



Cannabis Insurance Coverage and the Impact on the Insurance Industry - Episode #119

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Guest Attorneys: Jason Taylor and Jeremy Macklin of Traub Lieberman Straus & Shrewsberry LLP

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John Czuba: Welcome to the Insurance Law Podcast, the broadcast about timely and important legal issues affecting the insurance industry. I'm John Czuba, Managing Editor of *Best's Directory of Recommended Insurance Attorneys*.

We're pleased to have with us today attorneys Jason Taylor and Jeremy Macklin from the law firm of Traub Lieberman Straus & Shrewsberry, LLP, with offices in New York, New Jersey, Connecticut, Illinois, California, Florida, and London.

Jason Taylor is a Senior Associate with the firm. He's in the Chicago office, where he concentrates his practice in the areas of insurance coverage, excess monitoring, professional liability, and general liability.

Jason primarily represents insurance companies in complex claims disputes and declaratory judgment actions encompassing both first and third party coverage disputes involving primary and excess liability policies. Jason may be contacted at jtaylor@traublieberman.com.

Jeremy Macklin is a Senior Associate with the firm, where he practices in the firm's insurance coverage group, also in Chicago. Jeremy represents insurance and provides coverage advice on a wide range of commercial lines policies, including liability policies, property policies, and excess insurance policies.

His coverage experience includes policy interpretation, extra contractual liability issues, and litigation of declaratory judgment actions. Jeremy may be contacted at jmacklin@traublieberman.com.

Today's topic is cannabis insurance coverage and the impact on the insurance industry. Jason, we're going to start out with you today. Can you tell us what the current status of marijuana legalization is, and why is this issue important to insurance carriers?

Jason Taylor: Thanks, John, first of all, for having us on. It's a pleasure.

The legalization of marijuana, whether for recreational, medical purposes, is such an interesting issue. It's so new. Within the last few months, we've had the 24th and 25th states legalize medical marijuana. The most recent two were Pennsylvania and Ohio.

In addition, four states – Washington, Colorado, Oregon, Alaska, and the District of Columbia – have legalized marijuana for recreational use. Coming up, here in November, we've got another nine states, I believe it is, the last count, that have medical marijuana on the ballot or in a legislative initiative, and then another five that are seeking to legalize marijuana at the recreational level.

We're at a tipping point here. We've got about half the states that have legalized medical marijuana in some form or another, and potentially, by the end of the year, a very large swath of states that will have recreational marijuana. This is important, of course, because of money, like anything.

The market and the size of the industry is really staggering for how new it is. We've seen differing statistics, but by, say, 2020 or in the next couple of years here, there's estimates out there that the market will be something like \$20 billion.

That could even be higher, so really large, and in this exploding market, you can imagine, there's numerous businesses requiring new or specialized or additional insurance to cover cannabis and related operations.

John: Jason, what is the Controlled Substances Act, or CSA, and what does that mean for individuals and for businesses?

Jason: The Controlled Substances Act is the Federal law that sets out US drug policy, and regulates the manufacturing, possession, use, distribution of drugs and other substances. Drugs and other substances, chemicals, to make drugs, are classified into five schedules, from one to five.

Marijuana's in the Schedule 1 classification, which is the highest and most dangerous class of drugs. We're talking about drugs like LSD, heroin, ecstasy, the really bad ones. Schedule 1 drugs are typically those you'll find as having a high potential for abuse, can lead to psychological or physical dependence, and no currently accepted medical use.

That's where marijuana has been scheduled. What this really means for the rest of us is that it's illegal to possess, distribute, or use marijuana for any purpose under Federal law, and that's regardless of what the states have done with either medical or recreational use.

In general, Federal law will trump state law. Any time you're using, distributing, or selling medical marijuana, say, even if it's legal under the state level, you're violating Federal law.

This conflict between state law and Federal law, the Controlled Substances Act, and how the Federal government is going to enforce the Controlled Substances Act, is really the big issue here for business and insurers.

John: Jeremy, what are some of the common features of medical marijuana statutes?

Jeremy Macklin: I'm going to address two common features. First, there's generally a specific class of individuals to whom protections are afforded. By protections, I mean immunity from arrest, criminal prosecution, property forfeiture, penalties, and things of that nature.

For example, New Mexico and Illinois have statutes that afford protections to registered, qualifying patients, registered designated caregivers, physicians, registered cultivation centers, and registered dispensing organizations.

Second, there is a group of qualifying patients. They also must be suffering from one or more qualifying conditions. The list of qualifying conditions varies from statute to statute.

Second, some statutes contain provisions relating to marijuana use at the workplace, and employer protections. For example, Ohio and Illinois medical marijuana statutes provide that nothing in the statute shall prohibit an employer from forcing a policy concerning drug testing or zero tolerance policies.

There are other states that prohibit employers from firing medical marijuana users for failing a drug test without evidence of impairment on the job. Medical marijuana statutes are generally lengthy, but these are two common provisions that should be identified by any attorney seeking to represent a client who is a medical marijuana user.

John: Jason, what are the insurance risks associated with the cannabis industry and legalization of medical and recreational marijuana?

Jason: As you can imagine, there are some particular risks to the cannabis industry, and that goes beyond just maybe your typical property coverage or third party liability coverage from a general business operation standpoint.

For example, products liability and food safety are some big ones here. The marijuana itself, once it's harvested, is a product. You sell it. There have already been cases alleging some injury or adverse effect from the use of the product, either against a grower or retailers.

These can come in the forms of improper labeling or the use of certain prohibited fungicides or pesticides in growing the crop, edibles and infused products.

You may have heard about these. These are the products that you ingest that contain THC. It's probably the fastest growing sector out there. We're starting to see now claims against these companies, these businesses for some adverse reaction or inadvertent side effect. That's really your essential products' liability claim – either a failure to warn, improper labeling, or something of that nature.

A lot of states require cannabis businesses to maintain and procure coverage. Washington and Colorado are example. Professional liability coverage is another specialized area of need, medical malpractice insurance for physicians, for example. They evaluate patients and recommend marijuana.

Dispensaries are in that same boat, some professional liability concerns there. They're responsible, oftentimes, for validating and tracking medical marijuana cards. This will create a risk for the dispensary to properly do that, to validate those individuals that come into their facilities to purchase marijuana.

If you go to maybe a more traditional property site, premises liability and staff coverage are big issues. Most of these businesses still operate as cash only businesses, due to lack of accessible banking.

You have a situation where you've got a highly valuable, small, portable product, and large amounts of cash. It makes the cannabis businesses prime targets for, say, theft, or employee theft even, from both outsiders and employees. Businesses need substantial insurance to protect from these risks.

I'll identify one last one here. It's a growing concern nationally. It's cyber liability coverage – data breach, data theft coverage – from mishandling patient and customer information. These businesses are dealing with a large number of patients, a lot of them have serious medical conditions, and they're providing all sorts of patient and personal information.

This makes cyber risk a real risk for the industry, and something that the cannabis industry is likely to need specialized coverage for. These are just a few. Of course, there are probably many specialized areas, but those are the ones that jump out here.

John: Jeremy, is there any case law, or are there any decisions out there that impact insurance carriers, or provide some type of guidance to the insurance industry?

Jeremy: Most of the cases in the 2000s and the early 2010s have addressed whether Workers' Compensation insurers are obligated to provide coverage for medical marijuana, legally prescribed under state law. Also, in the employers' liability context, where an employer can legally terminate an employee who tests positive for medical marijuana while at work.

There's a recent case. It's a Federal case out of the US District Court for the District of Colorado, which was handed down in February of this year. That provides some guidance to insurance companies on issues of insurance coverage.

That case is captioned *Green Earth Wellness Center versus Atain Specialty Insurance Company*. I'll briefly go through some of the important facts, and a couple of the takeaways there.

The insured in that case was Green Earth. They operated a retail medical marijuana dispensary and a nearby growing facility. Green Earth purchased commercial property and commercial liability coverage from *Atain* in connection with its business operations.

Of course, a wildfire in Colorado impacted Green Earth's business. The specific claim was that smoke and ash from the fire overwhelmed the building's ventilation system, and caused damage to Green Earth's medical marijuana plants.

The opinion is long, but there are a few important takeaways. First, rather than applying Federal law – the case was pending in a Federal jurisdiction – the court applied the law of the state in which the lawsuit was brought, so in this case, Colorado.

This is important, because the court did not apply Federal law to find that the insurance policy was buoyed on grounds of illegality. For example, if a contract governing an illegal activity, which is illegal under Federal law, the court expressly rejected Green Earth's argument that its own policy was illegal. That's important.

The second takeaway, the court also considered whether marijuana was contraband under a contraband exclusion. The court looked to what they called conflicting signals that the Federal government has given regarding marijuana regulation, and the government's "ambivalence" towards enforcement of the Controlled Substances Act.

This is important, because it showed the diminished importance of the Controlled Substance Act to courts, which is in line with Coleman memo that came out in 2013. That's important, because it shows a sign that liability and property policies can be interpreted to provide coverage for marijuana activities despite the fact that the activities are illegal, currently, under Federal law.

Again, the case is much more complex and nuanced than what I've explained today, but in the short time we have, I believe that these are the two most prominent points from that February decision.

John: Jeremy, can you tell us what rules apply to attorneys trying to advise and assist those connected to the cannabis industry?

Jeremy: I think that the main rule to focus on here is Rule 1.2d of the Model Rules of Professional Conduct, which have been applied substantially in a similar fashion to the Model Rules by many states.

That rule allows an attorney to provide services that are strictly advisory regarding the validity, scope, meaning of law, but also at the same time, precludes that attorney from assisting clients from breaking the law or advising clients to commit fraudulent or criminal acts.

An attorney representing a client connected to the cannabis industry in a state where medical and/or recreational marijuana are legal may be in violation of Federal law, depending on the scope of the representation, and therefore, faces a question. "Am I violating Rule 1.2d with respect to the prohibition against advising and counseling a client regarding criminal or fraudulent acts?"

Jurisdictions where medical and/or recreational marijuana is legal have taken different approaches for providing attorneys with guidance as to how Rule 1.2d can be interpreted.

For example, in October of 2015, Illinois amended its version of 1.2d to provide that a lawyer can counsel or assist a client in conduct expressly permitted by Illinois law, that may violate or conflict with Federal law, so long as the lawyer advises the client about the Federal law and its potential consequences.

Hawaii took a similar position, and they did that through its Supreme Court ruling, which is, I believe back in 2013 as well.

You have some states such as Arizona and California where the Rule 1.2d has not been expressly amended, but state bars have set forth what they're calling memoranda or opinions which provide some guidance as to how the attorneys are supposed to act. Those opinions have said that these attorneys can represent ethically a marijuana based business under Rule 1.2 and at least as those state bars have interpreted the rule.

Finally, there are jurisdictions such as Maine that have amended Rule 1.2 to expressly preclude attorneys from representing cannabis related businesses, on the basis that the proposed client is known to be in violation of the Federal criminal law.

The takeaway is really that lawyers should engage in a case by case analysis of the jurisdiction, and the scope of the desired representation to determine whether taking on the client is ethical.

John: Jason and Jeremy, thank you both for joining us today.

Jeremy: Thank you.

John: We've spoken with attorneys Jason Taylor and Jeremy Macklin from the law firm of Traub Lieberman Strauss & Shrewsbury LLP.

A special thanks to today's producer, John Weber. Thank you all for joining us for the Insurance Law Podcast. To subscribe to this audio program, go to iTunes or our Web page, www.ambest.com/claimsresource.

If you have any suggestions for a future topic regarding an insurance law case or issue, please email us at lawpodcast@ambest.com. I'm John Czuba, and now this message.

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