Legal Pot Leaves Product Liability Attys Dazed, Confused

By Greg Ryan

Law360, New York (January 10, 2014, 8:34 PM ET) -- The legalization of marijuana in Colorado earlier this month has created a budding new industry in the state, but the undercooked regulatory scheme governing the product — particularly the mandatory health warning labels — exposes sellers to potentially significant liability.

Dispensaries in Colorado began selling marijuana to consumers Jan. 1, a development made possible by voters' 2012 approval of a ballot initiative allowing for recreational use of the drug. Voters in Washington state approved a similar measure on the same day, but no legal sales have yet taken place, making Colorado the first state to legalize pot, in practice, in the country.

The rollout of the law has been bumpy, not least because marijuana is still an illicit drug at the federal level. The Obama administration is allowing Colorado to implement the law, as long as it does not result in the distribution of marijuana outside the state or to minors. Still, dispensaries reportedly have had difficulty finding the child-resistant packaging the state mandates for the product, and controversy has swirled around banks’ ability to take money generated by marijuana sales.

The road will get only bumpier when the first product liability lawsuits are filed by purchasers, particularly because many marijuana sellers are small businesses that may not have product liability insurance, according to attorneys.

"All it takes is one significant claim ... and all of the sudden you've got lots and lots of bet-the-company cases involving these small businesses,” Snell & Wilmer LLP partner Lee Mickus said.

The dispensaries could be targeted by claims that the marijuana caused a lung injury or lung cancer, attorneys say. Under state regulations, sellers are required to include a warning against the use of heavy machinery while high on marijuana, as well as cautionary language about the "additional health risks" associated with use of the drug while pregnant, breastfeeding or planning to become pregnant.

The only mandatory health warning applicable to all users, however, says only that "there may be health risks associated with the consumption of this product.” A plaintiff suing a dispensary could argue that such warning language is too vague, and that the grower or seller should have warned about the risk of the specific injury at issue, according to Mickus.

"Is that kind of product labeling sufficient to cover manufacturers? A lot of product liability law would indicate no, there has to be more specific language there,” Mickus said.

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One possible reason behind the sparse language is that the warning requirements were issued by the Colorado Department of Revenue, not the Department of Public Health and Environment.

“They’re written like a tax person would write them, as opposed to like a human health or human factors kind of person would write them,” Mickus said.

Dispensaries could face lawsuits if the products become contaminated by a harmful substance like mold, as well. Growers and sellers are not required to test the products for mold, bacteria, and pesticides and other harmful chemicals. Instead, if they don’t perform the tests, they’re required to affix a label that says, “This package has not been tested for contaminants.”

False advertising class actions are also a possibility, according to attorneys. The regulations prohibit growers or sellers from making “any false or misleading statements regarding health or physical benefits to the consumer,” but other types of claims could be targeted, Davis Graham & Stubbs LLP partner Jordan Lipp said.

“You could imagine a consumer saying, ‘You said this contained so much THC, but it didn’t contain that, so I’m forming a class action,’” Lipp said.

In addition, the state regulations prohibit growers and sellers from marketing marijuana “in a manner that specifically targets individuals under the age of 21,” but only explicitly names cartoon characters as inappropriate.

“What’s a manner that targets an individual under 21? That’s kind of a vague standard,” Charles Joern of Joern Law Firm said.

Colorado legalized medical marijuana in 2000, but the use of the drug has been truly tested in the courts only in the context of employment law, not product liability, according to Lipp.

“These are things courts are going to have to slowly work through and slowly test over the next number of years,” Lipp said.

The legalization of pot in the state also has shaken up food regulation, as Colorado has authorized the sale of marijuana in food, ointments and tinctures. Marijuana-infused food must carry the same general warning that “there may be health risks” associated with the product, along with an additional warning that “this product was produced without regulatory oversight for health, safety or efficacy.”

The U.S. Food and Drug Administration typically regulates food and dietary supplements, but with the Obama administration turning a blind eye to the sale of pot in Colorado, attorneys say the agency is in a bind: Marijuana is a new dietary ingredient that would attract its attention under other circumstances, to say the least.

“On the one hand, you have the FDA proposing to rescind the [generally recognized as safe] status of partially hydrogenated oils because they contain trans fat, and on the other hand we have a state where foods contain marijuana,” Ricardo Carvajal of Hyman Phelps & McNamara PC said. “You tell me on what basis, at least under the [Food, Drug and Cosmetic Act], you can add marijuana to a food.”

---Editing by Elizabeth Bowen and Richard McVay.

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