



# Green Family Gatherings

Confused about cannabinoids? Let’s meet the family

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*[Editor’s Note: For the sake of everyone, let’s remove COVID-19 from the equation as it relates to this article’s attempt to bestow knowledge in a creative way.]*

Holidays are usually a time to spend with families. Whether we’re talking about Thanksgiving, Christmas, or a family reunion at Memorial Day, whenever families gather, misunderstandings are likely to ensue. The “Cannabinoid Family” is no different, with family members that include CBD, THC, Spice/K2, and the DEA “parents” who are still trying to figure it all out.

## CBD: The Not-So-Goody-Two-Shoes Cousin

CBD stands for “cannabidiol,” according to Harvard Health, and it is the second-most prominent of the active ingredients in the marijuana flower. CBD, THC, and the minor cannabinoid, Delta-8 THC, are also found in the flower of legalized industrial hemp, in which the THC level is 0.3 percent or lower in dried weight, per the 2018 Farm Bill.

There are growing concerns about the therapeutic benefits of CBD, its legality, and efficacy. Consumers have been conditioned to think CBD is safe since it is from the non-psychoactive part of the cannabis plant. It’s in oils, creams, drinks, edibles, and treatments for animal illnesses. Unfortunately, CBD may be a riskier business initiative than its highly regulated cousin, THC, because lawmakers are focusing on the bad-boy with psychoactive ingredients. Because of this, there are fewer lawsuits and fewer regulatory violations with THC on both the federal and state levels, so CBD manufacturers feel emboldened to operate with impunity.

That may be changing, though. On April 22, 2020, the Federal Trade Commission (FTC) began legal action against a CBD company for alleged deceptive practices and false advertisements of its products (the company claims its CBD products treat cancer and prevent or reduce COVID-19 risks). There are also class-action lawsuits against CBD companies for deceptive advertisements that claim the product is “THC-free,” since some employees have lost their jobs when they unexpectedly test positive for THC.

Part of the reason for these legal actions is inaction by the Food and Drug Administration (FDA). Since the FDA and Congress have not issued any rules regarding CBD, these regulations are left to the states, which creates a hodge-podge of rules that differ across the nation.

For example, Indiana, Utah, Texas, and Florida require a QR code on the CBD product that links to batch numbers, potency, and other ingredients. The Federal Food, Drug, and Cosmetic Act prohibits adding CBD, or any approved drug, to human or animal food sold in interstate commerce. This is known as the “drug exclusion rule.” Colorado, contrary to the drug exclusion rule,

allows CBD in foods and supplements—albeit with some labeling and testing restrictions.

The Federal Trade Commission and FDA are sending CBD companies a plethora of warning letters, although the FDA's warning letters are, in effect, just "guidance letters" from loving chaperones and do not pack the same punch as the law would. CBD companies see an increase in lawsuits after receiving a warning letter. The lawsuits assert liability under state consumer protection statutes for false health or disease-curing claims; for misrepresentative labeling regarding efficacy; and for product contamination.

CBD's efficacy and contamination may be the two major sticking points for insurers that underwrite these policies. Since the FDA does not regulate CBD, CBD acquired from industrial hemp flower does not require testing, so consumers are left fending for themselves. CBD from hemp may have some THC or other contaminate in the final product, leading to the class-action lawsuits about misleading advertisements and wrongful terminations.

California has a love-hate relationship with CBD. Its Department of Public Health's Food and Drug (CDPH) state hemp-derived CBD is illegal in foods, beverages, and dietary supplements. Yet CBD derived from the marijuana plant is legal. Marijuana-derived CBD is tested for efficacy and contaminates because the THC market is regulated and tested.

At issue is testing for consistent amounts of CBD product, and policy language. Many policies still have "criminal acts" as an exclusion, but an insurer may still defend a CBD company under a reservation of rights until coverage is determined. Despite CBD appearing to be the goody-two-shoes cousin, it has a secret: CBD is federally illegal according to the Drug Enforcement Administration (DEA).

### **THC: The Bad-Boy Brother**

THC is the known "bad boy" of the Cannabinoid Family because it is predominately classified federally as a Schedule 1 drug. As mentioned earlier, THC can also be found in the industrial hemp plant. Therefore, insurers should recognize that if they want to exclude marijuana, then they must use the correct terminology.

Surprisingly, "cannabis" may be too broad of a term for a policy. ISO policies, in attempting to exclude THC, also exclude "any other cannabinoid, regardless [if the cannabinoid] is natural or synthetic." Unfortunately, the spices an underwriter might use for Christmas Mulled Wine, such as cinnamon, clove, and star anise, are naturally growing cannabinoids. In its haste to remain legal in an environment that changes daily, an insurer may be accidentally excluding its CBD insureds, or it could be inadvertently including coverage for marijuana ventures by using improper terminology.

To further complicate matters, the DEA applied circular logic to its recent Interim Final Rule, published on Aug. 21, 2020. Several experts in the field fear the DEA is lumping CBD with THC simply by family association.

### **DEA: The Confused Parents**

In 2019, the DEA emphasized that, because it is a cannabinoid, and because cannabinoids are found in marijuana, CBD is an illegal substance on the federal level. Using this logic, the DEA will need to prosecute the rest of the Cannabinoid Family: black pepper, nutmeg, basil, and cilantro. The DEA's interpretation seems to be inconsistent with Congress' intent that Cannabis Sativa L. hemp plants with less than 0.3 percent THC concentration includes "all derivatives, extracts, and cannabinoids of hemp." Therefore, the DEA illogically lumps hemp-derived CBD with marijuana-derived CBD.

According to the DEA's interim final rule, it has not changed its stance, but merely attempted to clear up some confusion. Unfortunately, the DEA has made things worse. The DEA agrees that "...to fall within the current [Controlled Substances Act's] definition of [marijuana], cannabis and cannabis-derived material must both fall within the [pre-2018 Farm Bill] CSA definition of [marijuana] and contain more than 0.3 percent Delta-9-THC on a dry weight basis."

The logic loop is created by the DEA's strict interpretation of the process to extract CBD from the legal hemp plant. The agency does not recognize "work-in-progress extractions" as having a separate legal status from the final product, CBD. The extraction process entails a temporary increase in THC, pushing the product over the 0.3 percent legal status. It is exactly at this point when the DEA believes a manufacturer is in possession of a Schedule 1 controlled illegal substance. If insurers want to stay out of the marijuana industry, but they cover manufacturers of CBD products, it could be underwriting an illegal entity.

Because the DEA believes the manufacturer has "cannabis and cannabis-derived material," and insurers use "cannabis" to mean "marijuana," insurers may have sold illusory coverage to their insureds based on policy language and exclusions.

### **Spice: THC's Little Sister**

In the midst of all this confusion, synthetic cannabinoid products like “Spice,” “Kratom,” or “K2,”—which we’ll call the little sister of THC—are right on the heels of their cousin, CBD, in popularity. Known scientifically as Delta-8, these products are quite similar, chemically, to Delta-9 THC, which is what laypeople refer to as THC. Weed Maps, a tech company serving the cannabis industry, states that when THC has been stored for a period of time, it degrades into Delta-8 THC.

Hemp-derived Delta-8 THC is technically legal, but may be on the same path as its older cousin, CBD. The hemp flower contains approximately one percent of Delta-8 THC; therefore, in order to extract Delta-8 THC, manufacturers must synthetically produce the compound to have enough to make it economically viable for consumers to obtain a legal high.

When the DEA revised its regulations in 2003 to reference both natural and synthetic THC, it did not define “synthetic.” As with other undefined terms, we look to the everyday meaning of “synthetic” from Merriam-Webster Online Dictionary, where it is defined as, “relating to, or produced by chemical or biochemical synthesis.” This makes Delta-8 THC, technically, illegal because hemp-derived synthetic or natural cannabinoids are federally prohibited, according to the DEA’s interpretation.

This interpretation places currently underwritten industries that manufacture, distribute, and sell Delta-8 THC in jeopardy. Consumers usually obtain their Spice, Kratom, or K2 from the same distributors and purveyors of CBD. A former supplier of Delta-8 THC sued the DEA in the hopes of having the courts interpret regulatory language, while other manufacturers are ignoring the DEA’s interim rule much like marijuana distributors have ignored the DEA previously.

Insurers are not aware that underwriting policies and processing claims for CBD may be just as illegal as THC due to the method of extracting the compound. Likewise, if CBD is processed from industrial hemp, there is no regulatory oversight, which means CBD manufacturers are free to boast their products’ curative effects with audacity.

Other Family Affairs

Many insurers are skittish about entering the marijuana marketplace due to the conflict of state and federal laws, and only a select few are currently underwriting THC endeavors. Likewise, financial institutions are hesitant to offer marijuana distributors and growth facilities bank accounts due to federal money-laundering rules, leaving THC, which has a reputation in the Cannabinoid Family for being a bad influence, out in the cold. However, because everyone is paying attention to it, the marijuana industry is fairly well-regulated via the states (if not federally).

Delta-8 THC’s heyday may be nipped in the bud before it even begins, because, like its cousin, CBD, it undergoes a chemical process making it a synthetic cannabinoid, which the DEA strictly interprets as an illegal, Schedule 1 drug.

Having this knowledge when underwriting and selling a policy and handling claims is of the utmost importance in order to best protect the insureds who are friends of the Cannabinoid Family.

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