Updates
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Multiple CBD Class Actions Filed With More Expected

On the heels of the U.S. Food and Drug Administration's (FDA) recent declarations regarding the safety of products containing cannabidiol (CBD), several companies have been hit with class action lawsuits alleging that the company's CBD-containing products are mislabeled and falsely advertised in violation of state law. Manufacturers of CBD products should be aware of the likelihood of increased litigation, especially class actions, resulting from the FDA's recent actions.

What Did the FDA Do?

As we detailed last week, the FDA announced that CBD is not generally recognized as safe given numerous "unanswered questions and data gaps about CBD toxicity." The agency issued over a dozen warning letters to companies marketing CBD-containing products. The FDA also revised its *Consumer Update* about CBD, stating its position that marketing CBD "by adding it to a food or labeling it as a dietary supplement" is illegal under federal law.

What Does This Mean for CBD Litigation?

The FDA claims regulatory authority over CBD. It has, for example, approved one drug (trade name Epidiolex) that uses CBD as an active ingredient. Moreover, pursuant to the Food, Drug, and Cosmetics Act (FDCA), the agency can directly regulate many products containing CBD, including taking enforcement actions against manufacturers. To date, the FDA has exercised its direct regulatory power over companies marketing CBD-containing products in a very limited way; namely, by sending out warning letters. It has never launched a judicial action against a CBD product manufacturer.

Consumer class actions are often intertwined with government enforcement activity and proclamations. But given that the FDCA does not provide for a private right of action, a consumer could not normally bring suits against companies marketing CBD-containing products under a theory that CBD violates ***federal*** law. Nonetheless, experience from other FDA-regulated industries, particularly food, suggests that state attorneys general and private citizens might use ***state law*** as a vehicle for class actions against such companies. Instead of arguing that the use of CBD in products violates the FDCA, these putative classes could argue (and indeed are asserting) that the products are mislabeled and falsely advertised under state consumer protection laws.

Class Actions in the CBD Industry Are Already Here

The CBD industry has been bracing for an "avalanche" of class actions for some time. Several class actions are already in the court system, including one alleging that products did not contain the stated level of CBD and another alleging that the use of CBD products led to positive drug tests. Earlier this year, Curaleaf Inc. was the subject of a shareholder class action suit when its stock fell after it received a warning letter from the FDA for certain statements on its website and social media accounts.

Three recent suits suggest a new wave of CBD class action litigation. In these, putative class action plaintiffs allege that companies' CBD-containing products violated California state law. Each case notes that violations of the FDCA made the products illegal to sell, yet bring causes of action under California law. Two cases, *DaSilva v. Infinite Product Co. LLC*, No. 2:19-cv-10148 (C.D. Cal.), and *Davis v. Green Roads of Florida, LLC*, No. 2:19-cv-10194 (C.D. Cal.), allege that the manufacturers' CBD products were mislabeled as dietary supplements. Another case, *McCarthy v. Charlotte's Web Holdings, Inc.*, No. 5:19-cv-07836 (N.D. Cal.), notes that the defendant company had received one of the recent FDA warning letters.

Recommendations for Industry

Further class action litigation is expected given the language of the FDA's recent pronouncements and the widespread availability of CBD-containing products. Companies should prepare for the possibility of litigation and actively seek to mitigate the risks of unwanted attention by FDA or putative class action plaintiffs. Consistent with prior recommendations from Perkins Coie, companies may mitigate potential exposure as follows:

- Ensure express and implied health claims are supported by competent and reliable scientific evidence
- Avoid claims that are difficult or impossible to verify, such as "CBD gummies can help treat cancer"
- Review marketing claims about dosing and other "drug-like" qualities of products
- Avoid describing the product as a "dietary supplement"

While following the recommendations above cannot eliminate the possibility of attracting the attention of regulators or plaintiffs' counsel, companies marketing CBD products are advised that litigation strategy often involves taking proactive steps to mitigate risk prior to a potential suit.

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