CARLTON FIELDS

Court Stays CBD Class Action Until FDA Rolls Out Regulation

January 08, 2020

A class action lawsuit alleging that Green Roads of Florida LLC misrepresented the amount of CBD contained in various products has been stayed pursuant to the primary jurisdiction doctrine because the plaintiffs' claims implicate the U.S. Food and Drug Administration's expertise with regard to a regulated product. The named plaintiffs allege that the CBD products they purchased through Green Roads' website did not contain the amount of CBD stated on the products' labels. As a result, the plaintiffs allege they were overcharged for the products. The court dismissed the plaintiffs' claims to the extent that they related to products that neither of the named plaintiffs actually purchased. The judge also found that the plaintiffs failed to demonstrate a likelihood of future injury and therefore lacked standing to assert a claim for injunctive relief. However, these rulings did not prevent the case from moving forward with regard to the plaintiffs' claims related to products they actually purchased or the damages flowing from those past purchases. The court stayed these claims pursuant to the primary jurisdiction doctrine. The primary jurisdiction doctrine applies "whenever enforcement of a claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." The plaintiffs opposed the stay, arguing that the court could apply existing regulations to their claims and because it is unclear when and whether the relevant federal agencies will issue regulations with respect to CBD product-content labeling. The judge noted that "[r]egulatory oversight of CBD ingestible products, including labelling, is currently the subject of rulemaking at the FDA. The FDA recently has conducted a public hearing and instituted an agency task force on CBD regulation." The FDA "made clear" that it was "concerned" with the labeling of products containing cannabis and hemp-derived compounds, which include CBD. The judge further noted that the FDA is under "considerable pressure" from both Congress and the CBD industry to issue regulations regarding CBD products. After applying a five-factor test to determine whether the primary jurisdiction doctrine applied, the court stayed the class action. First, the court found that there is a need for consistent guidance with regard to regulation of CBD labeling. Second, regulation of CBD by the FDA is appropriate, regardless of whether CBD is determined to be a food additive, supplement, or nutrient, as regulation of all these categories is within the FDA's purview. Third, the 2018 Farm Bill explicitly recognized the FDA's authority to regulate cannabis and hemp-derived products under the Federal Food, Drug, and Cosmetic Act of 1938. Fourth, regulation of CBD product labeling "requires both expertise and uniformity in

administration," as illustrated by the FDA's concern regarding "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." Lastly, the FDA "obviously has expressed an active interest in regulating the manufacture and marketing of CBD products." As a result, the court held that the primary jurisdiction doctrine applied and that it was proper to stay the proceedings. Finally, the court "vehemently disagree[d]" with the plaintiffs' argument that the current regulatory framework was adequate to resolve the case, finding that the regulations currently in place provide little guidance with respect to CBD ingestibles and labeling requirements. The judge concluded by stating that it would "benefit greatly from the FDA's regulatory framework." A sentiment with which many in the industry can probably relate.

Authored By

Kevin P. McCoy

Benjamin E. Stearns

Related Practices

Cannabis Law