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Ninth Circuit Consumer Class-Action Ruling Signals Resurgence of Primary Jurisdiction Doctrine

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Emboldened by the promise of easy fee recovery, plaintiffs' attorneys have filed more than 300 food-labeling class actions since 2014, many in California. These lawsuits challenge the use of certain food additives (*e.g.*, partially hydrogenated oils, or PHOs) and attack the allegedly misleading use of terms such as "natural" or "evaporated cane juice" (ECJ) on food-product labels.

The uncertainty of litigation has led consumer advocates and food manufacturers to turn to the U.S. Food and Drug Administration (FDA) for guidance. FDA's subsequent decision to weigh in on some of the issues raised in food class actions implicates the primary jurisdiction doctrine. A recent ruling by the U.S. Court of Appeals for the Ninth Circuit signals the doctrine's resurgence in this context, as well as the limitations and implications of its use as a defense strategy.

Primary Jurisdiction. The primary jurisdiction doctrine allows a court to dismiss a complaint without prejudice or stay proceedings pending the resolution of an issue within the special competence of an administrative agency. The doctrine is designed to preserve a proper working relationship between courts and administrative agencies by allocating decision-making responsibility between the two where there is a jurisdictional overlap and the potential for conflict. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303–04 (1976).

Courts in the Ninth Circuit deciding whether to invoke the primary jurisdiction doctrine consider: "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *Syntek Semiconductor Co. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002) (citation omitted).

The Role of the Primary Jurisdiction Doctrine in Food Class Actions. In food litigation, primary jurisdiction is usually raised in a motion to dismiss, as an alternative to a preemption defense. Defendants have invoked the doctrine in food class actions involving PHOs, ECJ, and "natural" claims, with varying degrees of success. Recently, the Ninth Circuit weighed in on primary jurisdiction, providing some insight into how the defense may be successfully invoked.

In March 2016, the Ninth Circuit raised the issue of primary jurisdiction *sua sponte*, in its memorandum disposition of *Kane v. Chobani, LLC*, No. 14-15670, 2016 WL 1161782, at *1 (9th Cir. Mar. 24, 2016).[1] Katie Kane filed a putative class action alleging Chobani mislabeled its flavored Greek yogurt, in violation of California's consumer protection laws. Plaintiffs claim the labels mislead consumers by: (1) using the term ECJ to conceal the

[1] Case Detail, *Kane v. Chobani*, Washington Legal Found., http://www.wlf.org/litigating/case_detail.asp?id=792 (last visited May 16, 2016). [Ed. Note: WLF filed an *amicus* brief in support of the appellee in the Ninth Circuit in *Kane v. Chobani*.]

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fact that the yogurt is sweetened with sugar; and (2) purporting to be "all natural," although the products contain color additives derived from "highly processed unnatural substances." *Kane v. Chobani, Inc.*, 973 F. Supp. 2d 1120, 1124 (N.D. Cal. 2014).

Chobani moved to dismiss, asserting several grounds: standing, preemption, primary jurisdiction, failure to state a claim, and failure to plausibly allege that a reasonable consumer would be deceived by the yogurt's labels. *Id.* at 1128. The order granting the motion focused exclusively on plaintiffs' lack of standing, finding plaintiffs failed to plausibly allege that they actually relied on the alleged misrepresentations. *Id*. at 1138–39. Because this was plaintiffs' third failure to adequately plead their claims, the district court dismissed the action with prejudice. *Id.* at 1139. Plaintiffs appealed.

The parties' appellate briefs focused solely on the propriety of the order's standing analysis, including whether the district court applied the appropriate reliance standard. They did not address primary jurisdiction.

After the case was fully briefed, FDA took separate actions on the use of the terms "natural" and ECJ, leading the appellate panel to issue an order instructing the parties to be prepared to discuss the primary jurisdiction doctrine at oral argument. Order, *Kane*, (No. 14-15670), ECF No. 58. In July 2015, FDA wrote to Northern District of California Judge Edward Chen, indicating its ongoing review of the use of the term ECJ would conclude in 2016. *See* Letter from Dept. of Health and Human Svcs., *Swearingen v. Healthy Beverage, LLC*, No. 3:13-cv-04385 (N.D. Cal. July 16, 2015), ECF No. 74 (hereinafter, "Chen Letter"). In November 2015, the agency requested comments on the use of the term "natural" on products labeled for human consumption. *See* Use of the Term "Natural" in the Labeling of Human Food Products; Request for Information and Comments, 80 Fed. Reg. 69,905 (Nov. 12, 2015) (hereinafter, "Request for Comments").

The Ninth Circuit's unpublished memorandum opinion focused solely on primary jurisdiction. *Kane*, 2016 WL 1161782, at *1. Importantly, the panel held, "[t]he delineation of the scope and permissible usage of the terms 'natural' and 'evaporated cane juice' in connection with food products 'implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch.'" *Ibid.* The panel was persuaded by the FDA's ongoing proceedings on the terms "natural" and "evaporated cane juice." *Ibid* (referring to the Chen Letter and Request for Comments). The dismissal was vacated and remanded, "with instructions that the district court stay [the] action pending resolution of the FDA's 'natural' and 'evaporated cane juice' proceedings." *Id.* at *2.

Takeaways from *Kane*. *Kane* further demonstrates the Ninth Circuit's receptiveness to the primary jurisdiction defense, *if* the agency at issue has expressed "interest in the subject matter of the litigation." *Id.* at *1. This receptiveness extends to issues that are not strictly of first impression, suggesting agency interest in the issue is more important to the analysis than its novelty. *Kane* also solidifies the Ninth Circuit's preference for stays, signifying defendants may have difficulty obtaining primary jurisdiction dismissals.

Although *Kane* is unpublished, it may prompt courts with similar cases to issue stays on primary jurisdiction grounds. Indeed, one district court has already relied on *Kane* to stay a case involving "natural" and ECJ claims. *See George v. Blue Diamond Growers*, No. 4:15-CV-962 (CEJ), 2016 WL 1464644, at *3 (E.D. Mo. Apr. 14, 2016). Other courts have followed this guidance in other contexts (for example transfat safety litigation), and this appears to be a promising defense against these class-action cases. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 754, 129 Stat. 2242, 2284 (2015); *see also Walker v. B&G Foods, Inc.*, No. 15-CV-03772-JST, 2016 WL 463253, at *6 (N.D. Cal. Feb. 8, 2016) (staying action on primary jurisdiction grounds).

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