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**Cannabis Litigation Practice Alert**

# An Overview of Recent Motions to Dismiss or Stay CBD Content Class Actions

From California to Massachusetts and Florida to Illinois, CBD class action suits have been sweeping the country in recent months. One subset of these suits allege, based on state law claims like false advertising, that CBD companies are shortchanging their customers by using product labels that overstate the amount of CBD in their gummies, tinctures, and all manner of other CBD products. Meanwhile, as these suits are being litigated, the FDA is engaged in the process of determining how to regulate CBD products and what standards will apply to CBD products.

This combination of litigation during regulatory development sets the stage for a unique dynamic between the courts and the FDA, which are together making industry-changing decisions for CBD businesses nationwide. Now that the parties have begun filing motions in court, we are offered our first glimpse into how they will prosecute and defend these cases, and particularly into how they will incorporate the FDA's ongoing regulatory process into their arguments. So far, a review of the most recently filed documents in these suits shows two main arguments emerging.

## I. The Federal Preemption Argument

The first of the two arguments CBD companies have deployed generally is as follows:

> *The FDA sets labeling standards for food and supplements, and the FDA also sets testing standards to ensure food and supplements live up to their labels' claims. Plaintiffs' state law claims, to the extent they set more exacting standards than those of the FDA, are preempted by federal law, meaning we need not adhere to them.*

The legal term for this type of argument is "federal preemption." Basically, federal preemption says that a plaintiff cannot bring a claim under a state law that conflicts with a federal law. Defendants are arguing that federal laws are created to apply uniformly across the country, and particularly in the context of food, supplements, drugs, etc., uniformity is important. If each state had its own labeling and testing requirements, it would make marketing products nationwide difficult, and labeling uniformity ensures people can understand labels not just in their home states, but wherever they go. Here, CBD companies are using federal preemption to argue that plaintiffs' state-law claims must be dismissed.

## II. The Primary Jurisdiction Argument

The second argument CBD companies have deployed is as follows:

> *Plaintiffs' case must be put on hold because the FDA is still in the process of deciding whether certain CBD products are a food, dietary supplement or something else. FDA labeling and testing standards differ depending on which of these categories CBD products fall into, and thus the court would need to determine which category applies before deciding whether we have violated any FDA labeling standards. Since the FDA is in the process of deciding this very question, and the FDA is the expert on these types of matters, the court should not jump the gun by deciding what labeling is appropriate and what testing standards apply before the FDA does. Instead, the court should wait until the FDA determines what standards apply to CBD.*

The legal term for this type of argument is "primary jurisdiction." Essentially, the primary jurisdiction doctrine allows a court to stay a case if it would require the court to determine a new regulatory question that is more appropriately decided by the applicable government agency. Like federal preemption, the primary jurisdiction

doctrine is driven by practical considerations. If a regulation is unclear, instead of having courts figure it out, the agency that created the regulation is generally better equipped to resolve the ambiguity because it has more experience in the relevant industry and more resources at its disposal. Also, when an agency resolves an ambiguity—either by issuing opinion letters or amending an ambiguous regulation—it applies equally to all industry members, not just those involved in the lawsuit. This, in turn, promotes uniformity. So, here, CBD companies are arguing that because (1) the FDA is the expert on whether FDA regulations categorize certain CBD products as a food, dietary supplement, or something else; and (2) the FDA is in the process of determining how CBD should be regulated, courts should wait until the FDA reaches a decision before proceeding.

## III. The Current Litigation Landscape of CBD Content Cases

At least one court has weighed in on these arguments. In *Snyder v. Green Roads of Florida LLC*, No. 0:19-CV-62342-UU (S.D. Fla.), a consumer sued a CBD company in the US District Court for the Southern District of Florida for overstating the amount of CBD in their gummies, tea, and oils.[1] On January 3, 2020, the *Snyder* court agreed with the CBD company that the case should be stayed under the primary jurisdiction doctrine.[2] The court stated the FDA has the authority to issue regulations for CBD, is actively in the process of determining how to regulate CBD, and is under considerable pressure from Congress to do so.[3]

The court also noted that the "FDA has not yet promulgated CBD labeling regulations"[4] and it is uncertain "whether the FDA will conclude 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."[5] The court pointed out that CBD regulation requires the FDA's particular expertise and uniformity in administration, especially so given the technical issues involved, such as manufacturing standards, safety and dosing guidelines, and standardizing ingredient definitions.[6]

Accordingly, the court stayed the case until "the FDA completes its rulemaking regarding the marketing, including labelling, of hemp-derived ingestible products."[7]

Taking note of the *Snyder* decision, CBD companies facing similar claims followed suit and filed motions to dismiss using similar arguments:

*Potter v. PotNetwork Holdings, Inc*, No. 1:19-cv-24017-RNS (S.D. Fla.)

On January 8, 2020, just five days after the *Snyder* decision, PotNetwork filed a motion to dismiss in *Potter v. PotNetwork Holdings, Inc.*, arguing that Ms. Potter's claims that PotNetwork's product labels overstate the products' CBD content are federally preempted by the FDA's labeling regulations.[8] PotNetwork argued that Ms. Potter's state-law claims were an attempt to enforce standards inconsistent with the FDA's regulations, and Ms. Potter had not alleged PotNetwork violated any applicable FDA regulations.[9]

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1 Complaint ¶¶ 24-26, 39-40, *Snyder v. Green Roads of Florida LLC*, No. 0:19-CV-62342-UU (S.D. Fla. Sep. 19, 2019).
2 *Snyder v. Green Roads of Florida LLC*, No. 0:19-CV-62342-UU, at 16 (S.D. Fla. Jan. 3, 2020).
3 *Id.* at 12, 14.
4 *Id.* at 13.
5 *Id.* at 14.
6 *Id.* at 14-15.
7 *Id.* at 14.
8 Motion to Dismiss at 7-12, *Potter v. PotNetwork Holdings, Inc*, No. 1:19-cv-24017-RNS (S.D. Fla. Jan 8, 2020).
9 *Id.* at 7-11.

PotNetwork also argued the case should be stayed under the primary jurisdiction doctrine because the FDA has fast-tracked their decision-making process on CBD regulations, CBD regulation requires the FDA's particular expertise and uniform enforcement, and the FDA's eventual guidance would answer labeling questions at issue in the case, therefore streamlining the litigation.[10]

On January 22, 2020, Ms. Potter opposed PotNetwork's motion, pointing out that contrary to PotNetworks' contentions, her state-law claims were not preempted because they did not impose standards any different than the FDA's regulations, and the court need not determine which of the FDA's labeling standards were applicable to CBD at the motion to dismiss stage.[11]

Ms. Potter also argued the case should not be stayed under the primary jurisdiction doctrine because existing FDA regulations and guidance are sufficient to resolve the issues in dispute—*i.e.* whether PotNetwork's products' CBD content lives up to their labels' claims.[12] Ms. Potter noted that future FDA regulation would not affect her claims because (1) future FDA regulations "will not change the fact that manufacturers cannot state that their products contain a certain amount of CBD when they actually contain significantly less" and (2) any new FDA regulations on CBD would only apply going forward and would not affect Ms. Potter's claims based on past purchases.[13] She argued the case should not be put on hold because any eventual FDA regulation would not affect the issues in the suit.[14]

PotNetwork's reply to Ms. Potter's arguments is due on February 25, 2020.[15]

*Gaddis v. Just Brands USA, Inc.*, No. 0:19-CV-62067-RS (S.D. Fla.)

In *Gaddis v. Just Brands USA, Inc.*, Mr. Gaddis had claimed that Just Brands' "labeling and packaging repeatedly overstate the quantity of CBD contained in their Products,"[16] and on January 10, 2020, Just Brands filed both a motion to dismiss and a motion to stay.[17] The motion to stay was based in part on primary jurisdiction grounds, arguing that the FDA and state agencies are currently in the process of creating rules for CBD labeling and determining what testing standards "support the manufacturing of safe and consistent" CBD.[18] Just Brands pointed out the FDA has authority to regulate CBD products and that CBD regulation is a complex and technical issue that requires the FDA's particular expertise.[19]

Finally, Just Brands argued that given the number of CBD cases filed around the country, a stay until the FDA has completed its rulemaking would promote uniform enforcement of its rules and avoid the possibility of inconsistent decisions by individual courts.[20] Shortly after Just Brands filed its motions, Mr. Gaddis voluntarily dismissed his case.[21]

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[10] *Id.* at 17-21.
[11] Opposition at 11, 13, *Potter v. PotNetwork Holdings, Inc*, No. 1:19-cv-24017-RNS (S.D. Fla. Jan. 22, 2020).
[12] *Id.* at 15-16.
[13] *Id.* at 17.
[14] *Id.*
[15] Order, *Potter v. PotNetwork Holdings, Inc*, No. 1:19-cv-24017-RNS (S.D. Fla. Feb 12, 2020).
[16] Complaint ¶ 2, *Gaddis v. Just Brands USA, Inc.,* No. 0:19-CV-62067-RS (S.D. Fla. Aug. 16, 2019).
[17] Motion to Dismiss, *Gaddis v. Just Brands USA, Inc.,* No. 0:19-CV-62067-RS (S.D. Fla. Jan. 10, 2020); Motion to Stay, *Gaddis v. Just Brands USA, Inc.,* No. 0:19-CV-62067-RS (S.D. Fla. Jan. 10, 2020).
[18] Motion to Stay at 6, *Gaddis v. Just Brands USA, Inc.,* No. 0:19-CV-62067-RS (S.D. Fla. Jan. 10, 2020).
[19] *Id.* at 7-8.
[20] *Id.* at 8-9.
[21] Notice of Voluntary Dismissal, *Gaddis v. Just Brands USA, Inc.,* No. 0:19-CV-62067-RS (S.D. Fla. Jan. 16, 2020).

*Ahumada v. Global Widget*, No.1:19-cv-12005-ADB (D. Mass.) and *Glass v. Global Widget*, No. 2:19-CV-01906-MCE-KJN (E.D. Cal.)

In *Ahumada v. Global Widget*, Ms. Ahumada claimed that Global Widget's product labels and website descriptions "misrepresent[] that [Global Widget's] CBD Products have specific amounts of CBD when, in fact, the Products do not contain the amount of CBD as advertised and are instead grossly under-dosed."[22]

On January 16, 2020, Global Widget filed a motion to dismiss alleging both federal preemption and primary jurisdiction.[23] In the motion, Global Widget argued that Ms. Ahumada's labeling claims concerning CBD quantity were federally preempted by the FDA's labeling regulations because Ms. Ahumada did not follow what Global Widget contended are the applicable FDA testing procedures for measuring the amount of CBD in Global Widget's gummies and CBD products.[24]

Global Widget also argued the Court should stay the case under the primary jurisdiction doctrine while the FDA determines "the appropriate methodology for regulating, testing, and setting standards for the amount of CBD in consumable products and their status as dietary supplements."[25] Global Widget noted these issues require "the FDA's specialized expertise and uniformity in administration,"[26] and the FDA is "poised to issue CBD regulations soon."[27] The response to these arguments is due at the end of February.[28]

On January 29, 2020, Global Widget also filed a motion to dismiss in *Glass v. Global Widget*, making substantially the same arguments made in *Ahumada*.[29] Mr. Glass's opposition to the motion is also due at the end of February.[30]

## IV. Where Do We Go From Here?

As of yet, only the *Snyder* court has actually ruled on the federal preemption and primary jurisdiction issues. In the coming months, as additional rulings come down, or if the FDA provides further guidance, we will get more clarity on the situation.

Further, as the *Snyder* decision is at the trial court level (not the appellate level), it is not binding on any other court. This means we have not heard the last word on how the federal preemption and primary jurisdiction issues will be settled in courts across the country. While litigants have pointed to *Snyder* as persuasive authority in other courts, the decision to stay a case is subject to individual judges' discretion, and some judges may disagree that staying CBD cases is the best way forward.

Finally, staying cases under the primary jurisdiction doctrine only puts them on hold until the FDA makes progress promulgating further regulations for CBD. Thus, even if other courts decide to follow *Snyder*, this in no way means that CBD labeling cases are at an end. To the contrary, once the FDA progresses sufficiently in its regulation of CBD such that litigants can convince courts it is appropriate to resume litigation, the cases will continue, and CBD companies will need to decide how to best continue their defense of these suits.

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22 Complaint ¶ 4, *Ahumada v. Global Widget*, No.1:19-cv-12005-ADB (D. Mass. Sept. 24, 2019).
23 Motion to Dismiss and Strike, or, in the Alternative Stay, *Ahumada v. Global Widget*, No.1:19-cv-12005-ADB (D. Mass. Jan. 16, 2020).
24 *Id.* at 6-8.
25 *Id.* at 9.
26 *Id.*
27 *Id.* at 10.
28 Order, *Ahumada v. Global Widget*, No.1:19-cv-12005-ADB (D. Mass. Jan. 23, 2020).
29 Motion to Dismiss and Strike or, in the Alternative, Stay at 6-11, *Glass v. Global Widget*, No. 2:19-CV-01906-MCE-KJN (E.D. Cal. Jan 29, 2020).
30 Stipulation and Order, *Glass v. Global Widget*, No. 2:19-CV-01906-MCE-KJN (E.D. Cal. Jan 10, 2020).

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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