likelihood of success on the merits, the district court considered the well-established “digits of confusion” factors to assess the likelihood of consumer confusion. Under this test, the district court considered (1) the type of mark infringed, (2) the similarity between the marks, (3) the similarity of the products, (4) the identity of the retail outlets and purchasers, (5) the identity of the advertising media used, (6) the defendant’s intent, (7) evidence of actual confusion, and (8) the degree of care exercised by potential purchasers. Applying this rubric, the district court determined that although the third, fourth, and fifth digits of confusion favored granting the injunction, the remaining factors dispositively weighed against it.

Future Proof Rallied on to the Fifth Circuit

After falling flat at the district court, Future Proof rallied and appealed the denial of the preliminary injunction, arguing that the district court erred in evaluating the first, second, sixth, seventh, and eighth digits of confusion. The Fifth Circuit addressed each, concluding that while the district court erred in certain aspects of its analysis, it did not err in denying Future Proof’s motion for a preliminary injunction.

Digit one: the type of mark infringed. First, Future Proof argued that the district court erred when it concluded that the first digit of confusion—the “type of mark infringed”—weighed against the injunction. The district court held that BRIZZY is merely a descriptive mark, which marks are only protectable upon a showing of acquired distinctiveness, known as secondary meaning. The Court of Appeals disagreed with this categorization, noting that “BRIZZY is not merely descriptive, because it does not ‘convey[] an immediate idea’ about the characteristics of hard seltzers.” Instead, the name requires consumers to make an inference—for example, that the fact that the brand rhymes with “fizzy” suggests carbonation. Thus, because a consumer must “exercise the imagination” and infer that “brizzy” is a play on “fizzy,” the Fifth Circuit concluded that BRIZZY is suggestive, and therefore inherently distinctive.

Although the Court of Appeals disagreed with the district court’s classification of BRIZZY as descriptive, it nevertheless agreed that the first digit of confusion did not favor an injunction, noting that suggestive marks like Brizzy are “comparatively weak,” even though stronger than descriptive marks. Accordingly, regardless of whether the district court erred in making the original classification of the mark, the Court of Appeals held that it did not necessarily err in concluding more broadly that BRIZZY is a weak mark for purposes of the first digit of confusion factor. Additionally, the Court of Appeals looked to third-party use of the mark to assess the relative strength of the mark. Pointing to numerous other instances of beverages that share the common “IZZY” root, the Court concluded that BRIZZY was, in fact, a relatively weak mark, and as a result, that the first digit of confusion did not cut in Future Proof’s favor.

Digit two: the similarity between the marks. Next, Future Proof argued that the district court erroneously analyzed the second “digit of confusion”: the similarity between the marks. Specifically, Future Proof argued that the district court improperly considered the differences in product packaging when assessing the similarity of the BRIZZY and VIZZY marks. The Court rejected this argument, noting that “[c]ourts consider marks in the context that a customer perceives them in the marketplace,’ which can include ‘labels, packages, or . . . advertising material directed to the goods. . . .’” As a result, the Court of Appeals concluded, the difference in can shapes and label designs are relevant considerations when assessing the overall similarity between the marks, because these differences impact the way in which consumers perceive the two marks in commerce. Of course, distinctions in can shape and design may be relevant at the liquor store, but are less relevant at a bar or restaurant where beverages are often ordered verbally by name and served in a standard glass.

Digit six: the defendant’s intent. With respect to this sixth digit of confusion, Future Proof argued that the district court incorrectly decided the digit related to the defendant’s intent, alleging that Coors had “constructive notice” of Brizzy’s existence and was “keenly aware” of Brizzy at the time they began marketing Vizzy. However, finding no evidence that Coors “intended to derive benefits from the reputation of the plaintiff,” the Court concluded that this factor was not erroneously decided at the district court level.

Digit seven: evidence of actual confusion. Future Proof argued that the district court incorrectly ignored relevant evidence of actual confusion in denying the motion for a preliminary injunction. In support of its motion, Future Proof pointed to an instance in which a wholesaler allegedly confused Brizzy and Vizzy. The Fifth Circuit agreed with Future Proof that the district court was wrong to ignore this evidence on the grounds that a wholesaler is not a consumer. Nevertheless, the Court held that the district court did not err in finding that this factor similarly did not favor Future Proof, because the alleged isolated incident was not “actual confusion,” but instead only a “fleeting mix-up.”

Digit eight: the degree of care exercised by potential purchasers. Finally, the Court looked to the eighth and final digit of confusion: the level of care that potential purchasers exercise when buying the product. Although the Fifth Circuit conceded that the low price of the beverages as well as the environments (such as crowded bars) might suggest a lower degree of care exercised by seltzer purchasers, it noted that “Future Proof provides no affidavits, testimony, or other evidence supporting that proposition.” Accordingly, it concluded that the district court correctly concluded that the eighth digit does not favor granting the injunction because the movant did not provide sufficient evidence of the low degree of care exercised by potential purchasers.

Considering each of these factors, the Court of Appeals concluded that the district court did not err finding that Future Proof was unlikely to succeed on the merits of its claim and in denying the motion for a preliminary injunction.

Hair of the Dog

In the wake of the Fifth Circuit’s opinion, the case was recently returned to the district court for further proceedings. While one may think that Coors could simply retrace its steps and obtain an early dismissal based on the Fifth Circuit’s ruling, the district court did not construe the ruling as being last call for the case. Instead, the district court promptly denied Coors’ previously-filed motion to dismiss, finding that Future Proof had indeed stated a claim for relief. While the district court acknowledged that the Fifth Circuit had found Future Proof was not likely to succeed on the merits of its claim, it also acknowledged that at least four of the eight digits of confusion may ultimately be found to weigh in Future Proof’s favor. Accordingly, the Court held that Future Proof has met the lesser standard required to survive a motion to dismiss and is entitled to take a shot at discovery to further explore the viability of its claims.