

CBD Suit Stayed Pending Further Action from FDA or Congress

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On March 3, 2021, the U.S. District Court for the Central District of California invoked the primary jurisdiction doctrine to stay a consumer class action [asserting](#) various causes of action against Infinite Product Company, LLC (Infinite) related to the allegedly improper sale of cannabidiol (CBD) products.

As we have previously covered in our blog, the federal regulatory framework for CBD remains uncertain. The FDA has taken the [position](#) that CBD is not a lawful dietary or food ingredient, even while the market is flooded by CBD products and individual states, such as New York, are forging ahead with their own [regulatory frameworks](#). And while industry had hoped that draft CBD enforcement guidelines—which had been under review by the White House Office of Management and Budget (OMB) since July 2002—would provide clarity, the draft guidelines were [withdrawn](#) in January following the change in administration. No timetable for their release, or for any other FDA regulatory or Congressional action has been announced.

The class action had alleged that Infinite improperly and misleadingly marketed CBD products, including labeling of the products as dietary supplements when they were in fact (allegedly) misbranded drugs. The court found that it could not adjudicate the claims “given the lack of clarity as to which of Defendant’s CBD products are drugs, dietary supplements, or food products, and what standards apply to those Products.” Instead, the court held that the primary jurisdiction doctrine, which allows courts to stay cases pending resolution of an issue within the special competence of an administrative agency, was properly invoked because both FDA and Congress have expressed interest in regulating CBD and uniform regulation of CBD is necessary, especially given the potential safety concerns. Therefore, the case was ordered stayed “until the FDA completes its rulemaking and/or Congress passes legislation regarding the definitions, marketing, and labeling of CBD products.”

While the order states that the stay will be in effect until Congress or FDA act, it is likely that prolonged inaction might also result in a reversal of the stay. Many courts had initially stayed “natural” class actions pending FDA guidance on the definition of “natural,” but in light of continued FDA inaction, courts have [reversed course](#) and [refused](#) recent requests to stay. Keller and Heckman will continue to monitor the regulation of CBD products and class-actions relating to their sale.

National Law Review, Volume XI, Number 68

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