



Podcast Transcript

AD-torneys Podcast Episode 1

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Lee: Cannabidiol, or CBD derived from hemp, is now legal under federal law and it's everywhere. CBD perfumes, facial oils, cosmetics, gummies, chocolates, lotions, slushies, candles and more. I'm Leeann Lee and you're listening to AD-torneys@law, our podcast series devoted to all things advertising, marketing and digital media law. Today we're discussing the surge in popularity of CBD products, looking at the federal and state regulatory landscape for this burgeoning industry and providing answers to questions about what companies should know when it comes to CBD marketing.

Joining us today is partner Randy Shaheen and associate Jack Ferry, both attorneys on BakerHostetler's Advertising, Marketing and Digital Media team. Welcome Randy and Jack.

Shaheen: Thanks Leeann we're happy to be here with you today to talk about CBD.

Lee: Great. So to get us started Jack, what is CBD, and is it legal?

Ferry: Hey Leeann. That's a great opening question, something on many minds I'm sure. CBD is a cannabinoid found in the cannabis plant and the cannabis plant can be broken down into two main species, the marijuana and hemp varieties. And, CBD can be found in both of them, but what's special about CBD and hemp is that hemp doesn't contain THC or if it does, it's in very low levels rather. Which is of course the cannabinoid within the cannabis plant that makes people intoxicated and has kind of the effects associated with marijuana to some extent. So, because hemp does not have the intoxicating effects that marijuana does the 2018 Farm Bill actually legalized CBD so long as it's derived from hemp and contains less than 0.3% THC.

So, as of that, the passage of that law in 2018, late 2018, hemp-derived CBD is legal, which was ushered in this huge industry for CBD. But there is one important federal roadblock remaining and that's the fact that the FDA prohibits adding CBD to food and dietary supplements, which also applies to pet products. That's something unfortunately that is still being worked out. So, the answer is yes, CBD is legal but there's still some roadblocks that we're trying to figure out how to navigate.

Shaheen: Yeah, we're actually recoding this podcast the day after the election, so I'm guessing there was significant use of CBD products for anxiety in the last 24 hours.

Lee: Randy, so what are the prospects that CBD ingestibles may become legal under federal law anytime soon?

Shaheen: Right, so Leeann, so here's the catch with that. Before, as Jack mentioned, there was the Farm Bill that legalized CBD products under federal law. But before that happened, FDA had actually separately authorized a drug for use with epilepsy patients that included CBD at much higher dosages, but CBD was the active ingredient. And there is this probably little-known provision, at least until now, in FDA parlance that says you can't take something that's a drug and put it in foods or dietary supplements. And typically, that makes sense, but in this case, CBD is probably at lower doses perfectly fine in food and dietary supplements.

And so, FDA has been trying to find a way around that and the industry's been trying to find a way around that problem, really since the day CBD was legalized and everybody keeps predicting that there's going to be a solution soon but it just hasn't happened. FDA has held some public hearings on the topic. They've expressed concerns though about at what dosage is CBD safe, in other words is there the risk of taking too much CBD? They worry about, is it going to impact kids or pregnant women for example, differently. And so, they want some reassurance and they've said they want some reassurance about those issues before they'll try to take the next step and allow it to be used in ingestibles.

There's also been talk potentially about a legislative solution. Not much, as everyone knows gets through Congress these days but there's been some talk and certainly it seems like an issue that could have bipartisan support. And there's also just a lot of pressure from larger brands to solve this problem. They would love to be able to market CBD but typically the larger brands are a little more gun-shy about doing it without FDA approval. But they've signaled it, they're, for example, Ben & Jerry's ran an ad for a potential CBD-flavored ice cream but they're not gonna pull the trigger on that unless and until FDA authorizes the use of CBD in food and other ingestibles.

Ferry: And just to clarify on that, to mixed degrees several large brands are including CBD in non-ingestible products and cosmetics as opposed to food and dietary supplements. So, you're going to be seeing a lot of CBD on shelves but we're just flagging here that there is a pretty significant difference between a cosmetic and adding it into foods.

Shaheen: Yeah, we should add too Jack, that ingestibles includes things that your pets eat; your dogs, your cats, your goldfish, your hamsters. FDA considers pet products to also be ingestibles. If it's a pet cream it's fine but if the pet ingests it, it's covered by the same prohibition.

Lee: So, that's great perspective on the federal level. Now let's talk about the states. Are CBD products still illegal in any states?

Ferry: So, as Americans we're familiar with this possibility of drugs being legal at the federal level and illegal at the state level or how we traditionally think of it, vice-versa with marijuana which of course is now permitted in many states but is prohibited at the federal level still. And as Randy noted before, we're just one day after the election here. Results are unknown. We're pretty far from knowing anything about any prospective changes. But so CBD actually has the same sort of framework, but it flips the script. So, instead of being prohibited at the federal level like marijuana is, CBD is now legal there, but it's still prohibited in a few states. The good news is that CBD is now permitted in many, many more states than it was two years ago. Right after the Farm Bill passed in late 2018, most states still followed the old example of the federal law in which CBD was prohibited as cannabis. The hemp plant was still defined as cannabis under the drug law and as a result, products such as CBD that were derived from the hemp plant were prohibited.

The federal law came in the 2018 Farm Bill and created the specific exemption for hemp-derived products so long as they have less than 0.3% THC. In the last two years, dozens of states have followed that exact legislative framework and have passed similar exemptions. What is kind of difficult here is that there is still a patchwork of laws, it's not really a one-size-fit-all solution because in some states you aren't allowed to have any THC in a product. The federal law says they're committed if there's less than 0.3% THC, but some states when they passed these laws said, okay we'll allow CBD products, but you can't have any THC in it, zero THC. And so, there is definitely the federal standard is what many states have but there still is a bit of a patchwork of laws.

But the good news is, is that long story short in a vast majority of states CBD is now legal, so long as it meets certain requirements, primarily hemp-derived and less than 0.3% THC. We just expect this trend to continue and hold-out states to clarify their laws and also likely permit CBD. Of course, that hasn't happened everywhere yet but that's where we've been moving pretty rapidly over the last two years.

Lee: There's obviously lots of potential change, potential confusion. So, CBD products you can eat are illegal, but I see them all the time. So Randy, what's the practical risk here?

Shaheen: So, I think initially as Jack said, the federal government kind of got out ahead of the states. And so, a lot of states still considered CBD to be part of the definition of marijuana. It was still illegal. And you saw a decent amount of enforcement at the state or the local level. I think for a couple of reasons, one is I think a lot of law enforcement didn't necessarily understand the difference between CBD and marijuana. And then there was also this fear that this was gonna give carte blanche for people. The plants look, a hemp plant and a marijuana plant look virtually identical. And this was going to give people carte blanche to start growing marijuana in their backyard and the cops show up and they say, oh no don't worry, it's hemp.

So, states were nervous about this, you saw in some localities product being taken off shelves. Sometimes consumers were stopped, for example if you're going through an airport or coming through customs and you had a CBD product with you it might have gotten seized. One woman down in Florida was headed to the happiest place on earth, Disney World, went through security, she had arthritis so she had CBD oil in her bag, and it was confiscated and they wouldn't let her come in. Now that the states have pretty much transformed to legalizing CBD, you're seeing a lot less, essentially, no enforcement simply for selling CBD products. And I think that has encouraged companies, in particular smaller companies, or if you're selling online where you can't have product seized off shelves; to go ahead and market CBD products that are topical. And then also, to some degree, to market edible CBD products even though they're not legal technically under FDA's law and FDA so far has not gone after these companies just for the sake of marketing the products.

Now, the exception to that of course is that if they're making claims for either topical CBD or edible CBD products that the government thinks can't be substantiated. So, what you are seeing on the enforcement side still, is FDA/FTC sending out warning letters, bringing cases against companies that are making more kind of hard health claims for CBD products. Things like, it'll help with Alzheimer's, or help with cancer, help cure depression. Those kinds of more health-related claims, not things like help you feel less anxious or soothing, those kinds of softer claims. So, you are seeing that, and then, lastly the other thing you're seeing still from a regulatory standpoint are class actions that have been filed following the three categories.

One is cases where they allege you overstated the amount of CBD in a product. CBD is pretty expensive so arguably people have kind of cheated or tried to cut back on it. Second, some edible CBD products have been sued in class actions simply because they don't comply with federal law, and California in particular has a quasi-cause of action for products that are being marketed in violation of the law. And then finally as I think Jack mentioned, CBD products can contain small amounts of THC which is the active drug component in marijuana. But some companies want to market their products, consumers want products that are THC-free. It doesn't cause drug test complications, and so there have been some class action lawsuits alleging that products are falsely claiming to be THC-free.

Ferry: Psychoactive is the word for THC. I was saying intoxicating earlier which I think is correct but the exact word I was looking for is psychoactive component.

Lee: Well it certainly seems like with all of that in mind, there's an awful lot happening with CBD that could potentially confuse consumers. So Jack, are there any solutions for that on the horizon?

Ferry: Yeah. So, initially like I talked about before, CBD was legalized and it was kind of the wild, wild west initially with what can we say, well there's not laws here so we can say anything. All kinds of claims and all kinds of products were being sold, it was really a huge boom in the industry and a lot was happening. But when I guess the government sees that wild, wild west then the next step is regulation. So, there has been some move towards regulation of CBD products. Like Randy mentioned, part of that process is what the FDA is doing but also even class action cases can kind of help regulate the industry. But the most formal form of it has been labeling laws that certain states have passed. A growing number of states, not a majority yet by any means but maybe edging in on double digits or past that now, a number of states require labeling on CBD products.

The point of this is pretty apparent, it goes back to what Randy was saying that some CBD products may misstate what's in the, what it actually contains and so consumers think they're paying a premium for this amount of CBD but really it's not in the product. So, these sort of labeling laws are helping to get at those kinds of issues. The issue is that there isn't really a coherent standard around what that labeling should look like right now. So what's common is for, to have certain common things are required across pretty much all these laws. And that includes the amount of CBD that's in the product, the amount of THC that's in the product, some sort of coding system that identifies the date and place of manufacture and the manufacturer itself, statement that the FDA has not evaluated or approved the product. That sounds like a lot as-is, but then there's even some additional requirements that it's, maybe you have to display all of the cannabinoids and how many, the amount of milligrams of them in the product; that you should consult a licensed healthcare professional if pregnant; whether the CBD is synthetic or natural. The states are really, taking a number of broad approaches to this so there's a lot of requirements out there right now.

And one point, one thing to note about that is that there is also a divide here in terms of labeling for food or dietary supplement CBD products and for cosmetics. Some states only have labeling requirements that apply to ingestible products.

Lee: Well, that is a lot of information to put on a product label. So, if I'm someone who sells CBD products in multiple states, how can I handle this problem in a practical way?

Shaheen: So, Leeann, it can become a problem and particularly depending on how big your product is, there may just not be a lot of space on the label. And I think it's only going to get worse as probably more states begin to create these labeling requirements. Hopefully at some point we'll develop some kind of standardized labeling regulatory scheme much like there is under the Fair Packaging Act. But we're not there yet. So, one potential solution which isn't risk free but so far the states have not been aggressively enforcing these labeling requirements is, a number of the states let you provide this information via for example a QR code or some kind of scannable code on the product. Consumer can scan it with their smart phone, takes them to a website and then you display on the website all of the required information, how much CBD is in the product, THC content, etc. So, one possibility if it just seems impossible to fit everything on the label that's supposed to be there assuming you are dealing with a state that requires it to be on the label, is to do a little bit of a hybrid, right? Put what you can on the label, probably the stuff that seems more critical, and then the rest of the information if you just really can't get it all in there is to use the QR code solution, and still provide it to the consumer but provide it that way. I think in a number of these states it's not technically going to be compliant, but you probably have a good argument that you're at least complying with the spirit of the law. And again, stay tuned, keep an eye out, but so far, the states have not been aggressively policing these requirements.

Lee: That's a lot to think about. So Jack, with all of this in mind, what kind of claims can I make for my CBD products?

Ferry: Randy and I are both in the Advertising Group here at BakerHostetler, and the consistent mandate in this field of law is that you can only make a claim for which you have substantiation. You can only claim something if you have adequate support for it. So, it's gonna a bit of a case by case question and advertisers will need to look at what kind of support they have for the claims they want to make. But the general consensus on CBD right now is essentially that there isn't one. There are a lot of people claiming it's a wonder drug and that it can solve all kinds of things but there isn't really a scientific backup for that yet, at least not publicly so. So, in terms of assessing risk for different claims, the FDA and the FTC have only gone after, sent warning letters to companies making serious disease or health claims. It's along the lines of CBD treatment effectively blocks progression of arthritis, has shown the ability to kill cancer cells, treats neuropsychiatric disorders, things that are so severe I struggle to say the name of them. So, those kind of serious disease and health claims, there's certainly not going to be any tolerance for that. And stay away from that is the real bright line here.

If you want to make softer claims, Randy mentioned that before, and you've seen a lot of that on shelves I'm sure, like pain relief or sleep aid, that kind of thing. Then, again, you should only make a claim if you have adequate support for it. But realistically those are lower risk right now based on what we're seeing from the FDA and FTC.

Lee: So, Randy, what happens if I have other ingredients in my CBD products that would support certain claims? Can I make those claims in that case?

Shaheen: So, Leeann, that is a workaround that we see a number of companies, a number of clients using. As Jack mentioned, it is lower risk to make softer claims, pain relief, etc. but I will say that the former FDA commissioner scolded a bunch of retailers for selling a CBD pain relief cream even though, and that is a pretty soft claim, because he basically said you can't support that claim. They didn't take any regulatory action it was more kind of a public spanking or scolding. But what we have seen people do that want to bring that risk level down even further is go ahead and market a product with something FDA has already recognized as having some property. So, for pain relief, menthol is already authorized or approved for soothing relief of pain. So, go ahead and market a cream with menthol, market it for pain relief but then say with CBD, or the same thing with sleep is to go ahead and market a product with melatonin which a lot of people view as a sleep aid, and then add CBD to it and say with CBD.

And what a lot of folks tell us, what we hear is the CBD will just sell it itself. People don't really focus too carefully on the specific claims. And so the advantage of that is you say, menthol pain relief cream with CBD. You have isolated, you have separated the efficacy claim, the pain relief claim, the sleep aid claim from the CBD. So, you're not so clearly suggesting that the CBD plays an active role in that, as opposed to just saying it's something you've added to the product. And so that's one way to try to work around some of these problems as far as there not being a whole lot of science yet to support claims behind CBD.

Lee: That definitely makes sense. Now on the flip side, let's say I have a competitor who I think is making unsupported claims. Jack, what can I do in that situation?

Ferry: Well, what we would always say is to call us. Pick up the phone and contact Randy and he'll tell you what to do. But the, what we've already seen already is the NAD take up this issue. For those of you who may not know, NAD is the National Advertising Division, it's an advertising self-regulatory body. And, it basically allows companies to bring challenges there to their competitor's advertising and say, hey, what they're doing is deceptive. It's misleading to consumers and we want them to stop. So, if you have tested your competitor's product and you say, hey, that doesn't actually have CBD in it, you probably send them a cease and desist letter and if they don't comply then you can file an action at NAD. And NAD doesn't have any legal authority on its own per se, but the FTC has a good track record of picking up NAD cases that it refers to them, which it does if an advertiser doesn't comply with the NAD's decision. And that's actually, there's already been one case along these lines at NAD where it found

that a company couldn't support its claims that its products contain CBD, and the company agreed to discontinue those advertisements.

Shaheen And I'll add an additional plug to Jack's plug which is that's a case that Jack and I handled for a client at NAD. And it was kind of nice to have the first CBD case that NAD got to address.

Lee Absolutely. So, last question, and I know this is a question that all of our listeners want to hear you answer. Do either of you use any CBD products?

Shaheen So I'll go first. I've had probably a CBD gummy or two in my time, but don't use any of them regularly. I do have, one of my daughters has some issues with anxiety and she has been using a CBD oil to help with some of that. I get anecdotal reports from her that she thinks it's somewhat helpful, that she definitely finds it useful to have. And then, I did have a client send me a CBD product for dogs, an ingestible, so don't, close your ears, but I tried, we had a puppy at the time and I thought maybe it would calm the puppy down but then we ended up not using it. I probably should have given it to Jack who now has a new puppy as well.

Ferry Yeah, like Randy said, clients send us products sometimes and I think oh, okay. Why buy this, I'm sure there's something coming in from this client. But Randy said he's only had a gummy or two, yet there's never of these freebies left in his office. So, I have not had the opportunity yet.

Lee Well, this has been quite an entertaining conversation, and so Randy and Jack, I really want to thank you for your time and for making this such an informative discussion for our listeners.

If you have any questions for them, you'll find their contact information in the show notes, and if you haven't already signed up be sure to subscribe to BakerHostetler's AD-torneys@law newsletters and blog at bakerlaw.com. And coming up in our next AD-torneys@law podcast, we'll be talking about consumer reviews. It's no secret that reviews and testimonials can influence buying decisions, but what is there to watch out for legally? Amy Ralph Mudge outlines the legal framework and counts down an essential list of legal dos and don'ts.

I'm Leeann Lee, thanks for listening to AD-torneys@law, the BakerHosts podcast series covering all things advertising law.

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