

Class is in Session: CBD Class Action Lawsuits are Trending Up

Written By **Chris S. Edwards** (csedwards@wardandsmith.com) and **Tyler J. Russell** (tjr@wardandsmith.com), **Allen N. Trask, III** (ant@wardandsmith.com)

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Products containing hemp-derived cannabidiol ('CBD') have become incredibly popular in the United States, with new product brands entering the market seemingly every day.

Consumer demand and public interest in those products have been equally significant. But, the market has quickly outpaced the development of new laws and regulatory programs and, today, the industry lacks clearly defined regulations for the production, labeling, and sale of CBD products.

That lack of regulation continues to cause problems within the CBD industry as a whole. The U.S. Food & Drug Administration ("FDA") has issued numerous warning letters to CBD companies for illegally marketing and labeling their products, including 15 letters sent to CBD companies on November 25, 2019. The Federal Trade Commission has also issued warning letters to CBD brands that it deems to be in violation of the law. And recently, a new breed of class action lawsuits have cropped up involving CBD brands and products.

What is the Point of a Class Action Lawsuit?

Class action lawsuits involve a "class"—that is, a group—of injured people joining together to bring a claim or claims against a defending party. The class mechanism allows one person, or sometimes a small group of people, to represent the interest of a much larger, but similarly situated, group. In other words, a handful of people do the work, and the group reaps the benefit.

Class actions are common, often arising in the context of consumer protection claims. Many people have probably received a mailer advertising their ability to opt into a class action settlement, often one with a low value. But some class actions have achieved huge results. Some notable class actions include the 2006 Enron securities case, the 2001 Exxon-Valdez oil spill case, and the 1998 Dow Corning Breast Implant case. The total amount of money awarded between those three cases exceeded \$15 billion.

Why Are CBD Brands Becoming Targets?

There is confusion in the American public about the legality of hemp and CBD products. Some employers are struggling to come to terms with their employees' use of CBD products. Additional scientific data to support the safety and efficacy of CBD in consumer products is badly needed. Without clear regulations for the industry, it can be difficult for well-intentioned brands to identify and employ best practices in the marketing and labeling of their CBD products. Product testing and sampling protocols are not uniform from state-to-state, or lab-to-lab. And there are companies that cut corners and sell CBD products containing potentially harmful substances (and those bad actors will continue to exist until the FDA identifies a clear, detailed regulatory "pathway forward" for CBD).

As a result, class action lawsuits are becoming more common in the CBD space. Lawsuits have been filed against CBD companies across the country – from Massachusetts to Florida to California. Claims in those cases involve a myriad of issues, including: allegations of mislabeling and claims for allegedly inaccurate labeling of CBD product content; false advertising claims against CBD brands for labeling and marketing their products as dietary supplements, despite the FDA's prohibition against that practice; and claims for damages stemming from the sale of allegedly illegal products purchased and used by the consumer plaintiffs. Some lawsuits have even alleged that consumers took CBD products that were marketed as "THC Free" or "No THC" but actually contained trace or low amounts of THC and that, so it goes, resulted in that consumer plaintiff failing an employer required drug test.

Why Should CBD Brands Care About This?

The volume of class action lawsuits filed against CBD companies is trending up, and many in the industry believe this trend will continue for the foreseeable future. Some of the brands targeted so far have previously received FDA warning letters and regulatory enforcement actions. Others have not. Some defendants in these lawsuits are large, well known, nationally distributed CBD brands. Others are not. In short, these lawsuits can potentially target any CBD brand – large or small – and they can include a wide variety of claims and allegations.

And the claims alleged in these lawsuits can be difficult, costly, and time-consuming to defend. The risk and liability exposure involved in class action cases may create a "bet the company" feel for the lawsuit's defense. And even if the CBD brands are ultimately successful in the litigation, their defense costs and out-of-pocket legal fees can still be significant. Litigation of this nature can, and often does, bleed into other areas of the defendant's business operations as well – impacting cash flow, business operations, employee morale, and causing reputational damage.

CBD brands today are in the uncomfortable position of having to ascertain and manage risk without clear regulatory rules and guidance. As a result, it is absolutely critical that CBD market participants thoughtfully consider their labeling and branding practices and consult with knowledgeable legal counsel before bringing products to market. Failure to do so may expose companies to state and federal regulatory enforcement efforts – or, to private enforcement lawsuits brought by their customers.

Ward and Smith's Hemp Law attorneys can advise you as you work through these and other complex legal and regulatory matters.

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