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PARADISE LOST FOR FLORIDA MAN'S CONSUMER CLASS ACTION AGAINST GIN MAKER

by Glenn G. Lammi

If you enjoy a cocktail this holiday season, you might grab for a bottle of Bombay Sapphire Gin for your gin and tonic or Tom Collins. While enjoying your drink, you might detect a hint of pepper. Upon inspecting the bottle, you'll learn that the gin includes a peppery spice called "grains of paradise." You might wonder what that is and ask Google or Siri. What you are *not* likely to think, however, is that what you are drinking is *illegal*.

That is, unless you're a Florida attorney with unusual knowledge of the state's alcohol laws. One such law, vintage 1868, declares the sale of alcohol "adulterated" with grains of paradise to be a third-degree felony. Read about the law's backstory [here](#). In 2019, a Florida attorney purchased Bombay Sapphire and filed a class-action lawsuit against Bacardi U.S.A. and Winn-Dixie Supermarkets

The litigation, which reached its probable conclusion on November 8, 2021 with an Eleventh Circuit decision ([Marrache v. Bacardi U.S.A.](#)), highlights an interesting clash between state and federal regulation of products meant for human consumption. While the court rejected defendants' federal-preemption defense, it ruled for Bacardi and Winn Dixie on an alternative ground, one that alcoholic-beverage companies frequently rely upon in consumer-fraud lawsuits.

Plaintiff's Claim and District Court Ruling

Mr. Marrache couldn't enforce the 1868 Florida law directly, so he sued under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) on behalf of a class of Florida residents who purchased and consumed Bombay Sapphire. Marrache alleged that the presence of the spice violated the adulteration law, which in turn rendered the gin unlawful and financially worthless—an "unconscionable act" under FDUTPA.

The Southern District of Florida dismissed Marrache's suit with prejudice. The court agreed with Bacardi's argument that the 1868 law stood as an obstacle to the federal Food Additives Amendment of 1958, which grant FDA authority to monitor and control the introduction of food additives into interstate commerce. The court reasoned that Florida law "frustrates the purposes and objectives of the FFDCA and its implementing FDA regulations, which establish that grains of paradise is generally regarded as safe [GRAS]."

Same Result, Different Grounds at the Eleventh Circuit

On appeal before the Eleventh Circuit, Bacardi and Winn-Dixie urged the appeals court to affirm the lower court's preemption holding. The case attracted the attention of four food-nanny

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activist group, which filed an *amicus* brief arguing that a federal law should not preempt a more protective state food-safety law. The court not only accepted the brief, but also granted the groups' request to participate in oral argument.

The activists successfully convinced the three-judge panel to reject the lower court's preemption holding. The court held that the Florida law did not conflict with the Food Additives Amendment for two reasons. First, although it would "undoubtedly be inconvenient," Bacardi could sell Bombay Gin in Florida without grains of paradise. Second, when assessing the federal law's purpose, the district court improperly looked beyond the statute's plain meaning. Congress stated the Food Additives Amendment's purpose clearly in the text, the Eleventh Circuit reasoned—to "prohibit unsafe food additives from being in food and alcohol." That purpose, the court held, does not conflict with the goal of the Florida law even though FDA determined the spice to be GRAS.

The preemption holding did not resolve the case, however. The Eleventh Circuit reached back to an argument the defendants made only at the district court to affirm the lower court's dismissal with prejudice. Under Florida law, FDUTPA "does not apply to '[a]n act or practice required or specifically permitted by federal or state law.' Beer and distilled-spirits producers have relied upon such safe harbors when moving to dismiss labelling-fraud lawsuits, arguing that federal label approval bars state-law claims. Some courts have held that federal "Certificates of Label Approval" block fraud claims while others have concluded such regulatory action does not carry the force of law.

The Eleventh Circuit didn't need to pick a side on the legal effect of federal-label approval in *Marrache*. FDA's specific regulatory GRAS designation for grains of paradise permitted the spice's inclusion in Bombay Gin, and thus the FDUTPA safe harbor barred *Marrache*'s claims.

The Correct Outcome, But....

Marrache ends one plaintiffs' lawyer's mischievous reliance on an anomalous Florida law to seek yet another no-injury class action. But the way the Eleventh Circuit reached the right result left a slightly sour aftertaste. The three-judge panel seemingly went out of its way to hand the Food Court bar and its activist allies a victory on preemption. The oral-argument time it granted Center for Science in the Public Interest and its three co-*amici* is not a common occurrence in circuit courts.

A clear conflict existed between a state law that prohibited an ingredient's use and a federal law that specifically permitted it. The federal law sets uniform standards for food-ingredient safety. If courts allow state-law claims like *Marrache*'s to proceed, different standards for ingredients will proliferate, impeding commerce and inspiring more dubious lawsuits. It is no answer for courts to reason, as the Eleventh Circuit did, that producers can comply with both state and federal law by creating state-specific products. That "solution" means higher prices or fewer competing products, outcomes that neither benefit consumers nor grow a national marketplace.