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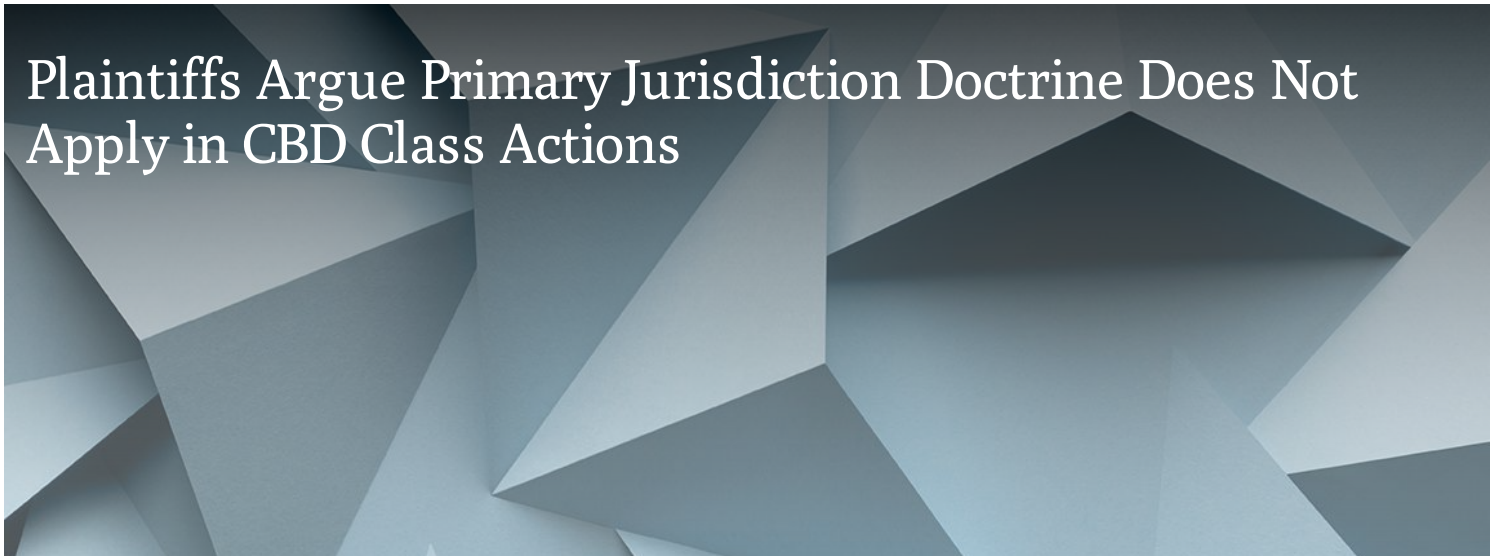
BLOG

Plaintiffs Argue Primary Jurisdiction Doctrine Does Not Apply in CBD Class Actions



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The primary jurisdiction doctrine continues to be a hotly litigated issue in class actions brought against consumer product companies selling products containing cannabidiol (CBD). While many courts have adopted the primary jurisdiction doctrine to stay these cases pending completion of the U.S. Food and Drug Administration (FDA) rulemaking for CBD products, some plaintiffs have recently requested that the stay on these cases be lifted.

Since we last examined the use of the primary jurisdiction doctrine in CBD class actions,[1] two additional federal cases were stayed pending FDA rulemaking.[2] In *Ahumada v. Global Widget, LLC*, 19-cv-12005-ADB, 2020 WL 5669032, at *1 (D. Mass. Aug. 11, 2020), the court analyzed three relevant factors used in the First Circuit to determine whether to apply the primary jurisdiction doctrine: "(1) whether the agency determination lies at the heart of the task assigned the agency by Congress; (2) whether agency expertise is required to unravel intricate, technical facts; and (3) whether . . . the agency determination would materially aid the court." Applying these factors, the court found all three were met. First, the court concluded that the FDA is "tasked with regulating food and drugs."[3] Second, "the FDA is in the best position to determine whether CBD is a legal product in the forms marketed by Defendant, whether those products are required to contain certain dosages of CBD, and how those products should be manufactured, tested, and labeled to ensure compliance with FDA requirements."[4] Third, the existing regulations "provide little guidance with respect to whether CBD ingestibles . . . are food supplements, nutrients or additives and what labelling standards are applicable to each iteration."[5] In making this holding, the court dismissed the plaintiff's argument that "the FDA has already determined that CBD products are illegal," noting that the FDA "has issued non-binding guidance only."[6]

Additionally, in *Pfister, et al. v. Charlotte's Web Holdings, Inc.*, No. 1:20-cv-00418 (N.D. Ill. Aug. 3, 2020), after the defendant filed a motion to dismiss or, in the alternative, to stay the litigation, the parties entered a joint stipulation on August 3, 2020, staying the litigation under the primary jurisdiction doctrine stating that "the parties would benefit from the FDA's expertise on the question of defining 'hemp extract.'"

Yet, although the majority of courts have stayed CBD class actions pursuant to the primary jurisdiction doctrine, some plaintiffs have recently argued that a stay is unnecessary because the FDA has already made its position clear on the illegality of CBD products as dietary supplements, the FDA's rules for CBD would not change existing content labeling regulations, and the FDA's rules would not be applied retroactively to the products at issue in these cases. For example, as mentioned in our previous article, plaintiffs filed a motion to lift the stay in *Snyder, et al. v. Greens*

Road of Florida LLC, 19-cv-62342 (S.D. Fla. July 13, 2020). The defendant has now opposed this motion, arguing that a stay should be vacated only where "the circumstances that persuaded the court to impose the stay in the first place have changed significantly," which is not the case here.[7] Instead, the defendant notes that the FDA has made considerable progress on the CBD regulation, including submitting a proposed CBD enforcement policy to the White House Office of Management and Budget on July 22, 2020. The plaintiffs respond in their reply that the progress made by the FDA focuses on the safety of CBD in consumer products, not on content labeling.[8] This motion is still pending.[9]

Since most courts that have faced this issue stayed the litigation, if the courts in these cases decided to lift the stays, it would create further uncertainty until the FDA completes its pending regulation.

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[1] Available at https://www.winston.com/en/product-liability-and-mass-torts-digest/the-primary-jurisdiction-doctrine-and-cbd-class-actions.html.

[2] In *Miguel Rodriguez v. Just Brands USA, Inc., et al.*, 2:20-cv-04829 (C.D. Cal. Sept. 24, 2020), the defendants filed a motion to stay the litigation based upon the primary jurisdiction doctrine on September 24, 2020. That motion is pending.

[3] *Id*.

[4] *Id*.

[5] *Id*.

[6] *Id*. at *2.

[7] *Snyder, et al. v. Greens Road of Florida LLC*, 19-cv-62342 (S.D. Fla. July 27, 2020).

[8] *Snyder, et al. v. Greens Road of Florida LLC*, 19-cv-62342 (S.D. Fla. Aug. 13, 2020).

[9] In a different case, *Colette, et al. v. CV Sciences, Inc.*, 2:19-cv-10227 (C.D. Cal. Sept. 1, 2020), the parties filed a joint status report on September 1, 2020, in which the plaintiffs argued that the stay should be lifted for multiple reasons, including that the FDA "has remained firm in its position that it is illegal to sell CBD products as dietary supplements or to sell food with CBD, and that it has no plans to legalize any CBD consumer products in the future absent a formal drug approval process."

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