





The Stuff of **DREAMS**—or **NIGHTMARES?**

**The Product Liability Claims Menace
Lurking in the Marijuana Marketplace**

BY CHANTAL A. ROBERTS

The marijuana marketplace can be a sweet dream for investors with hopes of getting rich quickly. *Forbes*, *The Motley Fool*, and *CNBC's Fast Money* co-host Tim Seymour have produced several articles about investing in marijuana stocks.



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But these dreams can quickly turn to nightmares due to the conflict between federal law—which still lists marijuana as a Schedule I drug—and the states that have legalized marijuana. Despite being federally illegal, though, the marijuana industry needs insurance. It has the same property perils as every other business, and marijuana product liability claims are the industry's new specter on the horizon.

Marijuana industries, such as cultivators, manufacturers, and dispensaries, need product liability coverage as their products become more mainstream. The World Health Organization's (WHO) 2019 recommendation to the United Nations was to remove cannabis' low-THC component from its scheduled substances list. The 2019 Marijuana Business Factbook predicts that the cannabis industry will have a total economic impact of \$39.2-\$48 billion. By comparison, the United States beer market is \$70 billion. Both industries claim to have 130,000 full-time workers in the U.S.

Unfortunately, many in the marijuana industry do not understand why they should buy product liability insurance, according to John Briggs, of Specialty Agriculture Risk and Financial Association LLC. (SARFA), in a recent MiBiz interview. And, from an insurer's perspective, general liability claims by their nature are low frequency and high severity. With no underwriting history, carriers find it difficult to offer liability coverage to the marijuana industry even though states mandate liability of certain policy-limit amounts.

WHAT THE STATES REQUIRE

According to the state statute, a registered marijuana dispensary (RMD) in Massachusetts must maintain "general liability insurance coverage for no less than \$1 million per occurrence and \$2 million in aggregate, annually, and product liability insurance coverage for no less than \$1 million per occurrence and \$2 million in aggregate,



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annually, except as provided in 935 CMR 502.105(10)(b) or otherwise approved by the [Massachusetts Cannabis Control Commission]. The deductible for each policy shall be no higher than \$5,000 per occurrence."

Obtaining product liability coverage can be a scary proposition because of a lack of insurers, non-form following excess insurers, lack of underwriting history, and high premiums. Further, a majority of the policies are manuscript in form because standardized policies have illegal acts, the Controlled Substance Act, and cannabis-and-its-derivatives exclusions. Currently, liability coverage

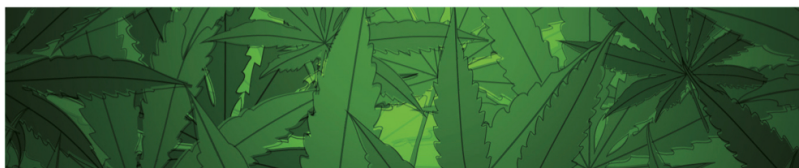
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is available in a limited amount in the excess and surplus markets since admitted carriers are still hesitant to offer products due to stigma and fear of prosecution. However, insurers need not be worried, said Phillip Skaggs, of the American Association of Insurance Services Inc., at a DRI Cannabis Law conference in May 2019. He stated that there have been no federal suits to date against insurers of cannabis companies. And insurers may indeed be starting to get more involved on the product liability side.

Norm Ives, of Worldwide Facilities LLC, said at the same conference that insurers are pulling back from marijuana property coverage due to natural disasters, but product liability is now easier to find. “Coverage is uneven in the cannabis space right now,” Ives said. “This is due to wildfires in California, which have increased property damage claims.” Ives believes insurers are embracing liability coverage despite a lack of claims history. Ives said the multi-million-dollar start-ups are attractive for insurers and cited two A+ carriers that have entered the market for liability coverage.

The product liability nightmare can begin when a claimant triggers coverage from the use of a covered product, and for which the insured had legal liability. These claims are foremost in the minds of insurers as seven out of eight “judicial hellholes” are medicinal marijuana states. Potential vulnerabilities for policyholders include labeling, packaging, employees’ actions, and quality control.

The lack of labeling, defective packaging, and contamination are the most worrisome sources of claims. States’ regulations—and insurers—struggle to keep up in this new world. Vermont’s marijuana-labeling guidelines state that the label must be affixed to all dispensed marijuana packaging. It says the label “shall identify the particular strain of marijuana and the weight of marijuana contained within the package in gram or ounce units. Marijuana strains shall

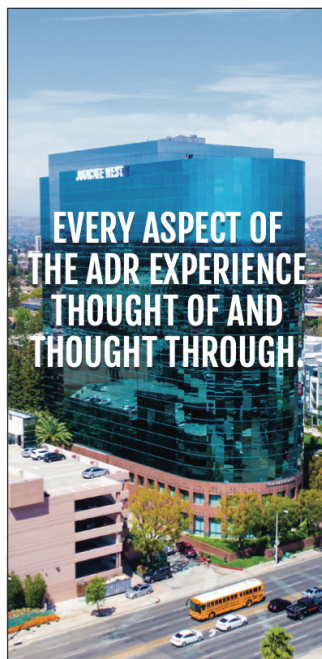


What’s in a Name?

The cannabis industry prefers to use the word “cannabis” when referring to “marijuana” because of the negative connotation of marijuana, but words mean something. Marijuana and hemp are genetically from the same plant: cannabis. However, hemp has no more than .03 percent by dry weight of tetrahydrocannabinol (THC), the psychoactive drug in marijuana. Cannabidiol (CBD), primarily the non-psychoactive chemical of cannabis, is in both hemp and marijuana. This means CBD, too, comes from cannabis. So, using the word “cannabis” for “marijuana” may not be accurate for the insured’s insurance needs. These facts are important since some insurers exclude “cannabis products and its derivatives.”

As an example, consider a convenience store that sells CBD oil. The store is named, along with the distributor and manufacturer, in a lawsuit regarding an allergic reaction a customer had from the oil. The store’s carrier excludes cannabis derivatives, so the store’s claim may be denied. Likely, neither the carrier nor the store wants to insure/protect marijuana, but “cannabis” may be too broad of a definition for the insured’s business plan.

Distributors, manufacturers, laboratories, and others should be aware of these exclusions when discussing policies for their operations and products, or they may find themselves without coverage.



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reflect the properties of the plant.”

Minnesota Revisor of Statutes on Packaging and Labeling states that the text on the label “must not include any false or misleading statements regarding health or physical benefits to the patient...,” while Montana has no marijuana labeling and packaging requirements as of June 2018.

Delaware’s labeling guidelines state that the package shall include “(d)etails indicating (1) the medical marijuana is free of contaminants....” Toxic products found in the marijuana bud can be dangerous. But the term “organic” is governed by the National Organic Program (NOP), a federal program, and currently there are no “organic” marijuana crops since marijuana is federally ineligible to obtain the moniker. The crop may be farmed in a pesticide-free manner, but the labeling must be clear that it is not “organic.” Pesticides on the marijuana bud cannot be washed off or removed; therefore, when the bud is processed, these toxins can become dangerous chemicals.

RECURRING NIGHTMARES

Laboratories that process marijuana into edibles may be in for nightmares

when product liability claims arise. The industry is moving away from inhaling marijuana and toward edibles. Unfortunately, edibles are difficult to dose. Edibles can take up to two hours to reach full effect, and an uneducated public may over-consume. In marijuana-linked visits to the emergency room, edibles have more concerning symptoms: Eighteen percent of these visits are for acute psychiatric symptoms, as opposed to 11 percent for smokers.

And manufacturers may have their own nightmares with respect to product liability or completed operations claims. For example, a California cannabis company, WellGreensCA, and its executives face federal criminal charges for dumping 28 drums of ethanol waste, weighing 1,500 pounds, without the proper federal permits. Further, manufacturers could have legal liability for marijuana vending machines used to streamline the purchase of edibles and pre-rolled joints. While these vending machines are found in dispensaries, they are difficult to oversee and ensure, through the normal two-step process, that the customer is of age and only receives the legal amount of product.

Exploding vape pens causing marijuana oil burns are another manufacturer product liability concerns.

Dispensaries’ liability can arise from their employees, known as “budtenders,” and completed operations or work. Budtenders, because they are not pharmacists, may not understand interactions between marijuana and medically prescribed drugs, and may recommend an incorrect product or dosage. Very few budtenders have formal or standard training. Training facilities such as Oaksterdam University are beginning to offer classes in budtender and patient relations. Uninformed budtenders may open the dispensary up to other liability concerns such as underage selling or dram shop-like claims similar to liquor liability claims—but instead of the customer driving under the influence of alcohol, cannabis is the involved drug.

Product liability policies do not cover every claim. The claim must allege bodily injury or property damage, and there must be a direct connection between the defective product or work and the injury/damage. Further, the bodily injury or property damage must take place away from the premises that the insured owns or rents.

To avoid potential nightmares, the marijuana marketplace needs product hazard analysis and warning placement, packaging, disclaimers and liability-limiting agreements, and insurance to protect its fledgling industry. Standard operation procedure manuals, job descriptions, and employee training, along with edibles education for the budtenders, may also help ease the terror of a product liability claim. Then, the insurance industry can begin focusing on the next nightmare: canna-gourmet businesses (cannabis infused meals/foods) and canna-lounges (smoke dens, similar to a bar, open to the public for consumption of marijuana). ■

Chantal M. Roberts, CPCU, AIC, is president of CMR Consulting and former director of claims. cmroberts@cmrconsulting.net