Growing Insurance Issues with the Rise of Medical and Recreational Marijuana

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Panel Members:

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- Michael McGrory, Partner, SmithAmundsen LLC
- Mark Passerini, President, Illinois Cannabis Industry Association
- Tim Pietrucha, Account Executive, Arthur J. Gallagher
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Medical Marijuana Liability – the Legal Climate

• Legalized marijuana for medicinal use is a relatively new concept:
  – California was the first state to legalize Medical Marijuana in 1996
  – It is currently legal in some form in 25 states and legal for recreational use in 4 states and the District of Columbia
  – Medical Marijuana is projected to grow to a $15 billion per year industry by 2019
  – Marijuana remains a Schedule I drug under federal law

• Case law clarifying statutory rights and duties is sparse
Conflicts Between State and Federal Law

- Informs the discussion on liabilities surrounding the manufacture, distribution and possession of Medical Marijuana
- Federal position: Marijuana is a Schedule I drug – it has no acceptable medical use but it is an inefficient use of federal resources to prosecute Medical Marijuana related crimes when the action is in compliance with state law
- State’s Medical Marijuana laws differ but common elements include:
  - Available only for enumerated conditions
  - Marijuana access must be pre-approved by a licensed physician
  - Dispensaries are strictly licensed by the state
Medical Marijuana and Professional Liability

• Dispensary Risks:
  – Dispensing risk
  – Failure to validate Medical Marijuana card
  – Interstate Commerce considerations

• Physician Risks:
  – Failure to properly evaluate a patient for Medical Marijuana use
  – Telemedicine risks/compliance with Medical Board regulations
• Risks:

• Premises Security Consideration:
  • Dispensaries and growers operate as all cash businesses
  • Increasingly have armed guards on premises

• Products Liability Exposures:
  • Dispensaries that grow their own product
  • Growing market for edibles
The next big question in Medical Marijuana liability exposure: Can an employer terminate an employee for testing positive for marijuana use if that employee properly obtains the drug for medicinal purposes?

- State Law – Split between states
- Case Law: Coats v. Dish Network; James v. City of Costa Mesa
- Federal Drug Free Workforce Act
Medical Marijuana and Fidelity Risk

• Employee Theft
  – The largest area of property loss for Medical Marijuana dispensaries
  – An estimated 90% of products and financial loss in the Medical Marijuana industry arise out of employee theft
• Is a Worker’s Compensation Carrier required to cover Medical Marijuana as a treatment for a disability or injury?
  – There is no clear trend in the case law
  – Proponents argue: 1) It is a safer and effective treatment for pain; 2) A physician authorization makes it a reasonable and necessary treatment option
  – Opponents argue: 1) It is illegal at the federal level; 2) It is not an FDA approved treatment option; 3) There is no proof of efficacy beyond anecdotal evidence; 4) There are no evidence-based guidelines for use; 5) It has a negative impact on performance
What is the Future of Medical Marijuana

• Will marijuana for medical use become legal at the federal level?
  – Public support
  – CARERS Act
  – 2014 Appropriations bill
• Meetings at 4:20
• Funny smell from the conference room
• Branded rolling papers
• “Weed Like to be Your Lawyers”
• No joke
  – Illinois: 10,000 patients/$25-45 million
  – Nationally: $2.6 billion
  – 2020 (if legal in US): $35 billion/year
BACKGROUND

• Compassionate Use of Medical Cannabis Pilot Program Act—Jan. 1, 2014

• Illinois Legislative Findings
  – Cannabis as medicine for 5,000 years
  – Confirmed by modern medical research
  – Other states have adopted successfully
  – State not required to enforce federal law
FEDERAL LAW

- Schedule I Controlled Substance
  - High potential for abuse
  - No currently accepted medical use
  - Lack of accepted safety for use
- FDA process, not popular vote
- But, feds acknowledge the trend
  - 23 States and D.C. with medical use
  - 4 States and D.C. with rec adult use
• Distribution to Minors
• Criminal Enterprises
• Interstate Transfer
• Pretext for Other Illegal Activity
• Violence/Firearms
• Drugged Driving
• Use of Public Land
• Possession on Federal Property
FEDERAL PROHIBITION ISSUES

- Interstate Commerce
- Intellectual Property
- Prescriptions
- Insurance
- Lawyers
- Taxes
- Banking
• Bank Secrecy Act: suspicious activity
• Treasury Guidance 2-14-2014
  – How to bank MMJ and comply with BSA
    • Cole Memo
    • Due diligence
      – Communicate with state
      – Review application
      – Understand the business
      – Ongoing monitoring / SARs
      – Red flag transactions
Compassionate Use of Medical Cannabis Pilot Program Act

- 410 ILCS 130/1 et seq.
- Pilot Program—expires Jan. 1, 2018
- Only for “Debilitating Medical Condition”
DEBILITATING CONDITIONS

- Include:
  - Cancer
  - Glaucoma
  - HIV
  - AIDS
  - Hepatitis C
  - Crohn’s
  - Alzheimer's
  - Muscular Dystrophy
  - Rheumatoid Arthritis
  - Spinal Cord Injury
  - TBI
  - MS
  - Parkinson’s
  - Lupus
  - Residual Limb Pain
  - Severe Fibromyalgia
  - Newly added conditions
WHAT WILL SYSTEM LOOK LIKE

• Cultivation → Dispensary → Patient

• Ancillary Businesses to Assist

• Regulation/Enforcement by Agencies
ROLES OF REGULATORY AGENCIES

• DFPR
  – 68 IL IDC 1290 et. seq.
• Department of Agriculture—Cultivators
  – 8 IL IDC 1000 et. seq.
• Department of Public Health—Patients/Drs
  – 77 IDC 946 et seq.
• (1) Resident (2) qualifying medical condition (3) signed certification who has (4) background check and is (5) 18+.

• Excluded offense: violent crime or controlled substance felony (unless medical cannabis)
• 2.5 ounces per 14 day period
  – May be increased per DPH approval
• No use in schools, correctional facilities, motor vehicles, public places, near minors
• Cannot use if active law enforcement or firefighter
PHYSICIANS

May Recommend if:

• Bona fide physician-patient relationship beyond certification for cannabis
• In-person, full assessment within 90 days
• Assessment of patient records for 12 mos.
• Explains risks and benefits
• Record-keeping requirements
May Not:

- Accept/off er remuneration to patient, dispensary, or cultivation center
- Examine a patient at a dispensary
- Serve on board or as employee
- Advertise
- Own an MMJ business, if certifying
• 60 statewide
• Business and Operations Plan
• Security Plan
• Recordkeeping and Inventory Plan
• Suitability of Proposed Dispensary
• Financial Disclosures
• Bonus
CULTIVATION CENTERS

- 22 statewide
- Cultivation Plan
- Security Plan
- Suitability of Proposed Facility
- Product Safety & Labeling Plan
- Staffing and Operations Plan
- Business Plan
- Bonus (each)
REGULATORY THEMES

- Patient Access—funds, experience
- Transparency—complete disclosure
- Security—record-keeping, alarms, cameras, delivery procedures, background
- Safety—location, packaging, recall, lab testing, infusion, inspections
- Economic—taxes, jobs
EMPLOYMENT ISSUES

• Employment protection measures
  – May prohibit at work
  – May not discriminate unless federally funded
  – Due process

• ADA and FMLA issues

• Workers compensation
WHAT THE FUTURE HOLDS

• Extension/Expansion Act?

• New Conditions

• Justice System (Evidence, DUI, Violations)

• Discrimination and Employment

• Banking, Insurance, Etc.

• ???
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Initial Coverage Considerations

- Controlled Substances Act, 21 U.S.C. 801 et seq. (the “CSA”)
- Gonzales v. Raich, 545 U.S. 1 (2005) (Supremacy Clause requires that where state and federal law conflict, federal law prevails)
• **Facts:**
  – Theft claim of 12 marijuana plants;
  – Claim submitted under Homeowner’s Policy;

• **Discussion:**

  1. **“Insurable Interest”:** Requires economic, lawful interest in property;

  2. Federal law: Controlled Substances Act (“CSA”); *Gonzales* and Supremacy Clause
• **Ruling:**

  Plaintiff’s possession, even for state authorized use, violates Federal law. Requiring insurer to pay for marijuana plants is contrary to Federal law and public policy.

• Overlooked, but recognizes “insurable interest” in marijuana plants under State law.
Worker’s Compensation Insurance

• Reimbursement Required?
  – “Reasonable & Necessary”; Proof of Efficacy?
  – No FDA Approval, Official Disability Guidelines
  – Statutory Interpretation:

  Statute shall not be construed to require a governmental, private, or any other health insurance provider...to be liable for any claim for reimbursement for the medical use of marijuana

• Cockrell v. Farmers Ins., 2015 Cal. Wrk. Comp. P.D. LEXIS 95
• Todor v. Northland Farms LLC, 2011 MIWCLR (LRP) LEXIS 133
Recent Trend?: New Mexico


**Question:** Whether employer and worker’s comp. insurer must reimburse injured worker for medical marijuana expenses pursuant to lawful use under Medical Marijuana Statute
1. “Reasonable & Necessary” Requirement
   – Statutory Interpretation/WC Guidelines
   – Will not second guess enrollment in State Cannabis program
   – Fact based; case-by-case analysis of evidence in the record
2. Conflict with Federal Law

*Argument*: would be illegal to reimburse worker for medical marijuana which is illegal under Federal law.

- **Vialpando**: 
  - acknowledges Gonzales’ Supremacy Clause holding
  - No statute employer/insurer violates by reimbursing medical marijuana costs
• **Lewis:**
  – Insurer/employer argues reimbursement “conspiracy” and “aiding and abetting” violation of CSA

• **Discussion:**
  - DOJ Memoranda 8 Priorities:
    - **Preventing** distribution to minors; revenue to criminal enterprises; diversion of marijuana to other states; pre-text for illegal drugs/activity; violence in cultivation/distribution; drugged driving and adverse health consequences; growing on public lands; and use on federal property.
– Medical Marijuana not among priorities;
– Beyond 8 priorities, DOJ “generally defer to State and local authorities.” Vialpando;
– Consolidation and Further Appropriations Act (2014) – no funds to prevent implementation of MM laws.

Employment Practices Liability

- Brandon Coats v. Dish Network, LLC, 350 P.3d 849 (Colo. 2015)

• **Facts:**
  – Coats was quadriplegic, licensed Medical Marijuana recipient
  – Wrongful Termination claim
  – Alleged violation of Colorado “lawful activities” statute

“Lawful Activities Statute”: Discriminatory to terminate employee for engaging in “lawful” activities outside of work.
Coats, Cont’d.

• **Discussion:**

- Term “lawful” not defined in statute.
- “Lawful” not restricted to state law only.
- Use of marijuana still prohibited by Federal law. See CSA. No medical marijuana exception.
- **Gonzales:** Supremacy Clause unambiguously provides that if there is any conflict between state and federal law, federal law shall prevail.
Coats, Cont’d.

• **Ruling:**
  – Nothing in legislative intent to extend statute to activities unlawful under federal law;
  – Because medical marijuana use was unlawful under federal law, it did not fall within statute’s protection for “lawful activities”;
  – Employees who engage in medical marijuana use under Colorado’s Medical Marijuana Statute are not protected from wrongful discharge under “Lawful Activities Statute.”
• **Ruling:** Private employers not required to accommodate use of medical marijuana in workplace

  – Does not address Supremacy Clause or Federal law;
  – Statutory Interpretation: statute applies as defense to prosecution or state action;
  – ID’s other similar statutes: Mont., Wash., Cal.
  – **Illinois:** “Nothing in this Act shall prohibit an employer from enforcing a policy concerning drug testing, zero-tolerance, or a drug free workplace provided the policy is applied in a nondiscriminatory manner.”
Coats/Wal-Mart Discussion

• No obligation to accommodate Medical Marijuana under company drug policies;
• Importance of clear Drug-Policy; increased risk of lawsuit from non-MM employees?
• Medical Marijuana in Workplace:
  – Liability Insurance Issues – injury to others
  – Worker’s Compensation Issues – intoxication or impairment
• Coats potential conflict with Lewis/Vialpando?
Additional Coverage Issues


• Bowers v. Farmers Ins. Exch., 99 Wn. App. 41 (Wash. Ct. App. 2000) (damage to the insured’s rental house was covered under a landlord’s protection policy when tenant’s marijuana growing operation caused damage to the home);
• Keckler v. Meridian Sec. Ins. Co., 967 N.E.2d 18, 23-24 (Ind. Ct. App. 2012) (refusing to apply a “controlled substances” exclusion to bar coverage where there was insufficient evidence to establish accident arose out of the use of marijuana)
  – Causal connection?
  – How to measure impairment
Questions?