

Practice Update

Ninth Circuit Rules Delta-8 THC Generally Legal Due to Hemp Origin

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The Ninth Circuit Court of Appeals recently ruled that products containing Delta-8 THC are generally legal because they are hemp derived products and federal law defines hemp as “any part of” the cannabis plant, including “all derivatives, extracts, [and] cannabinoids,” containing less than 0.3% Delta-9 THC by weight. In issuing this ruling, the court gave clarity and potentially created more confusion to an issue baffling the cannabis industry for the past couple years...whether or not Delta-8 THC products were legal.

By way of background, the Food and Drug Administration (“FDA”) considers Delta-8 THC to be just one of the hundreds of cannabinoids found in the cannabis plant. Concentrated amounts of Delta-8 are typically manufactured from hemp-derived products like CBD and like its cousin Delta-9 THC, have similar psychoactive and intoxicating effects. Unlike Delta-9 THC, Delta-8 has significantly different chemical structure making it less potent. Many in the cannabis industry consider Delta-8 to be “THC light.”

In upholding the trademark rights relating to a line of Delta-8 THC products, the court ruled that the plain statutory text of the 2018 Farm Bill, which federally legalized hemp in the United States, repealed prohibitions on other cannabinoids including Delta-8 THC. The court determined that

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while the cannabinoid has psychoactive and intoxicating effects like Delta-9, it is not a “marijuana” product under the law and therefore not explicitly banned by the Controlled Substances Act. The case at issue, *AK Futures LLC v. Boyd Street Distro LLC*, saw Boyd Street being accused of selling counterfeit versions of AK’s Delta-8 products. In finding that the 2018 Farm Bill legalized hemp, the court determined that Delta-8 trademark infringement can and did occur in the case. Judge D. Michael Fisher, writing for the court, stated that “[r]egardless of the wisdom of legalizing Delta-8 THC products, this [c]ourt will not substitute its own policy judgment for that of Congress.” He went on to state that if lawmakers inadvertently created a loophole and didn’t intend to legalize psychoactive substances such as Delta-8, “then it is for Congress to fix its mistake.”

While this ruling will undoubtedly provide clarity to many in the cannabis industry desperately seeking an answer to whether Delta-8 is legal, it will certainly create potential conflict as well. First, the Ninth Circuit only has jurisdiction over nine western states, so it is unclear whether the precedent will be upheld in other jurisdictions. Additionally, earlier this year the FDA issued its first set of warning letters to companies over the allegedly illegal sale of products containing Delta-8 THC and how they are marketed. These warning letters came shortly after the FDA also released a notice cautioning consumers about such products. Moreover, over 1/3 of the states have either restricted or banned Delta-8 in some way. In addition the action taken by states to limit or ban Delta-8, there is still uncertainty over whether the federal government could prosecute those manufacturing or selling Delta-8 THC products under the Federal Analogue Act, which is a section of the Controlled Substances Act that allows any chemical “substantially similar” to a controlled substance listed on Schedule 1 of the CSA to be treated as if it were listed in Schedule 1, but only if intended for human consumption. To date, we are not aware of any such instance where the Analogue

Act has been used to prosecute those manufacturing or selling Delta-8 THC; however, many believe with this recent court opinion, the Analogue Act may not be applicable to Delta-8 THC products anymore.

Regardless of the ongoing confusion over Delta-8, the court's opinion is a welcome breath of clarity.

Disclaimer:

Possessing, using, distributing, and/or selling marijuana or marijuana-based products is illegal under federal law, regardless of any state law that may decriminalize such activity under certain circumstances. Although federal enforcement policy may at times defer to states' laws and not enforce conflicting federal laws, interested businesses and individuals should be aware that compliance with state law in no way assures compliance with federal law, and there is a risk that conflicting federal laws may be enforced in the future. No legal advice we give is intended to provide any guidance or assistance in violating federal law.

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