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Transportation of Cannabis: Steering Clear of Legal Roadblocks

While industrial hemp and marijuana are members of the same plant family and are both considered to be “cannabis,” the legal and regulatory issues and challenges associated with moving each product from cultivator to market are strikingly different. This piece will provide an overview and discussion of some of the critical issues faced by companies engaged in commerce involving the transportation of hemp and marijuana in the United States.

TRANSPORTATION OF HEMP

Hemp, sometimes referred to as “industrial hemp,” is a commodity that can be used for numerous industrial and horticultural purposes including fabric, paper, construction materials, food products, cosmetics, production of cannabinoids (such as cannabidiol or CBD), and other products. In its visual appearance hemp is often indistinguishable from marijuana. But hemp is different from marijuana in that it lacks the high concentrations of delta-9 tetrahydrocannabinol, or THC, that cause the psychoactive effects associated with marijuana use.

The 2018 Farm Bill, signed into law on December 20, 2018, marked a significant change in the legal treatment of hemp and hemp products at the federal level. Whereas federal law did not previously differentiate hemp from other cannabis plants and products, the 2018 Farm Bill legalized the commercial production of hemp and authorized the states to submit plans to administer state-level hemp cultivation programs. To effect this change, the Farm Bill created a new statutory definition of hemp, defining it as any part of the *Cannabis sativa* L. plant, including seeds and all derivatives and extracts, so long as the product contains less than 0.3% THC on a dry weight basis. *See* 7 U.S.C.A. § 1639o(1). In general, the hemp-related provisions of the 2018 Farm Bill aim to facilitate the commercial cultivation, processing and marketing of hemp across the United States. To serve this purpose, the Bill empowers the USDA to promulgate regulations and guidelines to establish and administer programs for the production of hemp in the United States. Under this new authority, a state or Indian Tribe that wants to have primary regulatory authority over the production of hemp in that state or territory may submit, for approval by the USDA, a plan concerning the monitoring and regulation of such hemp production. Perhaps most notably, the 2018 Farm Bill allows for the interstate transportation and shipment of hemp in the United States, provided that the hemp was lawfully produced under a state or Indian Tribal plan or under a license issued by the USDA.

Despite these meaningful developments in federal law, hemp cultivators and those working with them still face significant challenges and risks in getting their product to market. First, as noted above, under the Farm Bill hemp cannot contain more than .3% THC on a dry weight basis. Any cannabis plant or product with a THC level exceeding .3% is still considered marijuana, which remains classified as a Schedule I controlled substance under the Controlled Substances Act (CSA). Interstate transportation of any product classified as marijuana, even if performed by a company that believed it was lawfully transporting industrial hemp, would still be illegal under federal law. Compounding this concern, for motor carriers considering transporting industrial hemp, as a practical matter it can be difficult to know with confidence whether the shipment contains product that would exceed the maximum THC concentration threshold.

Hemp cultivators also face significant challenges when transporting their products through states which have not harmonized their laws with the new federal regulatory scheme contemplated by the Farm Bill. For example, Idaho law still defines any product or substance containing THC as marijuana, and marijuana in any type or amount is illegal under Idaho state law. In early 2019 a truck transporting approximately 6,700 lbs. of industrial-grade hemp with a value of approximately \$1,300,000

was stopped by state troopers in Idaho. The hemp was being transported from Oregon to Colorado—both states with pilot hemp-growing programs as permitted under the Farm Bill. Although the driver presented a bill of lading and other documentation demonstrating that he was transporting hemp, the Idaho state troopers nevertheless seized the cargo and arrested the driver on suspicion of trafficking in marijuana.

The Colorado-based CBD company that owned the hemp, Big Sky Scientific, LLC (“Big Sky”), challenged the seizure in federal court. But to the date of this writing, Big Sky has been unable to secure meaningful redress. In [Big Sky Scientific v. Idaho State Police, 2019 WL 2613882](#), Big Sky sought a declaratory judgment that (1) its cargo was industrial hemp under the provisions of the 2018 Farm Bill; (2) hemp is not a controlled substance under federal law; and (3) Idaho cannot interfere with the transportation of hemp because to do so impedes Congress’s power to regulate commerce. Big Sky also moved for a preliminary injunction to require the Idaho State Police to return the hemp. One might have assumed that Big Sky’s arguments would be favorably received by the federal court, given that Congress, through the Farm Bill, sought to expressly preempt countervailing state laws governing the transportation of hemp. Specifically, Section 10114 of the Farm Bill states that “[n]o State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with” the relevant hemp laws and regulations.

Notwithstanding Congress’ clear effort to preempt contrary state laws when enacting the Farm Bill, the federal district court in Idaho denied Big Sky’s motions for declaratory judgment and preliminary injunction, finding that Big Sky had not demonstrated a sufficient likelihood of success on the merits. Big Sky subsequently appealed to the Ninth Circuit Court of Appeals, arguing that the district court erred in concluding Big Sky was unlikely to succeed on the merits of its claim that federal law prohibits the seizure of the hemp. In response to Big Sky’s arguments, the Idaho State Police argued that the federal district court should have abstained from deciding the case under the principles outlined in [Younger v. Harris, 401 U.S. 37 \(1971\)](#). The *Younger* doctrine stands for the proposition that federal courts cannot enjoin pending state court proceedings. The Ninth Circuit ruled against Big Sky and sided with the Idaho State Police, reasoning that because there was a pending *in rem* forfeiture proceeding in Idaho state court, the federal district court abused its discretion by hearing the case. In returning the case to state court, the Ninth Circuit declined to decide whether Idaho’s treatment of hemp conflicts with the Commerce Clause of the United States Constitution.

The truck driver eventually pled guilty to a misdemeanor charge. But even after the driver’s criminal case was closed, and even though the product passed tests confirming it was properly classified as hemp under the federal definition, the Idaho State Police refused to return the hemp to Big Sky. Consequently, Big Sky was forced to continue litigating its claim for return of the hemp in Idaho state court. Ultimately, in January of 2020, the state court judge sided with the Idaho State Police, ordering that Big Sky must forfeit the hemp because the product was still considered a controlled substance under Idaho law. Big Sky and its attorneys are reportedly considering appealing the state court’s ruling, but as it stands at present Big Sky is facing the forfeiture of its valuable hemp shipment, the driver was forced to plead guilty to a criminal charge, and Big Sky faces an uncertain path forward which will at minimum will involve further litigation costs.

There have been other publicized cases where hemp was confused for marijuana in [New York](#) (Sebastian Murdock, Charges Dropped in Weed Bust NYPD Bragged About That Was Actually Just Hemp, HuffPost (December 11, 2019), available at https://www.huffpost.com/entry/charges-dropped-after-nypd-brags-about-weed-bust-that-was-actually-just-hemp_n_5defe8bf-e4b0a59848d18f39); [Oklahoma](#) (Kimberly Querry, Charges dropped against four men accused of hauling thousands of pounds of marijuana, KFOR-TV, July 31, 2019, available at <https://kfor.com/news/charges-dropped-against-four-men-accused-of-hauling-thousands-of-pounds-of-marijuana/>); [South Dakota](#) (Dana Ferguson, USDA order is at issue, as Colorado driver hauling hemp to Minnesota is arrested in S.D., Twin Cities Pioneer Press, August 22, 2019, available at <https://www.twincities.com/2019/08/22/usda-order-at-issue-as-colorado-driver-hauling-hemp-to-minnesota-is-arrested-in-s-d/>); and [Colorado](#) (Rick Sallinger, Cannabis confusion over hemp, marijuana creates issues for Colorado law enforcement, KKTV.com, August 24, 2019, available at <https://www.kktv.com/content/news/Cannabis-confusion-over-hemp-marijuana-creates-issues-for-Colorado-law-enforcement-558124431.html>).

In short, even though the 2018 Farm Bill sought to legalize and normalize cultivation and interstate transportation of hemp, cannabis producers and manufacturers still face significant roadblocks in getting their product to market. The legal and regulatory issues arising from the movement toward broader legalization of commerce in hemp continue to be developed and

refined in state administrative bodies and the courts. Ultimately, one takeaway from *Big Sky Scientific* and other similar cases is that hemp growers and transporters must carefully plan their transportation operations and should understand that despite their best intentions and plans, risks still abound. Motor carriers and others involved with transporting hemp are well-advised to be cautious about engaging in this business, should aim to avoid states known to look unfavorably upon commerce in hemp, should strive to remain well-informed of the developing laws and regulations governing commerce in hemp, and should exercise all appropriate caution to ensure that the product they are transporting fully qualifies as hemp under the new federal definition. At a minimum, carriers are well-advised to closely review the bill of lading and associated paperwork and should strive to ensure that all shipments are transported with copies of the cargo's THC level test certification.

TRANSPORTATION OF MARIJUANA

Although recreational use of marijuana has been legalized in 11 states and ballot initiatives in favor of legalization or decriminalization are presently being pursued in multiple additional states, at the federal level marijuana remains classified as a Schedule I controlled substance under the Controlled Substances Act. *See* 21 U.S.C.A. § 801 *et seq.* Federal law prohibits transporting any federally-restricted substance across state lines, even when the product is being transported between two states that have both legalized adult recreational use. Consequently, persons and companies involved in transporting marijuana cannot rely upon interstate common carriers to transport their products, but must instead transport the product (and often the cash generated from sale of their product) themselves or rely upon specialty carriers who operate solely within the borders of the states where marijuana has been legalized.

In states where marijuana is legal for recreational or approved medical use, transportation is nevertheless regulated by the state. For example, Colorado, Washington, Michigan and Illinois all require persons and companies who wish to transport marijuana and marijuana products to first obtain licensure from state licensing authorities. *See* [Colo. Rev. Stat § 44-12-406](#); [Wash. Admin. Code § 314-55-310](#); [Ill. Admin. Code tit. 8, § 1300.195](#); [Mich. Comp. Laws § 333.27503](#). In addition to the licensure requirements, states also impose additional recordkeeping requirements upon those who transport marijuana. *See* [Wash. Admin. Code 314-55-085](#); Or. Admin. R. 845-025-7700(3); Me. Code R. 18-691-001(Section 4.2.1). By all indications, new states that join in the movement toward permitting recreational use of marijuana for adults within their states will also adopt state-specific regulatory schemes and revenue-producing mechanisms surrounding licensure and compliance for cannabis businesses. In short, even companies engaged in the lawful commerce of transporting marijuana and marijuana products solely within states where those products are legal must nevertheless be acutely sensitive to applicable state and local laws, must strive to remain in compliance at all times, and must be mindful not to operate across state lines.

Even leaving aside these unique and unsettled legal and regulatory hurdles, transporting cannabis is unlike transporting other commodities. First, both hemp and marijuana are extremely valuable by weight when compared to other agricultural products. While most agricultural products are valued at not more than a few dollars per pound, the average wholesale price of marijuana in Colorado was reported to be \$1,164 per pound as of April 1, 2020. Colorado Department of Revenue, Current & Prior Retail Marijuana Average Market Rates (Median Market Prices), available at https://www.colorado.gov/pacific/sites/default/files/AMR_PriorRates_Apr2020.pdf. The atypically high value of cannabis and cannabis products, combined with the nature of the products, make them a particularly attractive target for on-road theft, thus requiring cannabis companies and motor carriers to exercise considerable care and caution to maintain the security of their products and the persons transporting those products. In fact, a number of cannabis transporters have taken to providing armored transport services operated by trained security personnel in an effort to protect from loss.

Second, cannabis is highly perishable and must be stored under precisely controlled conditions to maintain quality and viability. Variations in light, oxygen, humidity, and temperature can damage the product, raising the potential that carriers may face high-dollar cargo claims for loss or damage to the product. For this reason, intrastate carriers engaged in transporting marijuana where state law permits them to do so are wise to exercise caution to appropriately allocate risks in their transportation agreements where possible.

Finally, but critically, insurance companies have generally been hesitant to underwrite the significant and unique risks involved in transporting marijuana and marijuana products. Conflicting state and federal laws and rapidly-evolving state-based regulatory schemes seem to have largely discouraged insurers from participating in the cannabis market, despite explosive growth and steadily increasing demand. While general liability policies will typically cover losses arising from bodily injury and property damage claims brought by third-parties, liability policies generally will not provide coverage in

the event of a robbery, seizure by law enforcement, or other incident resulting in loss or damage to the cannabis product itself. Although some companies have begun advertising insurance products purporting to serve the cannabis industry, the rates and coverage terms associated with these policies must be reviewed closely on a case-by-case basis so that companies can ensure that the offering truly meets their needs at a cost that is economically viable.

CONCLUSION

When it comes to intrastate or interstate transportation of cannabis and cannabis products, the “rules of the road” are still being written and refined. While the 2018 Farm Bill opened up many new opportunities for companies involved in commerce in hemp, much risk and uncertainty remain. It is likely that in the coming months and years more federal courts will be called upon to decide whether state laws that contravene the hemp protections outlined in the Farm Bill, such as Idaho’s, are in conflict with federal law and therefore unenforceable.

Interstate transportation of marijuana and marijuana products continues to be illegal and will likely remain so for the foreseeable future. Yet, opportunities exist for enterprising intrastate motor carriers who are prepared, equipped, and, importantly, appropriately counseled to meet the unique needs of the market and to accept and manage the considerable risks associated with transporting a commodity that, while legal in an increasing number of states, remains illegal at the federal level.

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