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Federal Appeals Court Says Certain THC-O Products Are Legal Contrary to DEA Interpretation

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The 1984 film *The Terminator* featured a deadly robot assassin who looked like a regular guy (if by "regular guy" you mean a young, jacked Arnold Schwarzenegger). The horror of it all was that the victims could not tell if the robot was a human or a fake – *organic or synthetic*.

The Terminator's debut on *Budding Trends* brings us to today's topic: Are hemp-derived products containing THC-O legal? The answer depends on whether THC-O is organic or synthetic under the eyes of the law.

We have a bit more clarity since the Fourth Circuit recently issued a decision that, in part, addressed the legality of hemp-derived products containing THC-O under the 2018 Farm Act.

Product Must Be "Derived" from the Plant and Contain Less Than 0.3% Delta-9 THC

A threshold question is how to determine whether a certain hemp-derived product is legal under the 2018 Farm Act. The relevant provision defines legal "hemp" as "the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis." In his concurrence in the Fourth Circuit's decision, Circuit Judge Julius Richardson helpfully breaks down this provision into two requirements that must be met:

1. The product must at least be "a part of" the cannabis plant itself.
2. Delta-9 THC must compose less than 0.3% of the product's dry weight.

The second prong is self-explanatory for the most part, so we will focus on the first prong. Certainly, some substances used to make hemp products can be found in the plant itself, arguably making that substance "part of" or "derived" from the plant under the Farm Bill.

The first prong, however, gets a little more complicated when you are talking about a substance like THC-O, which is manufactured by performing chemical operations on delta-9, delta-8, or delta-10 THC. In fact, THC-O itself does not naturally occur within the cannabis plant, even though the plant's

substances are altered to create THC-O. So, what counts as “derived” from the plant?

Two Federal Appellate Courts Held That “Derived” Means “Sourced From”

The Fourth and Ninth circuits answered this critical question by stating that as long as a product is “sourced from the cannabis plant,” then the product counts as a derivative of the plant.

The Ninth Circuit first addressed the issue of whether delta-8 THC products count as a “derivative.” Importantly, delta-8 *can be found in the plant*, but through the manufacturing process for some products, delta-8 is concentrated and flavored. The court rejected the argument that delta-8 was a synthetic drug because of the manufacturing process. The court stated, “[The statute] is unambiguous and precludes a distinction based on manufacturing method.” If it is “sourced from” the plant, then it is a derivative.

The Fourth Circuit agreed with the Ninth’s reasoning and, likely, went a little further than the Ninth when considering THC-O products. Unlike delta-8, THC-O cannot not be found in the plant. THC-O is produced by performing chemical operations on delta-9, delta-8, or delta-10. The Fourth Circuit, however, cited the Ninth Circuit’s opinion noting that the method of manufacture is irrelevant – it is the source of the product that matters. Thus, because THC-O can be traced back to the plant, it is legal. The Fourth Circuit adds that if the product “originat[es] from organic matter,” then the first prong is satisfied. But “synthetic cannabinoids,” which are “compounds manufactured entirely out of synthetic materials,” will not clear the test.

The Fourth Circuit’s decision contradicts the Drug Enforcement Agency’s prior position regarding THC-O, in which the DEA stated THC-O was illegal because it was a synthetic drug. The Fourth Circuit cited the Ninth stating, “[I]t didn’t need to consider the DEA’s position on synthetically derived substances because the definition of ‘hemp’ under the 2018 Farm Act was unambiguous in its application to *all* products derived from the cannabis plant, ‘so long as they do not cross the 0.3 percent delta-9 THC threshold.’” Likewise, the Fourth Circuit cited the Supreme Court’s decision to overturn *Chevron*, stating, “[W]e needn’t defer to the [DEA’s] interpretation.”

Takeaway

Under the Fourth and Ninth circuits’ understandings, hemp-derived products sourced from the plant are legal if the delta-9 THC levels do not exceed 0.3%. The Fourth Circuit went a bit further than the Ninth in its reasoning to hold that THC-O was legal, but the Fourth used the Ninth’s reasoning for support. In interpreting the DEA’s regulations, the Ninth Circuit stated, “[T]he source of the product—not the method of manufacture—is the dispositive factor for ascertaining whether a product is synthetic.” The Fourth Circuit noted that the “critical distinction that separates illegal marijuana and THC from legal hemp under both state and federal law is a product’s delta-9 THC concentration.”

It is important to understand that these court decisions are only controlling in states within the Fourth and Ninth circuits. The decisions do, however, at least arguably suggest a growing consensus on a position that would be a strong rebuke to the DEA’s interpretation of the legality of THC-O. As always, we’ll stay on the case so you don’t have to. Check back for further updates as they become available.

Daniel S. McCray also contributed to this post.

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