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Insights

Farm Bill Does Not Save Hemp Trademark Application

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In 2018, when the Farm Bill was signed into law, hemp cultivators and extract producers were hopeful that the federal pressure on their industry might begin to ease. The 2018 Farm Bill removed hemp from the Controlled Substances Act and permitted the cultivation of hemp (defined to have less than 0.3% THC by dry weight), paving the way for the registration of federal trademarks for hemp products. This was a long-awaited result, as prior to the 2018 Farm Bill, the United States Patent and Trademark Office (USPTO) consistently refused to register federal trademarks for these products because the products themselves were illegal. However, as a recent federal Trademark Trial and Appeal Board (TTAB) case points out, the answer as to whether a specific hemp product can obtain intellectual property protections may turn on several factors.

Stanley Brothers Social Enterprises LLC produces a hemp oil extract product that it describes as "dietary supplements" for treatment of childhood epilepsy and to promote mind and body wellness. The hemp oil extract contains no more than 0.3% THC, falling within the definition of "hemp" under the Farm Bill. Stanley Brothers applied for federal trademark registration of its CW mark for its food supplements. Since hemp is no longer illegal under the Farm Bill, many assumed that the USPTO would not object to the CW mark on illegality grounds.

The USPTO examiner, however, took a different view. While the dietary supplements may not be illegal per se under the Farm Bill, the Food, Drug & Cosmetic Act (FDCA) does prohibit "[t]he introduction or delivery for introduction into interstate commerce of any food to which has been added … a drug or biological product for which substantial clinical investigations have been instituted and for which the existence of such investigations has been made public …." 21 U.S.C. § 331(ll). The examiner therefore refused registration of the CW mark.

Stanley Brothers appealed. On appeal, Stanley Brothers argued that 1) the Farm Bill exempts its products from the applicable portion of the FDCA; 2) its dietary supplements are not "food" and thus do not fall within the applicable portion of the FDCA; and 3) that its dietary supplements should be exempt from the FDCA under a provision of the FDCA that excepts

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drugs or biological products "marketed in food ... before any substantial clinical investigations involving the drug or the biological product have been instituted." 21 U.S.C. § 331(ll)(1).

In an opinion that can be found here, the TTAB held that 1) the Farm Bill does not exempt hemp products from the provisions of the FDCA; 2) "dietary supplements" fall with the definition of "food" for the purposes of the FDCA in issue; and 3) Stanley Brothers did not provide persuasive evidence to support its argument that its products were marketed in food before any substantial clinical investigations involving were instituted at the FDCA. Registration of the CW trademark for dietary supplements containing hemp having less than 0.3% THC was denied on this appeal.

While this result might be surprising to those engaged in the hemp and CBD industry, it is not surprising to experienced trademark counsel. This case emphasizes the fact that the Farm Bill, as helpful as it is, is just one federal act that may affect the right to trademark, produce, market and sell hemp products. Applying and arguing for federal trademark registration often requires skilled representation, especially in rapidly evolving markets and legal environments. Engaging qualified counsel early in the process is always a good idea to increase the chance of success.
