

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

CASE NO. 08-61294-CIV-ALTONAGA/Brown

ERICK KELECSENY, et al.,

Plaintiffs,

vs.

CHEVRON U.S.A., INC., et al.,

Defendants.

ORDER

THIS CAUSE came before the Court for a hearing on January 14, 2009 on Defendants' Motion to Dismiss Plaintiffs' Amended Complaint [D.E. 58], filed November 14, 2008. The Court has carefully considered the parties' written and oral submissions, and applicable law.

I. BACKGROUND

Plaintiffs, Erick Kelecseny ("Kelecseny"), John Egizi ("Egizi"), and Todd Jessup ("Jessup") (collectively "Plaintiffs"), have brought the present action after a similar suit was dismissed in *Turner v. Chevron U.S.A., Inc.*, No. CV 08-2267 ODW, 2008 WL 4570271 (C.D. Cal. Oct. 14, 2008).¹ In their Amended Complaint [D.E. 36] in this case, Plaintiffs sue "major gasoline manufacturers" (*Am. Compl.* at ¶ 2), Chevron U.S.A., Inc., Exxon Mobil Corporation, BP Products North America, Inc., Shell Oil Company, Conoco Phillips Company, Tower Energy Group, and Does 1 through 10 (collectively "Defendants"). Plaintiffs assert Defendants have knowledge that when used in boats, ethanol blended gasoline will eventually expire more quickly around water, cause damage to boat engines and fuel systems, and cause significant damage to fiberglass fuel tanks. (*See*

¹ Plaintiffs' co-counsel in this case are the California attorneys who represented Plaintiff Turner.

id. at ¶¶ 1-2). Notwithstanding this knowledge, Defendants distributed, marketed and sold ethanol blended gasoline for use in boats without providing the consuming public with notice or warnings. (*See id.*).

Plaintiffs seek to have four classes certified, consisting, respectively, of boat owners who filled their fuel tanks with ethanol blended gasoline from a gasoline retailer in Florida; boat owners with fiberglass fuel tanks who filled the tanks with ethanol blended gasoline from a gasoline retailer in Florida; boat owners with fiberglass fuel tanks who had damage to their fuel systems or had to replace the tanks due to damage caused by the use of ethanol blended gasoline acquired from gasoline retailers in Florida; and all boat owners who had damage to the fuel systems of their boats due to “Phase Separation.” (*See id.* at ¶ 4). At the hearing, it was clarified that neither this Judge nor her family is included within the definitions of the four proposed classes.

The Amended Complaint contains three counts, two of which Plaintiffs conceded in their Memorandum of Law in Opposition (“Opposition”) [D.E. 73] should be dismissed. The two counts as to which it was agreed dismissal was warranted² are Counts II (fraudulent concealment) and III (FDUTPA), on the basis of *Conley v. Boyle Drug Co.*, 570 So.2d 275, 286 (Fla. 1990) (adopting market-share alternate theory of liability that requires plaintiff to make a genuine attempt to locate manufacturer responsible for injury before making negligence claim, but denying use of theory for claims of fraud and strict liability). Consequently, in their Opposition, Plaintiffs proposed that the Court consider the first count for products liability as reconstituted in a proposed Second Amended Complaint [D.E. 73-2] that accompanies their Opposition. As thus proposed to be amended, Count

² The parties disagree as to whether dismissal of these counts should be with or without prejudice. The Court finds it unnecessary to resolve this issue.

I is transformed into three claims: Count I for Defective Design, Count II for Negligent Failure to Warn, and Count III for Strict Liability Failure to Warn. Defendants' Joint Reply [D.E. 84] addressed the arguments raised in the Motion to Dismiss as they relate to the new claims presented in the proposed Second Amended Complaint.

Nevertheless, at the hearing Plaintiffs further conceded that their proposed counts for defective design (Count I) and strict liability failure to warn (Count III), should be dismissed, again on the basis of *Conley*, as the court held that strict liability claims could not be pled using a market share approach. 570 So.2d at 285. Accordingly, at oral argument the parties only addressed proposed Count II for negligent failure to warn, and the Court limits her discussion to this last remaining claim.

Proposed Count II for negligent failure to warn alleges Defendants have no good faith basis to assume Plaintiffs and the members of the four proposed classes would know of and appreciate the risks associated with the use of ethanol blended gasoline in boats and similar watercraft. (*See Second Am. Compl.* at ¶ 58). The risks include dissolving the resin that bonds together fiberglass fuel tanks, weakening the fuel tanks and causing damage to the fuel systems, and undergoing phase separation causing significant damage. (*See id.*). Defendants knew or should have known that ethanol is unsuitable for use in many boats and similar watercraft. (*See id.* at ¶ 60). Furthermore, Defendants knew or should have known using ethanol blended gasoline in boats and similar watercraft often causes the ethanol blended gasoline to cause the damage identified and thereby cause significant damage to Plaintiffs and the members of the class after normal use of such gasoline. (*See id.* at ¶ 61). Consequently, Defendants have a duty to warn Plaintiffs and members of the proposed classes of these foreseeable risks associated with using ethanol blended gasoline in boats,

and Defendants have breached that duty. (*See id.* at ¶¶ 59, 62). The breach of that duty is the actual and proximate cause of the damage suffered by Plaintiffs and the proposed class members. (*See id.* at ¶ 63). Plaintiffs seek injunctive and monetary relief. (*See id.* at ¶¶ 64-66).

The Motion to Dismiss, as simplified by Plaintiffs' concessions with respect to the fraud and FDUTPA claims, and the proposed (and now withdrawn) Counts I and III, asserts Plaintiffs fail to state a claim for relief as their one remaining claim for negligent failure to warn is preempted by federal law, which requires and encourages the use of ethanol blended gasoline. Defendants insist that if the Court agrees the defective design claim is preempted, then the negligent failure to warn claim must necessarily fail. Lastly and in the alternative, Defendants maintain that *Conley v. Boyle Drug Co.* requires that Plaintiffs' negligent failure to warn claim also be dismissed. The Court considers these arguments in turn.

II. STANDARD

A motion to dismiss a complaint for failure to state a claim requires that a court accept the facts pleaded as true and construe them in the light most favorable to the plaintiff. *See Quality Foods de Centro America, S.A. v. Latin Am. Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 994-95 (11th Cir. 1983). "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests . . .'" *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Nevertheless, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will

not do” *Id.* at 1964-65 (citations omitted). “[A] complaint’s ‘[f]actual allegations must be enough to raise a right to relief above the speculative level.’” *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 974 (11th Cir. 2008) (quoting *Twombly*, 127 S. Ct. at 1965). “When the allegations contained in a complaint are wholly conclusory . . . and fail to set forth facts which, if proved, would warrant the relief sought, it is proper to dismiss for failure to state a claim.” *Davidson v. Georgia*, 622 F.2d 895, 897 (11th Cir. 1980) (citations omitted).

III. ANALYSIS

A. *Is the Negligent Failure to Warn Claim Preempted by Federal Law?*

Defendants maintain federal law supports, encourages and mandates ethanol use in gasoline, and because Plaintiffs seek to hold Defendants liable merely for doing what federal (and Florida law) require, the claim stands as an obstacle to the accomplishment of the purposes and objectives of Congress. Defendants assert the claim is preempted and must be dismissed. Plaintiffs urge the Court to find no preemption exists for while the relevant federal statutes encourage the use of renewable fuels, including ethanol, to combat the harmful environmental and economic effects of using unblended gasoline, federal law does not ban the production of unblended gasoline. Furthermore, the Florida statutory scheme contains an exemption for boats and similar watercraft from the state’s blended gasoline requirements, in apparent recognition of the incompatibility of ethanol blended gasoline for use in boats (as well as other listed uses). To properly evaluate the preemption argument, the undersigned lays out the contours of the applicable preemption principles, and then examines whether the proposed claim is indeed preempted by the federal statutory scheme, as that scheme coexists with the applicable Florida statute.

1. Federal Preemption

Federal preemption is rooted in the Supremacy Clause. U.S. Const. art. VI, cl. 2. Thus, federal law preempts conflicting state statutes and regulations as well as state common law claims that conflict with the federal law. *See Riegel v. Medtronic, Inc.*, ___ U.S. ___, 128 S. Ct. 999, 1007-08 (2008); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521-23 (1992). Preemption is not found, however, unless it is “the clear and manifest purpose of Congress.” *Myrick v. Freuhauf Corp.*, 13 F.3d 1516, 1519 (11th Cir. 1994) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))). State law may be preempted by federal law in three ways: (1) where Congress defines explicitly the extent to which its enactments preempt state law (express preemption); (2) where state law regulates conduct in a field that Congress intended the federal government to occupy exclusively (implied preemption), and (3) where state law actually conflicts with federal law (implied conflict preemption). *See id.* (quoting *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990)). The parties agree only the third form of preemption may be found here, if at all.

In every preemption analysis, “[t]he purpose of Congress is the ultimate touchstone[.]” *Altria Group, Inc. v. Good*, ___ U.S. ___, 129 S. Ct. 538, 543 (2008) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963))). Furthermore, the analysis assumes “the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Id.* (quoting *Rice*, 331 U.S. at 230). In implied preemption, where the preemptive intent behind a federal statutory or regulatory scheme is unclear from the statutory language or legislative history, preemption may nevertheless be found where the ordinary application of the federal and state laws

creates a conflict. *See Taylor v. General Motors Corp.*, 875 F.2d 816, 826 (11th Cir. 1989) (citing *Brown v. Hotel & Rest. Employees & Bartenders Int’l Union*, 468 U.S. 491, 501 (1984)). Because the principle of implied preemption may apply where state law is rooted in a statute or common law rule, the imposition of state tort law damages may be a form of state regulation barred under an implied preemption analysis. *See Papas v. Upjohn Co.*, 926 F.2d 1019, 1022 (11th Cir. 1991), *vacated*, 505 U.S. 1215 (1992) (quoting *Taylor*, 875 F.2d at 824 n.16).

2. The Federal and State Statutory Schemes

In order to encourage the development of renewable fuels, in 2005 Congress enacted the Energy Policy Act, 119 Stat. 594 § 1501, amending the fuel provisions of the Clean Air Act (“CAA”), 42 U.S.C. § 7401, *et seq.*. The Energy Policy Act established a renewable fuel standards program found in 42 U.S.C. § 7545(o). The Renewable Fuel Standard (“RFS”) requires refiners to use increasing amounts of “renewable fuels” such as ethanol in U.S. gasoline beginning in 2006. 119 Stat. 594 § 1501. Section 211(o) of the CAA, entitled “Renewable fuel program,” has a definition section. With the Energy Policy Act, “renewable fuel” was defined as motor vehicle fuel “used to replace or reduce the quantity of fossil fuel present in a fuel mixture used to operate a motor vehicle.”³ 42 U.S.C. § 7545(o)(1)(C)(i)(II). “Renewable fuel” included “cellulosic biomass ethanol and “waste derived ethanol,” as well as “biodiesel.” 42 U.S.C. § 7545(o)(1)(C)(ii)(I) and (II). Under subsection (2)(A)(i), the EPA was mandated to promulgate regulations to ensure that gasoline sold or introduced into commerce in the United States contain the applicable volume of renewable fuel determined in accordance with a chronological schedule provided in the statute, beginning in 2006.

³ A “motor vehicle” is “any self-propelled vehicle designed for transporting persons or property on a street or highway.” 42 U.S.C. § 7550(2).

42 U.S.C. § 7545(o)(2)(A)(i).

Less than two years later, in 2007, Congress adopted the Energy Independence and Security Act, 121 Stat. 1492, in order to increase energy efficiency and the availability of renewable energy. See D. Wooley and E. Morss, *Clean Air Handbook: A Practical Guide to Compliance* § 5:53 (18th ed. 2008). Congress doubled the RFS mandate in the 2007 Act, requiring refiners to use higher amounts of renewable fuels, including ethanol, in gasoline, to reach 36 billion gallons annually by 2022. See 121 Stat. 1492 § 202 (to amend 42 U.S.C. § 7545(o)(2)(B)). That Act amends section 7545(o), broadening the definition of renewable fuel (in 42 U.S.C. § 7545(o)(1)(J)) to apply to “transportation fuel,” which is defined as “fuel for use in motor vehicles, motor vehicle engines, nonroad vehicles, or nonroad engines (except for ocean-going vessels).” 42 U.S.C. § 7545(o)(1)(L). The 2007 Amendments do not amend section 7545(o)(2)(A)(iii), which prohibits EPA from enacting any regulation “impos[ing] any per-gallon obligation for the use of renewable fuel” on any refineries, blenders, distributors, or importers.

The Final Rule implementing the federal RFS explains that “EPA expects that the overwhelming volume of renewable fuel used to demonstrate compliance with the renewable fuel obligation would still be ethanol blended with gasoline.” Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program, 72 Fed. Reg. 23900, 23915 (May 1, 2007) (to be codified at 40 C.F.R. pt. 80). However, “[a]lthough the RFS has been called an ‘ethanol mandate,’ there is no explicit requirement to use ethanol. For example, there are specific provisions for generating credits through the use of biodiesel and other renewable fuels.” Cong. Research Serv., *Selected Issues Related to an Expansion of the Renewable Fuel Standard* (Dec. 3, 2007), available at <http://fpc.state.gov/documents/organization/98150.pdf>.

Last year the State of Florida enacted the Florida Renewable Fuel Standard Act, Florida Statute Section 526.203 (2008), requiring that gasoline sold in Florida, with certain exemptions, be blended gasoline. In pertinent part, the Florida statute provides:

526.203 Renewable fuel standard. –

(1) Definitions. – As used in this act:

* * *

(b) “Blended gasoline” means a mixture of 90 to 91 percent gasoline and 9 to 10 percent fuel ethanol, by volume, that meets the specifications as adopted by the department. The fuel ethanol portion may be derived from any agricultural source.

* * *

(d) “Unblended gasoline” means gasoline that has not been blended with fuel ethanol and that meets the specifications as adopted by the department.

(2) Fuel Standard. – Beginning December 31, 2010, all gasoline sold or offered for sale in Florida by a terminal supplier, importer, blender, or wholesaler shall be blended gasoline.

(3) Exemptions. – The requirements of this act do not apply to the following:

(a) Fuel used in aircraft.

(b) Fuel sold for use in boats and similar watercraft.

* * *

(d) Fuel sold for use in collector vehicles or vehicles eligible to be licensed as collector vehicles, off-road vehicles, motorcycles, or small engines.

* * *

(i) Fuel for a railroad locomotive.

* * *

(j) Fuel for equipment, including vehicle or vessel, covered by a warranty that would be voided, if explicitly stated in writing by the vehicle or vessel manufacturer, if the equipment were to be operated using fuel meeting the requirements of subsection (2).

All records of sale of unblended gasoline shall include the following statement: “Unblended gasoline may be sold only for the purposes authorized under s. 526.203(3), F.S.”

(4) Report. – Pursuant to s. 206.43, each terminal supplier, importer, blender, and wholesaler shall include in its report to the Department of Revenue the number of gallons of blended and unblended gasoline sold. The Department of Revenue shall provide a monthly summary report to the department.

(emphasis added). No reasons are given in the statute for the listed exemptions.

The Florida statute is in stark contrast to the California law considered in *Turner*, 2008 WL 4570271, which contained no statutory exemptions and required that all gasoline sold in California be ethanol blended gasoline. It is also worthy of note that Defendants do not argue the Florida exemptions, including the exemption for boats and similar watercraft, are preempted by federal law. As Defendants see it, the “federal and state laws are in complete harmony: both support, and indeed compel, the use of ethanol in gasoline.” (*Joint Mem. in Support of Defs.’ Mot.* [D.E. 59] at 9). The list of exemptions and date for compliance – December 31, 2010 – evidence an intention by the Florida legislature to carve out certain users of gasoline from the requirement to use blended gasoline.

3. The Negligent Failure to Warn Claim is Not Preempted.

Defendants contend Plaintiffs’ proposed common law duty that Defendants not use ethanol in gasoline is preempted because such a duty would stand as an obstacle to the accomplishment of Congress’ objectives in the Energy Policy Act of 2005 and the Energy Independence and Security

Act of 2007. Defendants' argument assumes Plaintiffs' claim relies on the imposition of a state common law duty that Defendants not use ethanol or sell ethanol blended gasoline.

As explained by Plaintiffs, at no time have they alleged a common law duty prohibiting the sale or use of ethanol blended gasoline. Plaintiffs assert the proposed claim of negligent failure to warn of dangers of using ethanol blended gasoline in boats stands as no obstacle to Congress' objectives. A requirement that Defendants continue supplying unblended gasoline to the marine industry while providing warnings to marine users that ethanol blended gasoline may harm boat engines, fuel tanks and fuel systems, in no way conflicts with Congress' goals. The undersigned agrees with Plaintiffs' position.

Neither the Clean Air Act nor the Florida law bans production and supply of unblended gasoline. Congress delegated to the EPA the authority to determine the annual RFS; it did not explicitly ban unblended gasoline. While the Florida law mandates the use of blended gasoline, the law exempts fuel sold for use in boats. Plaintiffs' claim appears to fit within that exemption, as suppliers of gasoline in Florida are *not* required to supply blended gasoline; consequently, they may continue supplying unblended gasoline.

The issue, as the undersigned sees it, is whether the Florida statute conflicts with or stands as an obstacle to the accomplishment of the full objectives of Congress in passing the Energy Policy Act, the Energy Independence and Security Act, and the implementing regulations. If the Florida statute does that, then Plaintiffs' claim asserting a need to warn of dangers of using blended gasoline in boats, which appears to arise from and be in harmony with the exemption carved out by the Florida legislature to allow boats and other similar watercraft to continue using unblended gasoline, would appear to be preempted. If the Florida statute is in harmony with the federal scheme, then

Plaintiffs' claim, which is premised on (or not inconsistent with) the watercraft exemption, is not preempted.

The federal statutory framework is in harmony with the Florida law, which exempts boats and similar watercraft from the ethanol fuel blending requirements. Again, Defendants do not challenge the Florida law's exemptions as preempted by federal law. Defendants do not suggest the Florida law is unconstitutional. It is difficult, therefore, to conceive why Plaintiffs' claim relating to negligent failure to warn as it relates to the sale of ethanol blended gasoline to boat owners in Florida, runs afoul of any federal purpose contained in the CAA and its amendments.

This suit presents no obstacle to attainment of Congress' objectives as contained in the CAA and its amendments. If successful, Plaintiffs would obtain, among other things, an injunction requiring Defendants to warn customers of the potential dangers of using blended gasoline in boats and requiring Defendants to continue to make unblended gasoline available for purchase by boat owners in Florida. Defendants have cited to no law evidencing an intention by Congress to preempt Florida common law causes of action for property damage caused by defective design of unblended gasoline when used in boats or the failure to warn of possible damage if ethanol blended gasoline is used. Furthermore, no irreconcilable conflict between the federal standards and the claims presented has been shown. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984) (“[I]nsofar as damages for radiation injuries are concerned, preemption should not be judged on the basis that the federal government has so completely occupied the field of safety that state remedies are foreclosed but on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law.”); *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S.

51, 68 (2002) (finding Federal Boat Safety Act, which contained an express preemption clause pertaining to state or local law regulation, did not so completely occupy the field of safety regulation of recreational boats as to foreclose state common-law remedies).

Defendants cite to such cases as *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 881 & 886 (2000) (common law product liability claims for failure to equip car with airbags was preempted by federal standard that permitted various options to meet the safety standard); and *Martinez v. Ford Motor Co.*, 488 F. Supp. 2d 1194, 1196-98 (M.D. Fla. 2007) (product liability claim that auto manufacturer that used one of seven approved glass options should have used a different option was preempted where claim would impinge on the number of compliance options available under federal regulation), to support their position. The *Geier* and *Martinez* cases relied on by Defendants are distinguishable. Congress legislated how car manufacturers were to build cars to ensure safety and gave the manufacturers options. Because the legislature had provided the options for meeting federal safety standards, state common law product liability claims challenging the choice of airbags (*Geier*) or glass (*Martinez*) would clearly stand in the way of the federal goals which permitted less sophisticated safety mechanisms.

A positive result in this case requiring Defendants to continue to supply unblended gasoline to Florida boat owners (a result not inconsistent with the federal statutes which mandate increasing use of blended gasoline or the Florida statutory scheme which exempts from the State blended gasoline requirement “[f]uel sold for use in boats”), or to warn Florida boat owners of potential harm caused to boats from the use of ethanol blended gasoline, presents no obstacle to the Congressional goals stated in 42 U.S.C. § 7545(o). Consequently, the Motion to Dismiss on the basis of federal preemption fails to persuade.

B. *Does Plaintiffs' Claim Fail Because It Does Not Satisfy Conley?*

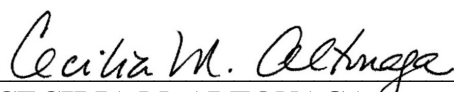
Proposed Count II for negligent failure to warn, like all four claims Plaintiffs concede fail, is premised on a market share theory. Despite Defendants' argument to the contrary, this claim satisfies the requirements of *Conley*. See 570 So.2d at 286. The court in *Conley* instructed that plaintiffs who cannot meet the traditional identification requirement may avail themselves of the market share theory of liability by alleging that they made reasonable attempts to identify the manufacturer(s) responsible for their injuries. *Id.* Plaintiffs make the allegation in their proposed amended pleading, and while "conclusory," it is sufficient to satisfy the Rule 8 notice pleading requirements and *Conley*.

IV. CONCLUSION

In accordance with the foregoing, it is

ORDERED AND ADJUDGED that Defendants' Motion to Dismiss Plaintiffs' Amended Complaint [D.E. 58] is **GRANTED** in part and **DENIED** in part. Counts II and III of the Amended Complaint, and Counts I and III of the proposed Second Amended Complaint are **DISMISSED**. Only the negligent failure to warn claim stated in the proposed Second Amended Complaint remains. To provide clarity, Plaintiffs are directed to file a Second Amended Complaint as a separate docket entry that complies with this Order by **January 26, 2009**.

DONE AND ORDERED in Chambers at Miami, Florida this 20th day of January, 2009.


CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record