

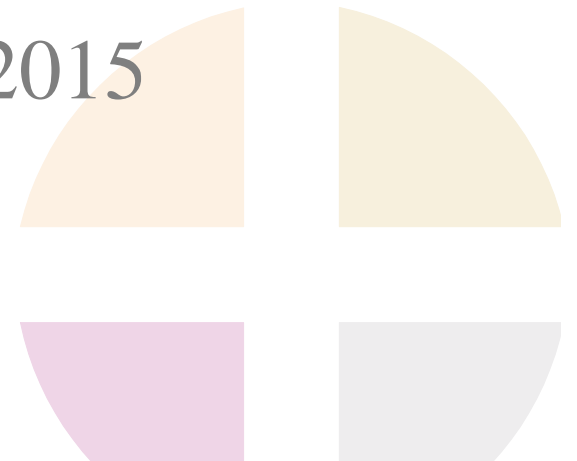


PLUS

PROFESSIONAL LIABILITY UNDERWRITING SOCIETY

Growing Insurance Issues with the Rise of Medical and Recreational Marijuana

Tuesday, September 8, 2015



Your source for professional liability education and networking.

Panel Members:

- **Deb Goldberg**, RPLU, Managing Director, Markel
- **Michael McGrory**, Partner, SmithAmundsen LLC
- **Mark Passerini**, President, Illinois Cannabis Industry Association
- **Tim Pietrucha**, Account Executive, Arthur J. Gallagher
- **Jason Taylor**, Attorney, Traub Lieberman Straus & Shrewsberry LLP

- 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

Conflict 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

- 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



Medical Marijuana and General Liability

- 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

Medical Marijuana and Worker's Compensation

- 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



TERRIBLE, HORRIBLE, NO GOOD, VERY BAD JOKES

- 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

- 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

- 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

- 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”

PLUS 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

PLUS WHAT WILL SYSTEM LOOK LIKE

- Cultivation  Dispensary  Patient
- Ancillary Businesses to Assist
- Regulation/Enforcement by 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

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/offer 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

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

- 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 protection measures
 - May prohibit at work
 - May not discriminate unless federally funded
 - Due process
- ADA and FMLA issues
- Workers compensation



PLUS WHAT THE FUTURE HOLDS

- Extension/Expansion Act?
- New Conditions
- Justice System (Evidence, DUI, Violations)
- Discrimination and Employment
- Banking, Insurance, Etc.
- ???

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PLUS 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.

- 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

- Vialpando v. Ben's Auto. Servs., 2014 NMCA-084 (N.M. Ct. App. 2014) &
- Lewis v. Am. Gen. Media, 2015 N.M. App. LEXIS 74 (N.M. Ct. App. June 26, 2015)

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.

Ruling: Violation of Federal law and public policy is “speculative” in light of “equivocal” DOJ & federal public policy. Clear public policy of State expressed in statute. Insurer must reimburse medical marijuana expenses.



PLUS Employment Practices Liability

- Brandon Coats v. Dish Network, LLC, 350 P.3d 849 (Colo. 2015)
- Casias v. Wal-Mart Stores, Inc., 695 F.3d 428 (6th Cir. 2012)



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.

- *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

- *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.”

- 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?

- Nationwide Mut. Fire Ins. Co. v. McDermott, 2015 U.S. App. LEXIS 3012 (6th Cir. Feb. 24, 2015) (No coverage under Homeowner's Policy for fire loss due to insured's failure to notify insurer in change of use of premises);
- 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?