Marijuana: The Legalized “Green Rush” Impacting Insurers and Professionals

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Seattle, Washington
Panelists

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Moderator

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Agenda of Presentations & Panel Discussion

• Law and Governance of Legal Marijuana

• Market Players and Why Insurance Matters

• Insuring the Risks to Impacted Professionals

• Insuring the Risks to Impacted Employers

• Insuring the Risks to All Legally-Acting Washingtonians
“Green Rush”
An Overview of Current Cannabis Law

By Emily Harris Gant
Federal Framework
Controlled Substances Act

**Schedule I**

- High potential for abuse
- No currently accepted medical use in treatment in the US
- Lack of accepted safety for use of drug under medical supervision
Controlled Substances Act

Illegal to manufacture, distribute, dispense or possess with intent
Washington Framework
Former Medical Marijuana Rules

• Medical Use of Cannabis Act

• Qualifying medical marijuana users had an affirmative defense to criminal prosecutions

• Very limited regulatory scheme
Former Medical Marijuana Rules

2011 Amendments to MUCA

- Legislature created registry

- Authorized qualifying patients to establish collective gardens for personal use

- Local governments retained authority to regulate through zoning, business licensing, taxes, etc.
Former Medical Marijuana Rules

- US Attorneys – Nope! Threatened federal prosecution
- Governor line-item vetoed the registration system
- Left collective gardens and local authority provisions intact
- Industry virtually unregulated
Recreational Marijuana

• Initiative 502 – Passed in November 2012

• Licensing and regulatory systems

• Allows limited possession of marijuana by those 21+

• Imposed taxes on wholesale and retail sales

• Earmarked revenue for health, safety and educational uses
Recreational Marijuana – Cole Memorandum

• Congress determined that MJ is a dangerous drug

• Significant source of revenue for criminal enterprises
Recreational Marijuana – Cole Memorandum

Federal Enforcement Priorities

• Preventing distribution of MJ to minors

• Preventing revenue from sale of MJ from going to criminal enterprises

• Preventing diversion of MJ from states where it is legal under state law to other states
Recreational Marijuana – Cole Memorandum

Federal Enforcement Priorities, Cont.

• Preventing state-authorized MJ activity from being used as a cover/pretext for trafficking of other illegal drugs

• Preventing violence and use of firearms in cultivation/distribution of MJ

• Preventing drugged driving/exacerbation of other adverse health effects
Recreational Marijuana – Cole Memorandum

Federal Enforcement Priorities, Cont.

• Preventing growth of MJ on public lands

• Preventing MJ possession or use on federal property
Recreational Marijuana – Cole Memorandum

What’s the Take-Away?

• If federal priorities are not implicated, enforcement left to states

• Assumes that states will implement strong, effective regulatory and enforcement systems
Recreational Marijuana – Licensing

**Producers**
- Grow marijuana
- Sell to producers or processors

**Processors**
- Buy from producers or processors
- Sell usable MJ, MJ concentrates or MJ-infused products to processors or retailers
Recreational Marijuana – Licensing

Retailers

• Sell usable MJ, MJ concentrates, MJ infused products and MJ paraphernalia to consumers 21+
Recreational Marijuana – Insurance Requirements

CGL, Plus Products

• Coverage for bodily injury and property damage arising out of the licensed activities, including products liability

• At least $1M in limits

• State must be added as an AI on all policies

• Carrier must have rating of A – Class VII or better
Recreational Marijuana – Industry Challenges

- Access to capital
- Pesticides
- Banking
- Taxes
- Ability to protect brand
2015 Legislation

Yikes!

Highly regulated recreational system

v.

Virtually unregulated medical marijuana system
2015 Legislation

Legislature passes legislation to align recreational and medical systems
Alignment of Medical and Recreational Systems

Key provisions

• Merged recreational and medical MJ system

• Re-opened application window for retail stores – Increased cap from 334 to 556

• Retailers could apply for a medical MJ endorsement
Alignment of Medical and Recreational Systems

Key provisions

• Reduced taxes (37% excise tax on retail sales price)

• Called for greater revenue sharing with municipalities

• Gave municipalities discretion to decrease buffer zones down to 100 feet, except for schools and playgrounds
Alignment of Medical and Recreational Systems, Cont.

Window still closed for producers and processors, with minor exceptions
Solve Problems?

Yes and No....
Solve Problems? Access to Capital

Yes-ish – Financiers

• Removed of residency requirement for financiers in June 2016

• Seeing out-of-state money invested
Solve Problems? Pesticides

Yes-ish – Product Recall Regs

• Issued Action Levels

• Public health or safety risk

• Maybe initiated by licensee or LCB
Product Recall Regs, Cont.

• Must immediate notify LCB enforcement officer

• Must secure, isolate and prevent distribution of MJ products

• Must coordinate with LCB on destruction activities
Solve Problems? Pesticides

Product Recall Regs, Cont.

• Must draft a Recall Plan
Solve Problems? Banking, Taxes and IP

Banking, Taxes and IP – No

• Two Governors petitioned the DEA to change MJ’s Schedule I status

• Many hoped that a schedule change would impact federal treatment of MJ
Drug Enforcement Administration

- Petitions to reclassify MJ under the CSA
- DEA refused
- No currently accepted medical use
- Lack of accepted safety for use of MJ under medical supervision
- Increased access to MJ research
Drug Enforcement Administration

Fall-Out?

- Conflict between federal and state law for MJ
- Threat of federal prosecution
- Problematic for banking, financial services, taxes and IP
Local Framework
Seattle Buffer Zones

Seattle Ordinance 124969

- Retains 1,000 buffer zone for schools/playgrounds

- Buffer zones for producers and processors are now 250 feet
Buffer Zones, Cont.

- Retailers – 250 feet downtown, 500 elsewhere
- No more than 2 retailers within 1,000 feet of one another
- If new retailer moves in, must be 1,000 feet+ from closest existing retailer
- City looks to facts on date LCB issues Notice of Marijuana Application
Political Uncertainty
Legalization – State by State

- **MEDICAL USE LEGALIZED**
- **RECREATIONAL AND MEDICAL USE LEGALIZED**
- **MEDICAL USE ON NOVEMBER BALLOT**
- **NO LEGISLATION**
- **MEDICAL USE LEGALIZED, RECREATIONAL USE ON NOVEMBER BALLOT**

Map showing the status of marijuana legalization by state.
Federal Election
Marijuana Market Players and Why Insurance Matters
Washington State Recreational Marijuana Sales

Washington State i502 Recreational Marijuana Sales

$324,629,000
Total Marijuana Excise Tax To Date

$1,248,747,940
Marijuana Purchased by Consumers

$103,107,628
Additional sales tax revenue assuming 9% average

Monthly Marijuana Tax Revenue Collected

<table>
<thead>
<tr>
<th>Month</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
<th>Total</th>
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<tbody>
<tr>
<td>Marijuana Retail Sales</td>
<td>$30,763,830</td>
<td>$322,823,639</td>
<td>$486,239,922</td>
<td>$839,847,441</td>
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<tr>
<td>Processor Sales</td>
<td>$15,638,761</td>
<td>$147,941,259</td>
<td>$254,631,465</td>
<td>$418,411,485</td>
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<tr>
<td>Producer Sales</td>
<td>$2,520,505</td>
<td>$15,340,047</td>
<td>$20,241,404</td>
<td>$46,110,757</td>
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<tr>
<td>Total Sales</td>
<td>$49,143,145</td>
<td>$486,113,745</td>
<td>$769,112,791</td>
<td>$1,304,369,682</td>
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Excise Tax Collected

<table>
<thead>
<tr>
<th>Year</th>
<th>Amount</th>
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<tbody>
<tr>
<td>2014</td>
<td>$16,446,626</td>
</tr>
<tr>
<td>2015</td>
<td>$128,948,915</td>
</tr>
<tr>
<td>2016</td>
<td>$179,233,459</td>
</tr>
<tr>
<td>Total</td>
<td>$324,629,000</td>
</tr>
</tbody>
</table>

Retailers: 335
Producer/Processors: 940
Legalization and the Correlation to Marijuana Use

MARIJUANA USERS BY STATE (%)
Percentage of people ages 18-25 who reported using pot in the past month.
The state of Washington has more than 2,000 active licensed cannabis operations today.

There are more than 2,600 applications actively in process (pending) at the WSLCB.
General & Product Liability Coverage
Requirement for Licensee’s

**WAC 314-55-083**

“... insurance shall also cover bodily injury, including disease, illness and death, and property damage arising out of the licensee's premises/operations, products, and personal injury. “
Common Policy Exclusions

• Limited contractual liability
• Advertising and Personal Injury Exclusion
• Med Pay
• Cyber - Data breach
• Assault and Battery Exclusion
General Liability Market for Marijuana Business

Multiple carriers available offering general liability (exc Products) and property packages.

There are four carriers offering Product Liability policy options to Washington state marijuana license holders.
GL Policy Options

Follow Two Coverage Models

Premises liability coverage with traditional CGL coverage options available “ala carte” through endorsement.

Product Liability requires additional policy / carrier

Follow traditional CGL form redefine coverage.

Product redefined to exclude specific ingredient or intake method
Likely Legal Theories To Be Pursued Against Manufacturers

1. Strict liability for defective products and warnings

2. Breach of contract

3. Misrepresentation and fraud
Defective Warnings

Washington Retail Marijuana

There may be health risks associated with consumption of this product. Smoking is hazardous to your health. Should not be used by women that are pregnant or breast feeding. For use only by adults twenty-one and older. Keep out of reach of children. Marijuana and products containing marijuana can impair concentration, coordination, and judgment. Do not operate a vehicle or machinery under the influence of this drug. This product is infused with marijuana or active compounds of marijuana.

Warning: This product has intoxicating effects and may be habit forming. This product may be unlawful outside of Washington State.
Caution: When eaten or swallowed, the intoxicating effects of this drug may be delayed by two or more hours.
What's hiding in your weed?
Cannabis smoke contains gaseous and particulate matter including:

- Carbon Monoxide
- Phenol (used to make plastics, nylon and detergents)
- Acetaldehyde (toxic, an irritant, and probably a carcinogen)
- Polycyclic Aromatic Hydrocarbons (PAHs) (carcinogenic and mutagenic)
- Toluene (a solvent for paint thinners)
- Naphthalene (used in moth balls)
- Benzene
- Hydrogen Cyanide (used to electroplate metals)
- Noxious Tars
- Lead (Pb)
- Nauseous (Arms)

Other things you may be exposed to:
- Pesticides and fertilisers
- Pathogens including hepatitis, TB, herpes
- Glass beads and hairspray to falsely increase weight
- Mould and fungus
- Petrochemicals and plasticides if using a plastic bottle or crushed can as a bong
Marijuana Market’s “Ripple Effect” on Professional Insurance Risks
Impacted Professionals

- Lawyers
- Insurance Producer
- Realtor
- Staffing Company
- CPA / Bookkeeper
- Business Consultants
- Security & Transportation
- Property Management
CLAIMS SCENARIO 1 – The “Claims-Made” Coverage Gap

Former patient sues Doctor and Medical Center housing Doctor’s office, claiming the Doctor’s written prescription of medical marijuana for patient’s nausea led to:

a. addiction to non-marijuana Schedule I substance; and
b. catastrophic overdose event resulting in brain injuries.

- No written Notice of Claim supplied to Insurer until after expiration of the “claims made and reported” insurance policy and Extended Reporting Period.

- No copy supplied at Insurer’s annual on-site audit of the letter demand from patient’s counsel, referencing brain injury experienced by patient.

- Insurer renews for subsequent policy years on Medical Professions PL, but adds “Compliance With All Applicable Laws – Medical Marijuana” Endorsement for the renewal year during which the lawsuit is filed.
Legalized Marijuana’s Impact on Medical Professionals, Going Forward

- Medical Market Subsumed Within The Recreational Market, 7/1/2016
- Medical Patients Can Possess More Than Recreational Users, and Can Grow Plants
- Beneficial Impact of the “Perception of Medical Approval”

- Will pertinent exclusions in E & O Policies evolve to address marijuana exposures?
- Are “traditional” exclusions (eg “criminal” acts exclusions ) going to be held to apply to new facts involving marijuana exposures?
Measuring The Risk * Insurance Policy Rescission

1. The omission was **fraudulent**.

2. The omission was **material** either...
   – to the acceptance of the risk; or
   – to the hazard assumed.

3. The insurer in **good faith** would not have issued a policy if the true facts had been known.
Measuring The Risk * Insurance Policy Rescission

• Knowledge or ignorance would influence insurer’s decision to
  – Issue the policy
  – Assess the risk
  – Calculate the premium

• Factor in underwriter’s opinion:
  – Would knowledge of the truth reasonably influence
decision of underwriter

WA statutes require “intent to deceive”.

- RCW 48.18.090.
Measuring The Risk * Insurance Policy Rescission

1. The omission was **fraudulent**.

2. The omission was **material** either...
   - to the acceptance of the risk; or
   - to the hazard assumed.

3. The insurer in **good faith** would not have issued a policy if the true facts had been known.

– Restatement requires material misrepresentation for *claim denial* or rescission
  • Encourages applicants to provide accurate information at application *and renewal* [§7, Comment a.].

– §8 - “material only if, in the absence of the misrepresentation, a reasonable insurer in this insurer’s position would not have issued the policy or would have issued the policy only under substantially different terms.”
CLAIMS SCENARIO 2 – Coverage Allocation Among Multiple Policies w/ Possible Retention Gaps

- Data breach event for a highly-insured entity exposes sensitive information (e.g., medical center’s patients, seed or herbicide producer’s customer list, corporate investor conglomerate’s money trail), and draws compliance investigation by State and Federal law enforcement, mandating notice to affected customers.

- Information and Privacy ("data breach") insurer provides breach-response services coverage after 100 Notified Individuals.

- Management Liability insurer covers Loss or Defense Expenses after $25,000 retention but subject to a regulatory claims sublimit of $200,000.


- Commercial General Liability insurer has no retention, but has “Exclusion – Health Hazard” re: “existence of” cannabis, and denies coverage on that basis.
Legalized Marijuana in the Workplace
Alphabet Soup!

- Controlled Substances Act (CSA)
- Americans with Disabilities Act (ADA)
- Family and Medical Leave Act (FMLA)
- U.S. Department of Transportation Regulations (DOT)
- Drug-Free Workplace Act (DFWA)
- State Laws!
Controlled Substances Act (CSA)

- Schedule I includes marijuana
- Illegal to grow, distribute, use, possess
- Doctors can’t prescribe
- U.S. Supreme Court: CSA trumps state law for federal criminal prosecutions
Family and Medical Leave Act

- Treatment / rehabilitation for addiction generally a “Serious Health Condition”

- Absences caused by illegal drug use not protected
Americans with Disabilities Act (ADA):

- Employees “currently engaging in the illegal use of drugs” NOT protected
- Employers may adopt reasonable policies or procedures – including drug testing – to ensure that an individual is not engaging in the illegal use of drugs
Americans with Disabilities Act (Cont.)

- Some protections for “former” / “recovering” addicts
- Accommodation of user (but not use) may be necessary
- Presentation of medical marijuana card (showing current marijuana use) does not end the interactive process or answer accommodation questions
- Certain drugs are FDA-approved and may be lawfully prescribed that will cause a “true positive” marijuana drug result
Drug-Free Workplace Act

Federal government contractors with $150,000+ contracts and federal grant recipients of any amount must:

- Publish a DFWP policy that prohibits, among other things, use or possession in the workplace
- Report drug-related crimes occurring in the workplace

Contract and grant at risk if non-compliant
What about the states?

• Most states’ medical marijuana laws are silent on employer rights and obligations
  – **Preemption!** California, Colorado, Michigan, Montana, Oregon and Washington have state Supreme Court decisions that hold those states’ medical marijuana laws offer no employment protection because the state laws making marijuana use lawful is inconsistent with federal law.

• Eleven states’ medical marijuana laws DO address employer rights and obligations, including:
  – Discrimination based on status as medical marijuana holder prohibited
  – Accommodation requirements
  – Prohibition on adverse action for positive drug test absent evidence of work-related impairment
  – On duty use/possession can be prohibited
Lawful Off-duty Conduct

- Protect from adverse employment actions for lawful off-duty acts (consumption of alcohol, tobacco, etc.)
- What about legal marijuana?
  - *Coats v. Dish Network, L.L.C.*
    
    *medical marijuana is not lawful activity under federal criminal law*
Recreational Use

- Limitations on Use of Recreational Marijuana
- **No** law requiring workplace accommodation of recreational marijuana
- Liability risks of ignoring use of marijuana
What Should Employers Do?

• Review their Policies!
  – What do they want?
    • Industry trends
  – Drug testing policies: May expressly state that testing positive for any illegal drug - including medical marijuana - is a policy violation and may result in discipline
  – Address reasonable accommodations for employees
  – Consider obligations under both federal and state law
Legalized Marijuana in the Workplace – The Employer’s Insurance Puzzle Pieces
Employer’s Insurance Programs:
- CGL
- State and Federal Comp Programs
- Workers’ Compensation & Employers’ Liability (or WA-Stop Gap) Insurance
- Employment Practices Liability, and
- Other Specialty Policies
CLAIMS SCENARIO 3 – Boys In The Boat-yard

- CA – based fishing boat stops in Long Beach WA for emergency repairs.
- George the crewmember rents a car so he can drive to Vancouver WA to pick up a crucial part.
- A pipefitter from the yard rides along because they want to make sure the part is the right one for the job.
- They purchase edibles that kick-in just as they return to the dock, where George rear-ends another car.
- George gets whiplash and is unable to work for a month; and the pipefitter breaks his arm.
Boys In The Boat-yard; George v. Employer Lawsuit

1. George is Seaman in service of vessel

2. Vessel’s Protection & Indemnity Insurance responds to the claims.

3. EL Coverage issued to CA boat operator does not respond:
   - Exclusion (10) for BI to “member of the crew”
Boys In The Boat-yard; *Passenger v. Employer* Lawsuit

- 1. If shiprepairer, car passenger is a longshoreman.

- 2. Longshore compensation or Marine EL coverage if qualifies as “arising out of and in the course of employment.”

- 3. EL bodily injury also must be “arising out of and in the course of employment.”
  - EL Exclusion (8) for longshoremen “in work”

- 4. CGL Coverage & Exclusions: d. workers compensation; e. BI to an employee; g. BI arising out of maintenance of insured’s watercraft.
Insuring the Risks to
All Legally-Acting Washingtonians
Questions?
Questions & Answers

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