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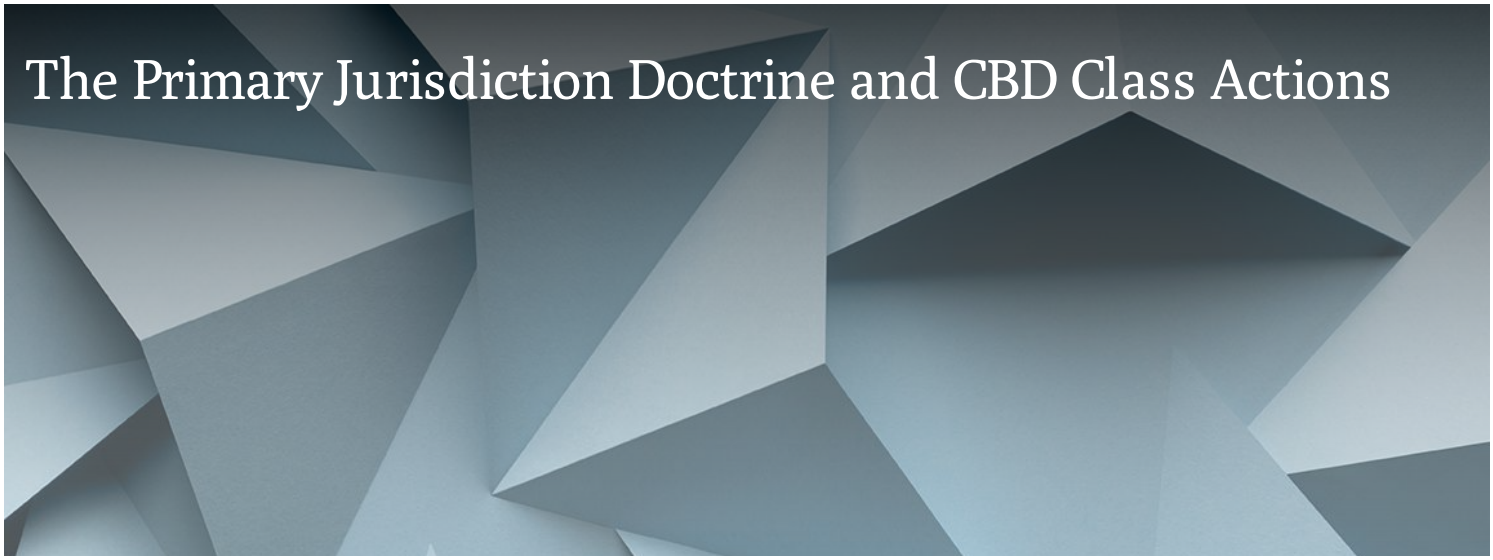
BLOG

The Primary Jurisdiction Doctrine and CBD Class Actions



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In just a few short years, products containing cannabidiol (CBD) have become a mainstay of the consumer products market in areas ranging from cosmetics to food and beverage. Growing consumer use of CBD has led to numerous class actions against companies selling CBD products. Typically, the lawsuits allege various claims, including false and misleading marketing and labeling of CBD products in violation of state consumer protection statutes.

A key legal issue in many of these lawsuits is whether the case should be stayed pursuant to the "primary jurisdiction doctrine" pending completion of U.S. Food and Drug Administration (FDA) rulemaking on CBD products. The primary jurisdiction doctrine allows a court to stay litigation pending resolution of an issue being considered by an administrative agency.[1] It is generally employed when the litigation "requires resolution of an issue of first impression, or of a particularly complicated issue that Congress has committed to a regulatory agency."[2] Several courts have been faced with this issue in CBD class action cases, but the decisions have lacked consistency.

The most recent decision staying litigation, *Glass v. Global Widget, LLC*, 2:19-cv-01906, 2020 WL 3174688 (E.D. Cal. June 15, 2020), involves a class action alleging that the defendant sold products with labels misrepresenting the amount of CBD in the product and that the defendant made false representations on the legality of CBD. In considering whether to stay the litigation, the court reviewed the non-exhaustive factors for applying the primary jurisdiction doctrine in the Ninth Circuit: "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration."[3] The court also reviewed the ongoing FDA rulemaking for CBD, specifically "whether the FDA will conclude that some or all CBD products are food additives, supplements or nutrients that can be safely marketed to the public and, if nutrients, whether the labelling standards and requirements for CBD products will be different or the same as for other nutrients."[4] In applying the factors, and given the ongoing FDA rulemaking, the court determined that "these cases raise issues of first impression surrounding how the FDA intends to classify and regulate the CBD."[5] The court also dismissed the plaintiff's argument that any forthcoming regulation from FDA would not apply retroactively in stating that "[a]ny presumption against retroactivity [] may be overcome by statutory authorization" and "whether cannabis regulations will apply retroactively is unknown."[6] Because the FDA "is working feverishly to develop rules concerning the regulation of CBD," the court "stay[ed] this lawsuit until such time as the FDA completes its rulemaking regarding the marketing, including labelling, of hemp-derived ingestible products."[7]

However, in a case involving similar facts and allegations regarding the mislabeling of CBD products, a judge in the Southern District of Florida opted against staying the litigation. In *Potter v. Potnetwork Holdings, Inc.*, 19-cv-24017, 2020 WL 1516518 (S.D. Fla. Mar. 30, 2020), the court acknowledged that the FDA is "eager to determine issues such as whether CBD products pose safety risks, how the mode of delivery affects safety, whether there are dosage considerations related to safety, whether there is a need for manufacturing standards, and whether there are standardized definitions for the ingredients in, for example, hemp oil."[8] Nevertheless, the court agreed with the plaintiff that whatever new FDA regulations may come, "[they] will not change the fact that manufacturers cannot state that their products contain a certain amount of CBD when they actually contain significantly less."[9] Additionally, the court noted that the FDA "has not expressed interest in modifying the disclosure requirements for nutrients or additives" and that new regulations "seem unlikely to change the food labeling requirements at issue in this case."[10]

In a similar case, *Snyder v. Green Roads of Florida LLC*, 19-cv-62342 (S.D. Fla. July 13, 2020), after a stay had been issued based on the primary jurisdiction doctrine, the plaintiff recently filed a Motion to Lift the Stay citing to a FDA report elaborating on the agency's progress in establishing regulatory guidance for CBD products, along with the *Potter* decision described above. Whether the court decides to lift the stay could have implications for how these class actions will proceed and for the CBD industry as a whole.

With the increasing number of class actions being filed against CBD companies, courts will continue to be tasked with deciding whether these cases warrant a stay under the primary jurisdiction doctrine until the FDA completes its rulemaking process. And as technology continues to progress, with innovative products being developed in emerging industries, companies should be aware of the implications of the primary jurisdiction doctrine for future litigation when agency regulation is pending.

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[1] *Glass v. Global Widget, LLC*, 2:19-cv-01906, 2020 WL 3174688, at *3 (E.D. Cal. June 15, 2020) (*citing Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008)).

[2] *Id*. (*citing GCB Commc'ns, Inc. v. U.S. S. Commc'ns, Inc.*, 650 F.3d 1257, 1264 (9th Cir. 2011)).

[3] *Id*. at *3 (*citing Syntek Semiconductor Co., Ltd. v. Microchip Tech, Inc.*, 307 F.3d 775, 781 (9th Cir. 2002)).

[4] *Id*. at *4 (*citing Snyder v. Green Roads of Florida, LLC*, 430 F. Supp. 3d 1297, 1308 (S.D. Fla. 2020)).

[5] *Id*. at *3 (*citing Colette v. CV Scis., Inc.*, 2:19-cv-10227, 2020 WL 2739861, at *4 (C.D. Cal. May 22, 2020)).

[6] *Id.* at *4 (*citing Colette*, 2020 WL 2739861, at *5).

[7] *Id*.

[8] *Id*. at *6.

[9] *Id*. at *6.

[10] *Id.* at *6.

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