

Transport of Hemp in Interstate Commerce: Pending Cases Examine Whether the Road is Really Open

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An Article highlighting the key points that in-house counsel should consider regarding transport of hemp in Interstate Commerce and an analysis of current conflicting case law.

Cannabidiol (CBD) is one of many compounds and substances found in the hemp plant and has recently been added to several consumer products in a short time. One may question whether or not it is legal. The answer may depend on the jurisdiction in which the product is located. CBD is a derivative of the cannabis plant, either hemp or marijuana. Although hemp is now legal at the federal level under the 2018 Farm Bill (Agricultural Improvement Act of 2018, Public Law 332, 132 Stat 4490), state laws remain a confusing patchwork. Many states have set up programs to broadly legalize hemp and its derivatives, including CBD; others have not. Despite lingering questions to CBD's legality, the CBD market has still flourished.

The law is just beginning to catch up to the market. While retailers scramble to shelve the latest hemp products, the court system is grappling with how to sort out transport of hemp between states where it is legal through those where it is not. The outcome of these cases may have a considerable impact on this burgeoning industry.

THE 2018 FARM BILL LEGALIZES HEMP-DERIVED CBD AT THE FEDERAL LEVEL

Every five years Congress passes legislation setting national agriculture, nutrition, conservation, and forestry policy. This legislation is commonly referred to as the "Farm Bill." Most recently, the Farm Bills from 2014 and 2018 instituted a fundamental change on how the Justice Department treats industrial hemp (hemp). Hemp is a subspecies of cannabis known for having low levels of THC, (tetrahydrocannabinol, the principal psychoactive constituent of cannabis) the compound that produces a "high." Marijuana, another subspecies of cannabis, has higher levels of THC.

The 2014 Farm Bill (7 U.S.C. § 5940 (2014)) legalized hemp production, but only under certain restrictive conditions where hemp can only be produced in conjunction with a state authorized

pilot program. All forms of the cannabis plant, including hemp, also remained a Schedule I narcotic under the federal Controlled Substances Act (CSA) (84 Stat 1242, 21 U.S.C. § 801 - 904), making any kind of cannabis illegal to possess, sell, or advertise. While the 2014 Farm Bill opened the door toward hemp legislation, by leaving it as a Schedule I controlled substance, considerable uncertainty and risk remained.

The 2018 Farm Bill became effective on January 1, 2019. The 2018 Farm Bill greatly clarified the federal regulatory landscape regarding hemp. The 2018 Farm Bill:

- Legalized production of hemp when cultivated, processed, and sold under a state hemp program and under (not yet established) federal guidelines.
- Defined hemp to cover all parts of the plant (including seeds, derivatives, extracts, and cannabinoids) if it has a THC level (the "high"-producing chemical) of 0.3% or less. This includes CBD, which is generally extracted as a resin and mixed with an oil to allow for processing into finished product.
- Removed hemp for the definition of "marijuana" under the CSA, meaning that hemp and its derivatives (including CBD), are now unambiguously legal at the federal level.

If CBD is derived from marijuana, it is still a Schedule I item under the CSA and the US Drug Enforcement Administration retains jurisdiction over it.

STATE HEMP LAWS ARE A PATCHWORK

Although it is now legal to federally own, transport, and sell hemp, this legality does not necessarily preempt state laws. The 2018 Farm Bill requires states and Indian tribes wishing to regulate hemp production to submit plans to the USDA for approval. States and tribes that choose not to do so can elect to have the USDA regulate hemp production in those states or tribal areas.

State hemp laws are a quickly evolving patchwork. As of January 2019, about one-third of states had operational hemp programs, one-third of states had passed laws to create these programs, and roughly one-third of states had no hemp programs. Adding to this complexity, many states, even some states that had hemp programs,

had not modified the language in their controlled substance acts to remove hemp and its derivative from the definition of marijuana. Hemp was therefore legal on one hand, but considered a Schedule I narcotic on the other.

Since January, the state patchwork has continued to evolve, with some states modifying their programs to make them consistent with the federal law. Other states have introduced legislation to create hemp programs. States that have hemp programs but have failed to address language in the controlled substances acts have introduced legislative fixes. Overall, the trend among the states is moving towards consistency with the federal standard outlined in the 2018 Farm Bill.

THE STATE LAW PATCHWORK AND INTERSTATE COMMERCE

In the midst of this evolution, however, two notable challenges have been filed regarding whether hemp can be transported in interstate commerce through states that do not have hemp programs. These cases are the first to address the interstate commerce provisions of the 2018 Farm Bill.

Section 10114 of the 2018 Farm Bill explicitly states that the interstate transit of hemp is permitted. The section states in full:

RULE OF CONSTRUCTION. - Nothing in this title prohibits the interstate commerce of hemp (as defined in section 297A of the Agricultural Marketing Act of 1946 (as added by section 10113)) or hemp products.

TRANSPORTATION OF HEMP AND HEMP PRODUCTS. - No state or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (as added by section 10113) through the State or territory of the Indian Tribe, as applicable.

Although states and Indian tribes may regulate the production of hemp more stringently than at the federal government, states and Indian tribes may not prohibit the transport of hemp or hemp products through interstate commerce. Section (b), in turn, mandates that states and Indian tribes must allow the transportation of hemp or hemp products “produced in accordance with subtitle G of the Agricultural Marketing Act of 1946” through their borders.

The legislative history of the statute and House Conference Report consistently underscore this clarity. The House Conference Report on this issue concluded, summarily and unequivocally as follows:

“While states and Indian tribes may limit production and sale of hemp and hemp products within their borders, the managers... **agreed to not allow such states and Indian tribes to limit the transportation of shipment of hemp products through the state or Indian territory** (emphasis added).”

INITIAL COURT DECISIONS ARE AT ODDS

Although the text of the 2018 Farm Bill and its legislative history seem to clarify the issue of whether hemp may be transported through states that disallow the production or sale of hemp has already begun to make its way through the courts, with mixed results.

In an ongoing case in federal court in Idaho, the magistrate judge overseeing the case read the above language of the 2018 Farm Bill in a limited manner. In that case, *Big Sky Scientific LLC v. Idaho State Police*, the plaintiff, Big Sky Scientific, shipped nearly 13,000 pounds of unprocessed hemp from Oregon (which has a hemp program) to Colorado (which also has a hemp program). On its way to Colorado, the shipment was stopped in Idaho, which has no hemp program and classifies hemp as marijuana per state law. The entire shipment was confiscated. Big Sky sued in federal court, arguing that the clear and unambiguous language of the 2018 Farm Bill allowed the transport of hemp through any state or Indian territory. (2019 WL 438336 (D. Idaho Feb. 2, 2019).)

The magistrate judge disagreed. The judge found that Section 10114(b) of the 2018 Farm Bill, which authorized the interstate transport of hemp produced under Subtitle G of the Agricultural Marketing Act of 1946, operated to limit the express language of Section 10114(a) of the 2018 Farm Bill, which authorized the interstate transport of all hemp and hemp products. Big Sky Scientific has appealed the ruling to the Ninth Circuit, where it is currently pending. (Ninth Circuit appeal is docketed as Case No. 19-35138.)

In another federal court case, decided on March 6, 2019, in West Virginia, the federal judge, in direct opposition to the Idaho magistrate judge, concluded that the text of the 2018 Farm Bill unambiguously allows for the interstate transport of hemp and hemp products. In that case, the West Virginia state police confiscated a shipment of processed hemp that was travelling out of West Virginia to Pennsylvania. The US Attorney in West Virginia accused the defendants of violating federal law by, among other things, transporting the hemp plants and seeds in question across state lines. (*United States v. Mallory*, 2019 WL 1061677 (S.D. W.Va. March 6, 2019).)

The West Virginia federal judge disagreed. In allowing the processed hemp to be released from custody in West Virginia and delivered to its contracted location in Pennsylvania, the court explained:

The 2018 Farm Bill expressly allows hemp, its seeds, and hemp-derived products to be transported across State lines. See Section 10114 of the 2018 Farm Bill (providing “[n]othing in this title or an amendment made by this title prohibits the interstate commerce of hemp (as defined in section 297A of the Agricultural Marketing Act of 1946 (as added by section 10113) or hemp products).”

(*Mallory*, 2019 WL 1061677, at *6.)

The US Attorney also alleged that hemp growers in West Virginia must identify international sources for their cannabis seed and may not purchase cannabis seeds from other states. The court found that the allegation had no merit and was in fact completely baseless. (*Mallory*, 2019 WL 1061677, at *8.)

The spending bills provided that these agencies were not to prevent the transportation of sale of industrial hemp within or outside a state. This language certainly suggests that Congress contemplated there was likely to be both intrastate and interstate transportation and sale of industrial hemp and its seeds and undermines the Justice Department’s argument the seed can only be purchased from international sources.

The Justice Department chose not to appeal its loss in the West Virginia case. That means that, in the Fourth Circuit (where West Virginia is located), there is valid case law on record unambiguously stating that the interstate transport of hemp is allowed and preempts contrary state law.

Until state laws catch up with federal law, interstate transport of hemp remains a fundamental question with real business

implications impacting hemp producers and their customers throughout the country. Re-routing shipments to avoid certain states adds to costs and, if delayed, may lead to spoilage and financial loss. In addition to whether states have established hemp programs, companies evaluating risk must also be mindful of state controlled substances laws.

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