

Cannabis Litigation Practice Alert

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

Last month, we reported on recent motions to dismiss in suits alleging CBD companies were shortchanging customers by overstating the amount of CBD in their products. This month, we continue our coverage of the wave of CBD litigation by focusing on another subset of these cases: those alleging it is inherently illegal to sell CBD as a food, dietary supplement, or anything other than an FDA-approved drug. These cases assert state-law claims, such as unlawful competition and false advertising, and seek to halt CBD companies from selling CBD.

Recently, CBD companies have filed a number of motions to dismiss these cases, offering us our first insights into how the parties will prosecute and defend “CBD illegality” cases. CBD companies have been relying heavily in their motions on the fact that the FDA is still engaged in the process of determining how to regulate CBD and have also cited FDA Commissioner Dr. Stephen Hahn’s recent statement that it would be a “fool’s game to try to even approach” banning people from purchasing CBD products. So far, a review of the most recent filings in these suits shows two main arguments emerging.

I. The Primary Jurisdiction Argument

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

Plaintiffs’ case must be put on hold because the FDA is in the process of deciding whether it is legal to sell CBD products as food, dietary supplements, or something else. Since plaintiffs’ claims hinge on whether CBD is legal to sell as a food, dietary supplement, etc., the court would need to determine this question to proceed with the case. Because 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 before the FDA does. Instead, the court should wait until the FDA makes its decision before proceeding.

The legal term for this type of argument is “primary jurisdiction.” 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. This 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 its regulations make it illegal to sell CBD as a food, supplement, or something else; and (2) the FDA is in the process of determining whether CBD can legally be sold as a food, dietary supplement, or something else, courts should wait until the FDA reaches a decision before proceeding.

II. The Federal Preemption Argument

The second argument CBD companies have deployed is called “federal preemption,” which, in short, means that federal law overrides state law in certain circumstances. Federal preemption is based on the Supremacy Clause of the US Constitution, which states federal law “shall be the supreme Law of the Land” and gives Congress the power to override state laws that conflict with federal law. Here, CBD companies have argued that two federal laws, the 2018 Farm Bill and the Food, Drug and Cosmetics Act (“FDCA”), preempt plaintiffs’ state-law claims.

Federal preemption arguments come in three slightly different permutations: express preemption, conflict preemption, and implied preemption. An express preemption argument is one that asserts plaintiffs cannot bring a certain type of state-law claim because federal law expressly prohibits it. A conflict preemption argument is one that asserts state laws are preempted when they stand as an obstacle to the purposes and objectives of a federal law—*i.e.* when state-law claims harm a federal law’s objectives so much that they should not be recognized. Finally, an implied preemption argument is somewhat more complex. It comes into play when Congress passes a federal law addressing a certain subject, and although Congress does not expressly say states are forbidden from making laws on the same subject, it is intended (or “implied”) that states should be excluded from doing so. This occurs when a federal law is so pervasive in a given subject area that it shows Congress intended to exclude states from passing laws addressing the same subject.

III. The Current Litigation Landscape of “CBD Illegality Cases”

No court has yet weighed in on these arguments. However, a number of motions to dismiss have been filed, most of which rely on both primary jurisdiction and at least one variety of the federal preemption arguments:

DaSilva v. Infinite Product Company LLC

On March 17, 2020, Infinite CBD filed a motion to dismiss in *DaSilva v. Infinite Product Company*, arguing the case should be dismissed on grounds of federal preemption and primary jurisdiction.¹ Infinite CBD touched only briefly on federal preemption, arguing that plaintiff’s claims were expressly preempted by the FDCA, which states that only the government may sue for FDCA violations.²

Infinite CBD relied more heavily on primary jurisdiction.³ Infinite CBD pointed out that Congress and the FDA have recently taken a number of actions pertaining to CBD.⁴ It also cited to FDA Commissioner Dr. Stephen Hahn’s statement in late February that it would be a “fool’s game” to ban people from using CBD products.⁵ Infinite CBD contended the case should be put on hold because the issues “the FDA is currently working to resolve include how and when CBD is considered a drug versus a food additive, dietary supplement or cosmetic product, as well as what information is required to be on CBD product labels and whether the information varies according to use of the product.”⁶ It argued that, because the resolution of these issues are central to the case, and because the FDA has the expertise and ability to uniformly enforce these standards, the court should wait for the FDA to make its decisions before proceeding with the case.⁷

¹ Motion to Dismiss and Strike, or in the Alternative, Stay, *DaSilva v. Infinite Product Co.*, No. 2:19-cv-10148 (C.D. Cal. Mar. 17, 2020).

² *Id.* at 6.

³ *Id.* at 5-6, 18-25.

⁴ *Id.* at 19-21.

⁵ *Id.* at 21.

⁶ *Id.* at 22.

⁷ *Id.* at 22-23.

Plaintiff's opposition to Infinite CBD's motion will be due on March 27, 2020.

Davis v. cbdMD, Inc.

On March 13, 2020, cbdMD filed a motion to dismiss in *Davis v. cbdMD, Inc.* It made only a passing reference to federal preemption,⁸ instead, as in *Infinite CBD*, primarily arguing the case should be dismissed or stayed based on primary jurisdiction.⁹

cbdMD argued the state of CBD regulation is in flux and that the FDA, its regulations, and its non-binding interpretations have been sending mixed messages regarding whether CBD can be legally sold.¹⁰ cbdMD emphasized that the FDA and legislators should be allowed to decide whether CBD can be sold legally and that the court should not determine this question based on existing regulations.¹¹ cbdMD also noted the FDA has not sent warning letters to all companies selling CBD products but instead only targeted those making impermissible claims that CBD can treat or prevent serious diseases, which indicates that selling CBD is not inherently illegal.¹²

Finally, cbdMD argued uniform FDA and congressional regulations, which are in the process of being created, would be more equitable to industry participants than having courts decide whether each individual industry member's CBD sales are legal.¹³

Plaintiff's opposition to cbdMD's motion will be due April 3, 2020.

Micheline Colette et al. v. CV Sciences, Inc.

On March 10, 2020, CV Sciences moved to dismiss plaintiffs' state-law claims in *Micheline Colette et al. v. CV Sciences, Inc.*, relying on both federal conflict preemption and primary jurisdiction. First, CV Sciences argued conflict preemption barred plaintiffs' claims because they sought to privately enforce the FDCA and this conflicts with the federal government's exclusive right to enforce the FDCA.¹⁴ Further, CV Sciences argued the claims conflicted with the FDA's discretion to decline to enforce regulatory violations.¹⁵

Second, CV Sciences argued the case should be stayed based on the primary jurisdiction doctrine,¹⁶ contending the legality of CBD was a new regulatory question, properly within the authority of the FDA, which requires administrative uniformity and the FDA's specialized expertise.¹⁷ CV Sciences noted the FDA is in the process of establishing regulations to address CBD sales and argued the court should wait for the FDA to complete this process before proceeding with the case.¹⁸

Should the court grant the parties' recent stipulation to extend time, plaintiffs' opposition to CV Sciences' motion will be due April 6, 2020.

⁸ Motion to Dismiss, *Davis v. cbdMD, Inc.*, No. 2:19-cv-10241-DMG-JEM at *12 (C.D. Cal. Mar. 15, 2020)

⁹ *Id.* at 6-19.

¹⁰ *Id.* at 7-11, 16-18.

¹¹ *Id.* at 7, 13-16.

¹² *Id.* at 8-9, 13.

¹³ *Id.* at 14-18.

¹⁴ Motion to Dismiss at 5-12, *Micheline Colette et al. v. CV Sciences, Inc.*, No 2:19-cv-10227-CAS-JEM, (C.D. Cal. Mar. 10, 2020).

¹⁵ *Id.* at 13.

¹⁶ *Id.* at 13-15.

¹⁷ *Id.* at 14-15.

¹⁸ *Id.* at 14.

McCarthy v. Elixinol, LLC

On March 13, 2020, Elixinol moved to dismiss plaintiff's state-law claims in *McCarthy v. Elixinol, LLC*, arguing they were expressly preempted by the 2018 Farm Bill, which bars states from prohibiting "the transportation or shipment of hemp or hemp products."¹⁹ Elixinol also argued plaintiff's claims should be dismissed because they conflicted with the federal government's exclusive right to enforce the FDCA.²⁰

Additionally, Elixinol asked the court to dismiss or stay the case based on primary jurisdiction.²¹ Elixinol pointed out that plaintiff's claims are based on whether CBD can be legally sold as a food or supplement, this determination is within the FDA's particular expertise, and Congress has entrusted the FDA with making this determination.²² Further, the FDA is currently working on regulations for CBD, and allowing the FDA to make this determination would promote uniformity in the industry.²³ Plaintiff's opposition to Elixinol's motion is due on March 27, 2020.

McCarthy v. Charlotte's Web Holdings, Inc.

On March 16, 2020, Charlotte's Web Holdings filed a motion to dismiss in *McCarthy v. Charlotte's Web Holdings, Inc.*, arguing plaintiff's state-law claims were impliedly preempted by the FDCA's language that vests exclusive enforcement power with the FDA.²⁴ Thus, because plaintiff's claims were based only on FDCA violations, they were an impermissible attempt to privately enforce the FDCA.²⁵

Charlotte's Web also argued the case should be stayed under the primary jurisdiction doctrine,²⁶ noting that the FDA has authority under the 2018 Farm Bill to regulate hemp products, and "the FDA is actively engaged in regulatory activity concerning hemp and CBD products, including the proper labeling of those products."²⁷ Thus, the court should let the FDA complete its regulatory process before proceeding.²⁸

Plaintiff's opposition to Charlotte's Web's motion is due on March 30, 2020.

¹⁹ Motion to Dismiss at 19-20, *McCarthy v. Elixinol, LLC*, 5:19-CV-07948 (N.D. Cal. Mar. 13, 2020).

²⁰ *Id.* at 20-21.

²¹ *Id.* at 21-23.

²² *Id.* at 22.

²³ *Id.* at 22-23.

²⁴ Motion to Dismiss at 12-13, *McCarthy v. Charlotte's Web Holdings, Inc.*, 5:19-cv-07836 (N.D. Cal. Mar. 16, 2020).

²⁵ *Id.* at 14.

²⁶ *Id.* at 21-23.

²⁷ *Id.* at 22-23.

²⁸ *Id.* at 23.

IV. Where Does This Leave CBD Companies?

No court has yet ruled on these arguments in a CBD illegality case. The importance of these cases, however, cannot be understated. By arguing that selling CBD in food and supplements is illegal, these cases strike at the heart of the CBD industry.

It is important to note, however, that any decision in the pending cases would only be binding on the specific defendants in the case, not the entire CBD industry. Further, because these cases are all at the trial level, any decision would not be binding on any other court. Nevertheless, a decision that it is illegal to sell CBD, even at the trial level, could serve as persuasive authority for other courts considering the same issue and possibly convince them to rule similarly. As such, developments in these cases should be monitored closely.

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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