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Eleventh Circuit distills federal preemption, FDUTPA safe harbor, and damages issues in Bombay Sapphire Gin putative class action

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Takeaway: Antiquated laws can give rise to creative class actions. In the nineteenth century, the Florida Legislature criminalized the use of a food ingredient ultimately declared safe for consumption by the Food and Drug Administration (FDA) in the twentieth century. In *Marrache v. Bacardi U.S.A., Inc.*, --- F.4th ----, No. 20-10677, 2021 WL 5175762 (11th Cir. Nov. 8, 2021), an Eleventh Circuit panel affirmed the dismissal with prejudice of putative class claims based on the allegation that the presence of a so-called "illegal" ingredient rendered an alcohol product worthless. The panel's decision, which found no federal preemption, navigated the federal preemption issues that apply to food product labels and also applied the safe harbor built into Florida's consumer fraud statute.

In 1868, the Florida Legislature passed a statute declaring the "grains of paradise" additive "poisonous or injurious to health," thereby criminalizing the "adulteration" of any liquor product with that additive. 2021 WL 5175762, at *3. Over 90 years later, the FDA passed a regulation identifying grains of paradise as one of a number of food additives "generally recognized as safe." *Id*. at *4.

Bombay Sapphire Gin includes "grains of paradise" as an ingredient, a fact "prominently etched on each of [Bombay Sapphire's] distinctive blue bottles." *Id*. at *1. Florida resident Uri Marrache filed a putative class action lawsuit on behalf of Florida consumers against Bacardi U.S.A., Inc. (Bacardi), the producer of Bombay Sapphire, and Winn-Dixie Supermarkets, Inc., where he bought the gin, asserting claims under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), and for unjust enrichment. He alleged that because the inclusion of grains of paradise in Bombay Sapphire violated the 1868 Florida statute, he and the other putative class members purchased "worthless" gin.

The district court dismissed the complaint on federal preemption grounds, finding conflict preemption. As the panel noted, however, conflict preemption presents a high bar and will only be satisfied "where (1) 'compliance with both federal and state regulations is a *physical impossibility*,' or (2) 'the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id*. at *5 (citation omitted; emphasis added).

The panel reversed the preemption ruling, finding that it was not "physically impossible" for Bacardi to sell grains of paradise-free Bacardi Sapphire in the state of Florida, and also that the 1868 Florida statute did not present an obstacle to "the full purposes and objectives of Congress." *Id*. at *6-7. On this second point, the panel rejected the defendants' arguments based on legislative history, relying solely on the "plain meaning" of the statutory text to ascertain Congressional purpose. *Id*.

But the panel affirmed the dismissal of the FDUTPA claim on another ground not ruled upon in the court below: FDUTPA's safe harbor. The safe harbor statute, Florida Statute § 501.212(a), provides that

FDUTPA does not prohibit "[a]n act or practice required or specifically permitted by federal or state law." Because FDA regulations permitted the inclusion of grains of paradise in Bombay Sapphire, the FDUTPA claim failed as a matter of law.

The panel also affirmed the district court's ruling that Mr. Marrache did not suffer any damage and did not state an unjust enrichment claim. "Marrache did not allege that he and the other class members: (1) were unable to drink the Bombay [Sapphire], as the complaint alleges that they consumed the alcohol, (2) unsuccessfully sought a refund for or complained of the Bombay [Sapphire] to Defendants, or (3) suffered any side effect, health issue, or harm from consuming the Bombay [Sapphire] containing grains of paradise." *Id*. at *9. He further did not allege any depreciation in the resale value of Bombay Sapphire. He simply concluded that, because Florida law prohibited the inclusion of grains of paradise in gin (even though federal law and the law of all other states permitted the sale of the gin), he acquired "an illegal product which is worthless." *Id.* According to the panel, Mr. Marrache's allegations failed to show the "actual damages" required for a FDUTPA claim and, for the same reasons, failed to state an unjust enrichment claim. *Id*. at *9-11.

Finally, the panel affirmed the district court's dismissal with prejudice, concluding that Mr. Marache would not have been able to cure the defects in his claims through further amendment of his complaint.