

# COMMITTEE NEWS

## Litigation and Trial Practice

### New Frontiers: Hemp Law & Litigation

You would have to be living under a rock by now to not have taken note of cannabis legalization sweeping the nation, with “marijuana” as it is defined by the U.S. Controlled Substances Act (CSA) legal in medical programs in 34 states and adult use legal in 11 states and the District of Columbia. Cannabis reform is the subject of over 1,200 bills pending before the U.S. Congress, several with the support of the ABA!

But you may not know much about hemp, though you may have heard about CBD by now. Hemp is rising even faster from the shadows. Products containing hemp extracts high in CBD, such as oils, topicals, and infused products, are gaining mainstream popularity, acceptance, and just this year, federal legality. With legality, however, brings the ability to sue in state and federal courts, which has begun.

But first, a quick introduction to hemp, which is a type of cannabis plant. In contrast to marijuana, which is tightly regulated from a law enforcement perspective because of its status on Schedule 1 of the CSA, hemp contains low THC (< 0.3% THC, the compound causing euphoria) and currently is subject to much less regulation –

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though that regulation is coming from multiple federal agencies including the USDA and the FDA, along with state health departments. The USDA just released its proposed rules for farming under the 2018 Farm Bill the last week of October.

Part of CBD's immediate mass popularity is its capability to reduce inflammation, pain, and anxiety. How it works is not well understood yet because cannabis' classification as a Schedule 1 substance prohibited research in the United States for 100 years. Studies in other countries have demonstrated that formulations of the cannabis plant can destroy cancer and brain tumors, among other miraculous results that seem to demonstrate the cannabis plant was intended to interact with the body's natural endocannabinoid system. Where some companies are getting in trouble is by making claims about what their CBD products can do to treat conditions in violation of FDA guidelines and rules, as there is only one FDA approved CBD medicine to treat epilepsy; therefore, the FDA now treats CBD as a drug rather than a health or dietary supplement.

Before 1937, industrial hemp was legal and used for clothing, paper, rope, and fuel. But in 1937, Congress passed the Marihuana Tax Act, which made all species of the Cannabis sativa L. plant illegal, including hemp. While the purported purpose was to eliminate the use of cannabis as a drug, some theorists posit that the real intent of the Act was to eliminate the competition hemp posed to paper and steel manufacturers by referring to cannabis as "marijuana" as a scare tactic in relation to its use as a drug.

Fast forward to 2014, and under the Agricultural Improvement Act, known as the "Farm Bill," hemp finally was permitted to be grown again, but only if in conjunction with a state's industrial hemp program, or with a license by a public university for a research pilot program. However, to the misconception of many, in neither of these instances were hemp or the products made from hemp allowed to cross those states' lines. But they did, including on Amazon.

In just a few short years, licensed hemp producers began to multiply in states such as Colorado, Oregon, Kentucky, and Montana. Extracts derived from hemp plants can be infused into a variety of products to produce therapeutic effects sometimes rivaling or surpassing pharmaceutical counterparts, with none of the side effects of synthetic pharmaceutical drugs. As the public becomes more aware, businesses have been aggressively pursuing market share by peddling their own versions of hemp and CBD products for humans and pets across all types of marketing platforms, despite recent illegality and the growing regulatory presence of the FDA over hemp derived CBD. The market became so lucrative, that Sen. Mitch McConnell of Kentucky passed the Hemp Farming Act inside of the 2018 Farm Bill, to legalize hemp as an interstate

*name a few. After 15 years of practice and developing significant expertise in complex commercial insurance coverage, she almost left the practice to open a wellness center for women focused on plant-based therapies and nutrition. This led to learning about the cannabis plant's healing properties. She has now merged her passions and represents domestic and international companies a broad range of clients from investors to ancillary service and product providers to "plant touching" companies. Lisa is also passionate about empowering women in business. In 2012, she founded a 501(c)(3) in Houston, Executive Moms' Society, and at its first meeting hosted a then unknown Brené Brown, and in 2017, Sheryl Sandberg.*



agricultural commodity and to remove it from the definition of marijuana under the CSA. The 2018 Farm Bill was effective January 1, 2019, and upon adoption of final rules by the USDA, hemp will be federally legal, subject to some scriptures.

However, there is a lot of confusion about hemp and the nuanced new law. For example, state law enforcement often intervenes and is frequently unclear about the legality of the substance they may discover in a vehicle or on the shelves of a health food store. The latest issue surrounds hemp flowers that can be smoked, and there have been many seizures from smoke shops on the allegation that the flowers are marijuana. They look and smell the same.

From both an agricultural and medicinal standpoint, the hemp movement—largely unbeleaguered by the crushing compliance and taxing obligations of cannabis businesses—is on an exponential rise in the United States and internationally. A leading trade publication states that by 2020, annual sales of CBD products will exceed \$1 billion. The magnitude and swiftness of these transactions, coupled with the uncertain nature of the laws, results in many situations and business lawsuits of all kinds between farmers, buyers, sellers, and brokers, as well as intellectual property battles and regulatory issues, along with the interplay of federal law and cross-state and cross-border investment.

As farmers and entrepreneurs scramble to take advantage of this potential opportunity, frequently they do not use attorneys for their contracts, and/or the law is so quickly changing, few attorneys are versed in these areas. And, with a “green rush,” there is a fair amount of backstabbing and very few are seasoned players yet. Finally, it is difficult for law enforcement to distinguish between hemp and marijuana, nor are many crime labs set up to determine percentages of THC. Moreover, as a consumable product for health, the potential for litigation abounds, be it product liability or misrepresentation. In short, this is all brand new, and here are the latest hemp lawsuits that illustrate some common issues in the hemp trade:

## Business Disputes in the Agricultural Setting

In *Jupiter Pharma, LLC et al v. Lafayette Land Company, LLC et al*, a lawsuit filed in U.S. District Court in Portland by Jupiter Pharma, a processing company out of Delaware, Jupiter Pharma alleges that its Oregon farmer had agreed to grow the crop on two properties in March, but suddenly terminated communications in May, shortly before planting, ignoring an agreement to grow 2 million pounds of hemp on about 950 acres for \$7.5 million.

Jupiter Pharma is planning to build a “soil to oil” operation in Oregon, investing \$12.2 million for a hemp drying and extraction facility and more than \$3.3 million for



associated equipment for growing, processing and marketing industrial hemp and CBD. The complaint alleges that Jupiter agreed to pay for a tractor and irrigation equipment that the farmer had acquired, but without documenting the purchase. Since then, the farmer responded to Jupiter that a memorandum of understanding they had signed was not a “final, binding and enforceable agreement.” In hemp disputes, simple rules of contract law apply, but difficult issues in damages and determining breach, especially with poor documentation, with added layers of regulation, made even more complex when only one party in a venture holds the license to grow hemp. In this case, the farmer began planting hemp seed on two properties for another party; meanwhile Jupiter Pharma could not secure alternative fields so late in the 2019 season, with time running out to plant hemp, according to the complaint. The lawsuit seeks a declaration that the agreement is enforceable and an injunction prohibiting the farmer from growing hemp on the two properties for anyone else. Otherwise, Jupiter seeks \$1 million in damages for fraud and breach of contract as well as unspecified punitive damages. Damages are so high because CBD is so lucrative right now.

Accordingly, the plaintiff’s bar has focused its attention on the growing CBD product sector. A series of recently filed lawsuits signal that it is more important than ever for participants in the CBD market to know where their product is coming from and to document their testing and labeling methodologies, as will be required by upcoming federal and state rules in 2020.

## Deceptive Advertising

Three recent cases allege tested CBD products contained less CBD than advertised:

- In *Potter v Potnetwork Holdings, Inc., Diamond Cbd, Inc., And First Capital Venture Co.*, pending in the U.S. District Court for the Southern District of Florida, the plaintiffs allege that the defendants’ products contain “a significantly lower amount of CBD than represented.” Plaintiffs brought claims for unjust enrichment and a violation of the Florida Deceptive and Unfair Trade Practices Act.
- *Ahumada v Global Widget LLC (Hemp Bombs)*, filed in the U.S. District Court for the District of Massachusetts, is a class action complaint asserting claims for breach of express warranty, breach of contract/common law warranty, and Magnuson-Moss – breach of express warranty (15 U.S.C.A. § 2301 (West) *et seq.*). The plaintiff in *Ahumada* alleges that “independent laboratory testing, commissioned by plaintiff’s attorney, confirms that the CBD products do not contain the amount of CBD as advertised.”



- [\*Gaddis v. Just Brands USA Inc., et al.\*](#), filed in the U.S. District Court for the Southern District of Florida, alleging that defendant's products "repeatedly overstate" the amount of CBD they contain, with some containing "only a fraction of the CBD advertised," and some containing "no CBD whatsoever." The *Gaddis* complaint alleges claims for breach of express warranty, breach of the implied warranty of merchantability, unjust enrichment, fraud, violations of N.Y. Gen. Bus. Law § 349 and 350 (McKinney), and a violation of the Florida Deceptive and Unfair Trade Practices Act.

Because the hemp market has been largely unregulated until now, it is unsurprising to see these types of claims and lawsuit arise. These are consistent with the FDA's and FTC's recent warning letters to companies making unsubstantiated claims about their products. Participants in the CBD market should use caution, implement good manufacturing and testing practices, and consult with qualified counsel to avoid potential pitfalls and legal actions, and to comply with what guidance currently does exist state to state.

### Bad Seeds

In September 2019, in the U.S. District Court for Oregon, [\*Elemental Processing, LLC v. HP Farms, LLC\*](#), Elemental Processing sued HP Farms for \$44 million dollars, alleging receipt of fraudulent seed for CBD production. Elemental claims HP delivered a batch of predominantly male seed—absolutely forbidden in CBD hemp farming which requires feminized seed; no males allowed. (Whether male or female, hemp seed is indistinguishable to the eye.)

After Elemental distributed the HP-provided seed, its farmer clients got whacked with a jarring surprise in late-season when the plants developed pollen sacs—indicative of males. Bottom line: Elemental claims the male seed caused a loss of profits HP Elemental would have made from the female seeds offered.

### Breach of Contract

When hemp lawsuits go to court, there is far more at play than simply referencing a contract to settle a given dispute. Why? Hemp contracts, at present, are sometimes riddled with holes and buttressed with little more than nebulous text, often pasted together on Google.

Case in point: In July 2019, in Clackamas County, Oregon, Circuit Court, [\*Boring Hemp Company \(BHC\) filed suit against Natural Health Resources \(NHR\)\*](#) and its principals, for breach of contract and "an amount to be proven at trial, but not less



than \$563,200.” In January 2019, according to BHC’s complaint, NHR signed a “Hemp Purchase Agreement” with BHC, and agreed to buy 9,000-14,000 lb. of hemp at \$50 per pound. The agreement did not specify CBD percentage or the moisture content of the hemp. The precise weight of the hemp was to be determined on delivery via a certified scale. Further, if payment wasn’t received by BHC in 30 days, plus an additional 10-day grace period, a 10% penalty would be shouldered by NHR.

On Jan. 24, NHR retrieved a hemp load from BHC in Boring, Ore. After placement on a certified scale, the load net weight measured 10,240 lb. according to the complaint. Therefore, the purchase price dictated BHC was due for a \$512,000 (10,240 x \$50) payment. When NHR didn’t pay, BHC tacked on the 10% penalty (\$51,200). Asking for an amount no “less than \$563,200,” BHC asserts: “Defendants’ actions in depriving BHC of the possession, use, and value of such industrial hemp was intentional and attended by circumstances of fraudulent and/or willful and wanton conduct.” Issues in court will be proving these damages, and, as the author has learned, educating the Judge that this case is not about drugs—that hemp is no longer a controlled substance. So, litigants have found themselves in a disadvantaged position when they do sue.

## Interstate Commerce/Transport

Famously, on January 24, 2019, Idaho State Police (ISP) arrested an Oregon truck driver after finding over 6,000 pounds of hemp in the trailer. While the product contained less than .3% THC – the legal limit for industrial hemp – authorities contended that the substance was marijuana, seized the cargo, and charged the driver with felony trafficking of marijuana. VIP Transporter, the Portland-based trucking company he was driving for, is suing Idaho State Police to recover its product, as is Big Sky Scientific, the company that purchased the hemp. While the two companies argue that the hemp was legal to produce and transport due to its THC count, ISP attorneys say that substances containing *any* amount of THC are illegal under Idaho law. Big Sky is suing for the damage to the loss of value of the crop due to the seizure, as well as fighting constitutional lawsuits.

## Individual Consumers

While attempting to enter Disney World’s Magic Kingdom on April 15, 2019, a 69-year-old grandmother was arrested when security found a bottle of CBD oil in her purse. Orange County police detained Burkhalter for 12 hours before releasing her on \$2,000 bail. She said the oil was recommended by a doctor to treat her arthritis, and the bottle found in her possession was labeled as containing zero



THC. However, local law enforcement says they tested it themselves and found positive amounts of THC in the product. Orange County police eventually dropped the charges against Burkhalter. But this was a high profile post-2018 farm bill “bust” of an innocent consumer.

## Store Seizures

Mere days after opening Cajun Cannabis – a CBD shop and café – Lafayette, Louisiana police arrested its owner and seized much of his store’s inventory, as well as two firearms. The 17 charges he faces include felony counts for possession of a firearm in the presence of a controlled dangerous substance and the manufacture, distribution, or possession of marijuana.

Shortly after the 2018 Farm Bill was signed into law, the Louisiana Office of Alcohol and Tobacco Control announced that they would issue citations to any retail permit holders who sell CBD products which the agency has banned, and remove all CBD products from the premises. Despite the notice, Cajun Cannabis received an official occupancy certificate from the Lafayette Consolidated Government.

These are just a sampling of the lawsuits coming our way...and I did not even mention products liability suits from people who claim to have been injured while using CBD—Very timely with the recent vaping disease epidemic. Nor the intellectual property battles or lawsuits between investors. This article has focused on litigation issues particular to hemp, but every aspect of this business is subject to lawsuit just like any other industry.

Let the games begin! And may the odds be ever in your favor. 