

ALCOPOPS, MALTERNATIVES, AND FLAVORED COOLERS

The ABC's of Kiddy Alcohol

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In the midst of summer vacation as temperatures soar, youngsters' thoughts turn to beaches, camping, the mall, and alcopops, malternatives and flavored coolers. Why not, beaches are cool, camp sites are inviting, the mall is open and flavored coolers are enticing. Intentionally enticing? Many think so. It's obvious that such products as Margarita or Melon or Strawberry Flavored Malt Coolers, Smirnoff Ice, Captain Morgan Gold, "Doc's" Hard Lemon, Bacardi Silver, Skyy Blue, Stolichnaya Citrona and Mike's Hard Lemonade all would be attractive to the under 21 years alcohol drinking community. Watch dog groups and public advocates are screaming about children's alcohol drinks. The industry says that's not who it's after. The government says; well, the government says, as with most issues: Let's investigate this by committee.

Stacey Stein, then a journalism student at Ryerson Polytechnic University, Toronto, writing for *Young People's Press* (1998), noted that

flavored coolers were “especially appealing to young people since the alcohol is masked by the beverage’s sweet taste.”

According to the August 13, 1997 edition of *The Christian Science Monitor* (Alexander MacLeod), a (near) London housewife brought home “Power Ranger Freeze Drinks” for the kids, later noticed those youngsters’ manifesting the effects of alcohol, and only still later found the product contained 4.5% alcohol. The *CSM* article recognized: “As in Britain, labeling in the US seems pitched at youngsters, with cartoon characters used extensively. Cosmic Kaze (20 percent alcohol) features a meteorite with sun glasses. Butter Ball (15 percent) has a graphic that looks like an overweight Elvis singing.”

The breweries and distilleries deny they market to teens, but the advertising speaks for itself as does the packaging. The consuming public is capable of drawing its own conclusions. Some industry executives have expressed a belief that the products draw in a new class of consumer, that is, folks who don’t like the taste of alcoholic beverages. At least not yet. The question is: does that entry level group include kids learning to acquire that taste a few years before it’s legal to do so? There are those critics who say this is training wheel alcohol. You know, like your first bicycle.

While there has been discussion of these issues at the top levels of the Department of Alcoholic Beverage Control, according to informed sources within the Department, the ABC perceives its responsibility as simply following the Federal Government's lead. But Alcohol Tobacco and Firearms appears to see its role in regulating flavored malt beverages as a labeling issue. In ATF Ruling 2002-2 (April 8, 2002), the ATF introduced the issue by stating:

Sales of these newer types of flavored malt beverages have increased dramatically within the last year. As a result of these sales increases and widespread marketing campaigns, the media has given these products wide exposure. Another fact drawing media attention to these products is the impression given that these flavored malt beverages are made with distilled spirits or contain distilled spirits.

ATF believes the association drawn between distilled spirits and malt beverages through the use of well-known distilled spirits brand names and terms on labels of flavored malt beverages causes confusion for consumers, the media, and State regulatory and taxing organizations. ATF believes this practice is confusing and leads consumers to believe distilled spirits are present in these flavored malt beverages.

That same informed source within the Department pointed out that 90% of the alcoholic content of these products is derived from distilled spirits. So who is confused if the products' alcohol content is 90% derived from distilled spirits, but the Feds are concerned that the public is being misled by the distilled spirits style of branding? North of California, the Oregon Liquor Control Commission published a notification that effective

January 1, 2004 flavored malt beverages may be restricted to sales in premises licensed to sell distilled spirits. In Oregon that would land the products in liquor stores controlled by the State of Oregon. Meanwhile, the Federal Trade Commission is drafting a report to Congress on the effect of advertising of flavored malternatives on underage consumers. The Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau, is mulling over a rule change responding to the labeling issue. Treasury has invited public and industry comment, and the industry has asked for more time to submit its response.

Once the Federal Government assures the products are properly labeled as to contents and are sold accordingly, and the California ABC follows the Fed's lead, is there anyone out there watching for whom the products are marketed and to whom the brightly packaged bottles are sold? If these products are sold as distilled spirits, will they be removed from Type 20 premises and moved over to Type 21 premises? Does that change the targeted consumer? Does that solve the related "sales to minor" problems?

Just when retail licensees thought their job of policing against sales to minors was tough enough, just when licensees face revocation of their licenses for a third sales to a minor case within 36 months of the first

such violation, just when minor decoys are frequenting all manner of licensed premises on a regular basis throughout the state, along comes a product line so obviously targeting the underage crowd, that parents can and have (ask that London housewife) mistakenly brought home flavored coolers not knowing they were giving their teenagers something that was around 5% alcohol. Certainly accurate labeling should be mandatory. In Ruling 2002-2, the ATF requires:

Pending the completion of rulemaking, ATF will continue to approve statements of process and applications for certificates of label approval meeting these criteria. Statements of process submitted under Section 25.67 for flavored malt beverages that include the use of any alcohol flavoring materials shall explicitly indicate:

1. The volume and alcohol content of the malt beverage base.
2. The maximum volumes of such alcohol flavoring materials proposed to be used.
3. The alcohol strength of such flavoring materials.
4. The overall alcohol contribution to the finished product provided by the addition of any alcohol flavoring materials.
5. The final volume and alcohol content of the finished product.

Our review of products on store shelves indicates the labels comply with these interim Federal requirements. Those numbers are printed there, hidden in plain sight amongst the catchy kids' phrases and cartoon characters. To all of the accusations leveled by consumer groups, such as Center for Science in the Public Interest (based in Washington DC), there

are defenses proffered by the distilleries and breweries. There are even counter accusations against the bias of the public interest groups and their perceived general anti-alcohol agenda. The end of the conversation always arrives in the same place. How can one prove an intent to target kids? Any cute cartoon character that would sell a malternative to a kid could also sell the product to a 22 year old. Any televised sports event sponsored by a dancing pirate selling a flavored bottle of stuff originally derived from rum could be watched by high school seniors or college seniors. Unfortunately, the product might be purchased by either. That's the problem.

At this point precious little has been accomplished to guard against targeting kids as consumers of these products. Any retailer could refuse to shelve the items. Would this be fair to that retailer since the store across the street has those products for display and sale? Would it be fair in light of the sincere protestations of manufacturers that they were after the new, young but over 21 crowd?

Will flavored beer commercial tapes end up on studio floors together with Joe Camel and cigarette ads? No alcohol advertising on television? Don't bet on it. Right now the federal government defines an issue that it thinks can be resolved by more accurate labeling. The problem

really is in the dichotomy of how government regulates retailers on the one hand and manufacturers on the other. If government watches flavored cooler manufacturers from a distance and California's retailers under a microscope, somehow that doesn't seem right. For government to be respected, it must be even-handed. Meanwhile, the federal government is crafting rule changes that may change product labeling. Alcopops may vacate the shelves of convenience store staffed by employees of international conglomerates and move over to the corner liquor store. And is the State of California happy to stand back and watch? Problem solved? It depends on who you ask. Will kids continue to look at malternatives as the teenage introduction into alcoholic beverages? Will they go into your store to check out the product line? Will local law enforcement be there to watch the minors take the bait? That's a certainty.

Now in the middle of summer, high schoolers are not thinking about a citation that could affect their ability to maintain a driver's license. Not at all; teenagers' thoughts turn to beaches and the mall, to Smirnoff Ice, Bartles and Jaymes, fast food and 31 Flavors. You know, kid stuff.

Solomon, Saltsman & Jamieson are attorneys practicing in the areas of ABC law, ABC Appeals Board cases, and all related Land Use Matters such as City and County Conditional Use Permits, Variances, Police and Fire permits, Entertainment law, and Gambling Law; as well as Business and Personal Injury litigation. Solomon, Saltsman & Jamieson can be reached at 800 405 4222."

