

## ***CBD Suits Challenge 'THC-Free' Claims After Users Fail Drug Tests; Plaintiffs Bar May Just Be Warming Up***

Rose Sheet

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### **Body**

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Suits filed by individuals who were terminated from their jobs after testing positive for tetrahydrocannabinol, which they attribute to defendants' purportedly THC-free cannabidiol products, could be the trickle before the flood, industry attorneys say.

"Setting aside the employment issues in these cases, the plaintiffs' bar is likely to scrutinize CBD labels with the same skeptical eye they have taken to the food and beverage industry in recent years," say ***Kelley Drye*** partner Kristi Wolff and associate Lee Baumgardner in a 9 August [post](#) to the firm's Ad Law Access blog.

Patterson Belknap attorneys issue a similar warning in a 7 August [article](#) published on legal intelligence site JD Supra. Noting the same employment-related litigation, they state, "Manufacturers of CBD products should take pains to develop a sound strategy for thoroughly vetting advertising claims and anticipating the wave of litigation that is likely to follow."

There are two cases that have attorneys' attention at present.

Plaintiff Douglas Horn filed a complaint against Medical Marijuana, Inc. in August 2015 in the US District Court for the Western District of New York, alleging that an ingestible CBD tincture the company advertised as THC-free in fact is not free of the psychoactive cannabinoid associated with marijuana's "high."

As a result of ingesting the firm's Dixie CBD Hemp Oil Dew Drops to treat persistent pain from a vehicle accident, Horn tested positive for THC in random drug screening administered by the trucking company where he worked. The company terminated his employment when additional urinalysis showed the same result, according to the complaint.

Medical Marijuana markets its Dixie CBD Hemp Oil Drops in peppermint, cinnamon and other variants

The New York federal court dismissed many of Horn's claims in an April ruling. Among its findings, the court determined that the deceptive transaction did not occur in New York - though Horn resides in New York, and the product was shipped to and consumed in New York - because the plaintiff viewed the defendant's marketing outside the state. Thus, the plaintiff did not satisfy territorial provisions of New York General Business Law governing deceptive business practices and false advertising, according to the decision. That finding, among others, now is being appealed. The court did allow Horn to proceed with a fraudulent inducement claim that Medical Marijuana challenged in its motion for summary judgment, determining that he had reasonably pled that the

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defendants' THC-free statements were false and intentionally deceptive. According to the decision, discovery showed that the company had conducted its own testing, concurrent with its THC-free marketing, that detected THC in its CBD oil. Further, Horn sufficiently demonstrated to the court's satisfaction, for pretrial purposes, that he had relied on Medical Marijuana's THC-free claims and suffered damage as a consequence of that reliance. Other representations made by the plaintiff as bases for his fraudulent inducement claim did not meet those criteria as required by New York law, the court determined. According to Horn, Medical Marijuana falsely claimed its Dixie product was legal, safe to consume, had health and wellness benefits, was adequately tested and would not cause a positive drug test. However, the court held that at the time those statements were made, the defendant may not have known them to be false and intended to mislead consumers. The court's reasoning in the Horn case suggests that THC-free claims may be riskiest for companies marketing CBD products, similar to how other absolute, unqualified claims - eg, "100% natural" and "preservative-free" - have proven to be legal liabilities for food/beverage and personal-care companies in recent years. (["Natural Brands Work To Deter Lawsuits Some More Successfully Than Others" "HBW Insight"](#))

The [Kelley Dye](#) attorneys point to a similar case pending in California Superior Court for the County of Los Angeles, in which plaintiff Bianca Thurston purchased CBD vape juices advertised by Koi CBD, LLC as having "0% THC." She used the products to treat or alleviate knee pain - an indication supported by the company's anti-inflammatory and other health benefit claims - not expecting the products to cause her to fail her company's drug test, which resulted in her dismissal.

She too seeks damages, including for lost wages, citing violations of California's Unfair Competition Law, Consumer Legal Remedies Act and other statutes.

"While we do not know whether the products at issue in these cases were accurately or falsely advertised, it's fair to say that scrutiny on the advertising claims at issue were foreseeable based on what we've seen in [other sectors]," the [Kelley Dye](#) attorneys say.

They add, "Terms such as 'free,' '0%,' health claims, 'free from'-type claims, and processing claims such as 'organic' have been frequent targets in consumer class litigation. As the CBD industry grows, marketers will want to understand and follow these trends to fully evaluate risk."

Patterson Belknap's Camille Fletcher and Joshua Kipnees note the US Food and Drug Administration's growing interest in CBD products, with some 50 warning letters issued to CBD marketers since 2015. (["With Another Warning FDA Pledges Report On CBD Use In Nondrug Products" "HBW Insight"](#))

"When the FDA begins issuing warning letters to manufacturers regarding labeling practices, the class action plaintiffs' bar usually isn't far behind," they say.

The attorneys advance a number of theories on which plaintiffs could build cases against CBD product manufacturers, including allegations that health benefit claims are unsubstantiated and therefore false and misleading, or that the amount of CBD or THC in purchased products differs from what companies have represented on labeling or in promotional materials. (["CBD Beauty Claims Based On ThirdParty Studies Could Be Litigation Targets Venable Attorney" "HBW Insight"](#))

"While there are viable defenses to each of these theories, a lack of merit has rarely served as a barrier to the plaintiffs' bar, and manufacturers' costs of defending against such litigation could be steep," the attorneys note.

By [Ryan Nelson](#)

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