



## CBD regulatory uncertainty opens door for class action litigation

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Historically, cannabidiol (“CBD”)—a derivative of hemp—was a schedule I narcotic regulated by the U.S. Drug Enforcement Agency. Since the passage of the 2018 Farm Bill, which legalized CBD, there has been an explosion of new ingestible CBD products that have flooded the market. However, the U.S. Food and Drug Administration (“FDA”) is now responsible for regulating CBD—because it is commonly added to food or drinks—and it remains vigilant to ensure consumers aren’t harmed by these novel products.

Plaintiff-side attorneys have become creative in finding ways to take advantage of this unregulated market to bring lawsuits against CBD companies. Not unlike asbestos, tobacco, and other products that have been on the receiving end of mountains of plaintiff-side litigation, recent class action lawsuits brought against CBD businesses threaten liability for the CBD industry. For example, in California there have been a number of class action lawsuits brought for violations of California’s Unfair Competition Law and False Advertising Law against companies that sell CBD.

Plaintiffs in these class action cases follow the arguments contained in FDA Warning Letters issued to a number of CBD businesses about the legality and concerns the FDA has about their products—particularly products that purport to have health benefits. The FDA’s position is that products marketed as being able to treat a disease or otherwise have a therapeutic, medicinal, dietary, or any other use that may affect the structure or function of the body, fall under the FDA’s definition of a “drug.” Because the FDA has not approved any CBD products (other than one prescription drug to treat a rare form of epilepsy), plaintiffs argue that any sale of a product containing CBD is essentially an illegal drug sale. If courts agree, sellers of products containing CBD may be subject to civil liability under various consumer protection statutes. In addition to other forms of relief, plaintiffs are asking courts to force companies to refund all profits earned off of CBD products sold to persons in the United States, a request that, if granted, could expose companies with CBD products to exponential levels of liability. A class of plaintiffs could consist of all persons in the United States that purchased products containing CBD.

Further, these new consumer protection-based actions seek redress from courts that goes beyond claims common in prior cases, which focused on targeted issues like false claims about the amount of CBD in a product, breach of warranties, and unfair competition. CBD businesses may be the next

target of similar class action lawsuits and exposed to uncharted levels of liability. Companies with CBD products on the market should closely monitor pending class action litigation and recognize the risks associated with potentially being named a defendant therein. Manufacturers and distributors of products containing CBD need strong defense counsel to determine the weaknesses of plaintiffs' cases and how to aggressively seek to dismiss a case or to beat it at trial.

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