

# **Ninth Circuit Rules Hemp-Derived Delta-8 THC Products Are Federally Legal, Creating Broad Implications for the Hemp, Marijuana and Insurance Industries**

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On May 19, 2022, the Ninth Circuit Court of Appeals issued an unexpected ruling that hemp-derived delta-8 THC falls within the definition of “hemp” under the 2018 Farm Bill. The Court’s decision in [AK Futures LLC v. Boyd St. Distro, LLC](#), No. 21-56133, 2022 U.S. App. LEXIS 13526, affirmed a preliminary injunction granted by the district court in favor of the appellant, finding that its Cake-branded delta-8 THC vape products are legal under the 2018 Farm Bill, and that the appellant is therefore entitled to “traditional” federal protections that include trademark protection under the federal Lanham Act.

This decision has broad implications for the future of delta-8 THC as federal and state authorities grapple with the sudden popularity of these unregulated intoxicating products. This article examines the underlying dispute over delta-8 THC’s federal legality, and the AK Futures opinion and its likely impact on the hemp and marijuana industries, as well as on the insurance companies that insure them.

## **Popularity of Delta-8 THC Products as “Legal High”**

Eighteen months ago, most cannabis industry experts anticipated that the cannabinoids CBG (cannabigerol) or CBN (cannabinol) would become the next popular “novel” cannabinoid to follow the explosive popularity of CBD (cannabidiol). The sudden popularity of hemp-derived delta-8 THC was largely a surprise, driven by media reports that it allows for a “legal high.” Delta-8 THC products have quickly become a popular alternative to heavily regulated and more expensive marijuana products that have higher concentrations of delta-9 THC, the primary psychoactive and intoxicating cannabinoid in marijuana.

Delta-8 THC also is psychoactive and intoxicating, similar to delta-9 THC. The two cannabinoids are molecularly identical but for the placement of one double bond. Studies around delta-8 THC are limited, but the present consensus is that it has about two thirds of the intoxicating potency when compared with delta-9 THC. The National Center for Biological Information describes delta-8 THC as

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having antiemetic, anxiolytic, analgesic, appetite-stimulating and neuroprotective properties.

## **The Basis of the Dispute over Delta-8 THC's Federal Legality**

The issue that has perplexed cannabis lawyers over whether delta-8 THC products are legal under federal law involves how delta-8 THC is created. Delta-8 THC is not expressed in adequate concentration in most hemp varieties to make its extraction functionally viable. It is economically feasible, however, to convert hemp-derived CBD into delta-8 THC. Indeed, the current oversupply of CBD has caused its price to drop, with CBD suppliers looking for alternative outlets for their product. Almost all delta-8 THC products on the market therefore contain delta-8 THC that is derived from the chemical conversion of CBD, not through direct extraction from the hemp plant.

It has been essentially undisputed that delta-8 THC that is directly extracted from legally cultivated hemp is lawful. The 2018 Farm Bill's definition of "hemp" includes all cannabinoids with a delta-9 THC concentration that does not exceed 0.3% on a dry weight basis. Under this legal definition, delta-8 is treated no differently than CBD or any of the more than 100 cannabinoids that may be directly extracted from the hemp plant. All of those cannabinoids have been removed from regulation under the Controlled Substances Act (CSA), including delta-8 and delta-9 THC, so long as the delta-9 THC concentration is no more than 0.3% on a dry weight basis.

Although delta-8 THC is not a federally controlled substance when extracted from hemp directly, it is a controlled substance when extracted from marijuana. This distinction between a cannabinoid's legal status depending on whether it is extracted from marijuana or hemp is known among cannabis lawyers as the "Source Rule."

One common view has held that delta-8 THC products created through chemical conversion from hemp-derived CBD are illegal "synthetic" THC. In August 2020, the Drug Enforcement Administration (DEA) released its interim final rule stating in part that "all synthetically derived tetrahydrocannabinols remain Schedule 1 controlled substances." The DEA reiterated this position in its September 2021 non-binding opinion letter on delta-8 THC to the Alabama Board of Pharmacy, stating that delta-8 is a synthetic THC that falls outside the protections afforded by the 2018 Farm Bill. The CSA explicitly lists "synthetic THC" as a Schedule 1 controlled substance. The term "synthetic THC," however, has never been clearly defined either by statute or through a court ruling. Although delta-8 THC certainly is produced in a laboratory from CBD, the end product is molecularly identical to the chemical structure of delta-8 THC that occurs in nature.

It is against this backdrop that the Ninth Circuit was tasked with deciding whether AK Futures could invoke federal trademark protections for its Cake-branded delta-8 THC vape products.

## **The AK Futures Opinion**

AK Futures is a manufacturer and distributor of delta-8 THC products under the "CAKE" brand – a logo depicting a two-tier cake overlaid with a stylized letter "C." AK Futures sued Boyd St. Distro, LLC (Boyd Street), a wholesaler of smoke and vaping products, for trademark and copyright infringement for allegedly selling virtually identical Cake-branded vapes. The district court granted AK Futures's preliminary injunction, finding that the 2018 Farm Bill legalized the company's delta-8 THC products.

On appeal, Boyd Street did not deny that it sold counterfeit Cake-branded vape products. It instead presented two chief arguments: (1) legalized hemp does not extend to delta-8 THC, and (2)

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Congress never intended for the Farm Bill to legalize intoxicating substances.

In support of its first argument, Boyd Street relied on the DEA's position that delta-8 THC is an illegal Schedule 1 synthetically derived THC. In response, AK Futures asserted that the Farm Act's definition of "hemp" encompasses hemp-derived delta-8 THC products so long as they contain no more than 0.3% delta-9 THC.

The Ninth Circuit Appellate Court held that the "plain and unambiguous" text of the Farm Bill indicated that delta-8 THC products were lawful. The Farm Bill removed "hemp" from Schedule I of the CSA, where "hemp" is defined as "the plant *Cannabis sativa* L. and any part of that plant, including ... all derivatives, extracts, [and] cannabinoids ... with a delta-9 concentration of not more than 0.3%." The Court further noted that the delta-9 THC concentration level was the only statutory metric for distinguishing marijuana from hemp, and that the terms "derivative, extract, or cannabinoid" were substantially broad. The Court concluded that "hemp" encompasses delta-8 THC products that contain no more than 0.3% delta-9 THC.

In support of Boyd Street's argument that Congress never intended for the Farm Bill to legalize intoxicating products such as delta-8 THC, Boyd Street essentially proposed that the Ninth Circuit limit products legalized by the Farm Bill to those suited for an industrial purpose, and not for human consumption. Noting that this limitation appears nowhere in the Farm Bill or the CSA, and refusing to "muddy" clear statutory language, the Ninth Circuit ruled that "regardless of the wisdom of legalizing delta-8 THC products, this Court will not substitute its own policy judgment for that of Congress" and that if an inadvertent loophole was created, "then it is for Congress to fix its mistake."

Ultimately, the Ninth Circuit found that AK Futures's use of the trademarks in commerce was lawful and could give rise to trademark priority. Notably, the Court recognized that AK Futures screens its products for "heavy metals, pesticides, and other contaminants," but it cannot test counterfeits. Because federal trademark law "allows consumers to distinguish between brands that take consumer health seriously ... and those that do not," the Court found that the public interest also favored an injunction. As such, the Ninth Circuit affirmed the district court's grant of a preliminary injunction in AK Futures's favor and remanded the case for further proceedings.

## **The Impact**

The AK Futures decision should give a boost to the delta-8 THC product market by providing additional clarity on the legality of those products under federal law. This comes with various benefits and risks, discussed below.

## **Trademark and Copyright Implications**

As the first federal ruling on the legality of delta-8 THC products, the Ninth Circuit Court's broad interpretation of "hemp" under the Farm Bill is a win for companies seeking trademark protection for hemp-derived products. Given the ever-evolving changes in cannabis law and hemp-derived products, however, the assistance of knowledgeable trademark counsel becomes crucial to assist with the filing and registration of a trademark application for hemp-derived products with the United States Patent and Trademark Office (USPTO). An experienced trademark attorney can advise regarding the use and registration of the hemp-derived product and decrease the possibility of costly legal problems by ensuring proper due diligence that includes a comprehensive clearance search prior to submitting a trademark application with the USPTO. It also is important to understand how the ongoing rulemaking by the Food and Drug Administration (FDA) on ingestible hemp-derived

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cannabinoids may prevent USPTO approval for certain delta-8 THC products regardless of the ruling in AK Futures.

## **Conflict with Regulated Marijuana Industry**

Notwithstanding the potential economic opportunities around delta-8 THC, many fear that its sudden popularity threatens to undermine the hemp, CBD and regulated marijuana industries. There is concern that because delta-8 is an unregulated cannabis product that causes intoxication, it may damage the regulated marijuana industry by alarming politicians, local leaders and law enforcement. The U.S. Cannabis Council, for example, has issued a public statement urging that “all forms of THC, regardless of chemical variant, isomer or ‘delta level,’ should be regulated as intoxicating THC in adult use products” and that “delta-8 products should be sold only where regulated, tested and labeled THC products are available.”

What has emerged is a split between those who see delta-8 THC as a means to revive a flagging hemp and CBD industry versus those who see delta-8 as a dangerous uninvited “party crasher” to the cannabis industry that may give rise to substantial liability and reputational harm. The AK Futures ruling certainly gives a boost to those on the pro-delta-8 THC side of the debate.

## **Product Contamination, Adulteration and Label Concerns**

The immediate fallout from the AK Futures decision will likely result in exacerbating the problem of largely unregulated delta-8 THC products becoming more widespread. The chemical conversion process from CBD to delta-8 THC can produce unknown byproducts as high as 30% to 50% of the converted batch, depending on the conversion process used. This may include chemicals such as acetic acid, bleach and other solvents that are used in the conversion process. Also, since delta-9 THC is created during the conversion process, separating the two almost-identical cannabinoids can be difficult. Many labs do not have the proper expertise, equipment or validation methods in place to properly separate delta-8 from delta-9 THC.

Label inaccuracies and outright fraud are pervasive within the hemp cannabinoid market. Delta-8 THC products often are marketed with misleading or false claims. Many products are marketed as “hemp derived,” “natural” or “THC free,” and many delta-8 THC products fail to incorporate any explicit warning of intoxicating effects. A recent survey by CBD Oracle found label inaccuracies in over 75% of the delta-8 THC products. Most problematic, a large majority of products tested had over 0.3% concentration of delta-9 THC, meaning that they are Schedule 1 controlled substances that can give rise to substantial criminal exposure.

## **Delta-8 THC and the FDA**

On May 4, 2022, the FDA issued its first warning letters to five companies for selling products labeled as containing delta-8 THC in ways that violate the Federal Food, Drug, and Cosmetic Act (FD&C Act). The warning letters address the illegal marketing of unapproved delta-8 THC products by companies as unapproved treatments for various medical conditions or for other therapeutic uses. The letters also cite violations related to drug misbranding as a result of inadequate directions for use and for other reasons, as well as the addition of delta-8 THC in foods.

In a public statement issued concurrently with the warning letters, FDA Principal Deputy Commissioner Janet Woodcock, M.D. stated: “The FDA is very concerned about the growing popularity of delta-8 THC products being sold online and in stores nationwide. These products often

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include claims that they treat or alleviate the side effects related to a wide variety of diseases or medical disorders, such as cancer, multiple sclerosis, chronic pain, nausea and anxiety.” Dr. Woodcock also called it “extremely troubling” that some delta-8 THC food products are packaged and labeled in ways that may appeal to children.

Similar to the FDA’s analysis around CBD, any future determination by the FDA as to whether delta-8 THC may be added to food or dietary supplements would be based on evidence of its safety for human consumption. This would normally be performed through the premarket approval process involving “generally recognized as safe” (GRAS) applications and new dietary ingredient (NDI) notifications, which involve lengthy and expensive evidence-based data.

### **Delta-8 THC and State Law**

Regardless of any clarity provided by AK Futures on the legality of delta-8 THC under the Farm Bill, legality under state law varies widely and a number of states have taken action on delta-8 THC products. States vary in their respective definitions of “hemp” under state law. Some states have adopted the definition of hemp contained in the 2018 Farm Bill, while others use definitions that leave out derivatives, isomers or other forms. A few states have expressly included delta-8 THC on their list of controlled substances and several others regulate delta-8 THC as they would marijuana.

Currently, delta-8 THC is subject to strict limitations or outright bans in approximately 20 states. There are lawsuits pending in Texas and Kentucky that may determine the legality of delta-8 THC in those states. Several state legislative bans are under consideration, and we expect more states to follow suit, notwithstanding the AK Futures ruling, due to public health and safety concerns.

### **Implications for the Insurance Industry**

The AK Futures decision is prompting a reconsideration by some insurance companies that have until now refused to insure delta-8 THC products. Insurers should proceed cautiously. Intoxicating hemp-derived products add another level of hazard onto an already risky venture. Even non-intoxicating hemp products such as CBD and CBG generally have a higher risk profile than regulated marijuana due to the lack of strict testing requirements and the resulting contamination, label errors and fraud discussed above.

Misbranded and adulterated delta-8 THC products give rise to possible civil abatement by regulatory authorities, liability under consumer protection statutes and potential criminal exposure. One should expect to see more civil court cases filed in connection with delta-8 THC products, including consumer class actions similar to the earlier wave of such litigation filed against CBD products.

Insurers must recognize that underwriting delta-8 THC necessitates a flexible state-specific analysis, similar to the analysis for CBD products. Forms and underwriting procedures should be reviewed regularly to ensure that they adequately reflect the current underwriting intent for insureds that manufacture, distribute or sell delta-8 THC products. Policy definitions, endorsements, exclusions and application questions should be revisited and updated as state law, known risks and market conditions change.

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