



2020 Annual Conference
March 18-20, 2020
Dallas, TX

THC, CBD and Me: The ABC's of Cannabis and its Effect on Claims, Medicine, Legislation and Litigation

I. Overview and History of Marijuana Legality

Thirty-nine states and the District of Columbia currently have laws broadly legalizing marijuana in some form. Eleven states and the District of Columbia have adopted the most expansive laws legalizing marijuana for recreational use. Thirty-three states and the District of Columbia allow physicians to prescribe medical marijuana as treatment or pain management; however, the Federal Food and Drug Administration (FDA) only approved the use of medical marijuana “for [the] treatment of two rare and severe forms of epilepsy, Dravet syndrome and Lennox-Gastaut syndrome”.¹ Further, several legislatures in states recently passing legalization measures are debating regulatory proposals around the use and sale of marijuana. Nevertheless, marijuana is still classified as a Schedule 1 controlled substance under the Controlled Substance Act despite recent legislation pending in the House of Representatives. See Controlled Substance Act, 21 USC § 801, et seq.

During his 2008 campaign, Barack Obama stated: “I think the basic concept of using medical marijuana for the same purposes and with the same controls as other drugs prescribed by doctors is entirely appropriate. I’m not going to be using Justice Department resources to try to circumvent state laws on this issue.”² While President Trump stated during his campaigns that he supports the legalization of marijuana for medicinal purposes, he further elaborated that the ability for a state to regulate the legalization of marijuana for recreational purposes should be left for the states.³

¹ Lovelace, Berkley, “House committee approves landmark bill legalizing marijuana at the federal level,” CNBC, November 20, 2019; Neil Lava, M.D., “Medical Marijuana FAQ”, WebMD, December 15, 2018.

² DeAngelo, Steve. *The Cannabis Manifesto: A New Paradigm for Wellness*. Berkeley: North Atlantic Books, 2015.

³ Marijuana Moment, “President Trump Reiterates his administration will let states legalize marijuana,” Boston Globe, September 3, 2019.

While medical marijuana laws vary considerably, all provide that, to be exempt from arrest, prosecution, and civil forfeiture of their marijuana, medical users must show that they have a debilitating medical condition (except in California, where any illness will do if a physician says that marijuana might provide relief), diagnosed by a physician (or, in some states, other medical practitioner); they must also have the physician's recommendation, which must be in writing (again except in California, where an oral recommendation will do), that marijuana might provide relief. Most laws list eligible diagnoses, typically including cancer, AIDS, glaucoma, and other chronic diseases with symptoms such as severe pain, seizures, and nausea. California's list includes a broad catch-all: any condition for which marijuana may, in the treating physician's opinion, benefit the patient.⁴

In a March 18, 2009, press conference, Attorney General Holder was similarly reassuring and much more specific with respect to prosecuting medical marijuana. He said the administration would end the Bush Administration's raids on medical marijuana suppliers and that "[t]he policy is to go after those people who violate both federal and state law," meaning "traffickers who falsely masqueraded as medical dispensaries and 'use medical marijuana laws as a shield'"⁵. Holder's assurance was formalized in an October 2009 memo from Deputy Attorney General David Ogden to United States Attorneys stating that while "[t]he prosecution of significant traffickers of illegal drugs, including marijuana, [...] continues to be a core priority [...], pursuit of these priorities should not focus federal resources in your states on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."⁶ Some states took this as encouragement to adopt medical marijuana laws and regulations.

The Justice Department continued under Obama to give a free pass to medical marijuana users. Simple possession for recreational (as well as for medical) use is only a misdemeanor under federal law, and for many years federal prosecutions for mere possession have been rare even in most states where all marijuana use is illegal.

On August 29, 2013, the Department of Justice published a memorandum authored by U.S. Deputy Attorney General James Cole, which described a new set of priorities for federal prosecutors operating in states which had legalized the medical or other recreational use of marijuana⁷. The 2013 memorandum represented a significant shift of

⁴ Robert A. Mikos, "A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana," Vanderbilt University Law School Public Law and Legal Theory Working Paper No. 11-07 (2011)

⁵ Associated Press, "Attorney General Signals Marijuana Policy Shift," NBC News, March 18, 2009; David Johnston and Neil A. Lewis, "Obama Administration to Stop Raids on Medical Marijuana Dispensers," *New York Times*, March 18, 2009.

⁶ Memorandum for selected U.S. Attorneys from David W. Ogden, Deputy Attorney General, "Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana," October 19, 2009 (hereinafter Ogden memo), available at <http://www.justice.gov/opa/documents/medical-marijuana.pdf>.

⁷ *Cole memo*. medicalmarijuana.procon.org. *ProCon*.

government priorities away from strict enforcement of federal cannabis prohibition and toward a more hands-off approach in the case of jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale and possession of marijuana." Since that date, the overall number of federal marijuana prosecutions in such states has declined.

However, on January 4, 2018, the Obama Administration's Cole memorandum was rescinded by U.S. Attorney General Jeff Sessions, who instructed U.S. Attorneys to enforce federal laws criminalizing marijuana. Despite the Obama Administration's choice to enforce the federal laws criminalizing marijuana, President Trump's attitude towards allowing states to choose for themselves whether or not to legalize marijuana in some capacity, is furthered by the legislation, sponsored by the House Judiciary Committee Chairman Jerrold Nadler (D-NY), which would remove the federal impediment to a state's right to legalize marijuana pursuant to the Tenth Amendment; with the House Judiciary Committee's approval on the bill November 20, 2019, the bill now moves to a full vote in the House of Representatives.⁸ See United States Const. Amend. X.

Most recently, on November 20, 2019, for the first time in history, a congressional committee approved a bill to end federal marijuana prohibition – the Marijuana Opportunity, Reinvestment and Expungement (MORE) Act. This approval would federally deschedule cannabis, expunge the records of those with prior marijuana convictions and impose a five percent tax on sales, revenue from which would be reinvested in communities most impacted by the drug war. This committee vote comes two months after the House approved a bill that would protect banks that service state-legal cannabis businesses from being penalized by federal regulators.

II. Marijuana-Based Insurance Policies⁹

In light of the growing legalization of marijuana and the new attitude, policyholders, agents and insurers have been reconsidering the insurability of marijuana-based industries in the United States. Today, the trend is to allow them to be insured. Many insurers see the marijuana industry as no different than any other. In fact, many insurers believe the risk posed by the marijuana industry is similar to the risk posed by the alcohol industry and believe that both should be insured in a similar manner.

⁸ Angell, Tom, "Vote to Federally legalize Marijuana Planned in Congress," *Forbes*, November 16, 2019; Lovelace, Berkley, "House committee approves landmark bill legalizing marijuana at the federal level," *CNBC*, November 20, 2019.

⁹ Horst, Jason and Francis J. Mootz, III, "Marijuana Symposium: Cannabis and Insurance," *Lewis & Clark Law Review*, 2019 (outlining issues that insurance companies and varying types of policies may face in different states that legalize marijuana while it remains federally illegal). *Marijuana Symposium: Cannabis and Insurance*, 23 *Lewis & Clark L. Rev.* 893.

In the past, as marijuana was illegal (and still is in some states), any insurance of marijuana growing or selling operations was considered uninsurable because of policy provisions relating to illegal operations or the public policy against insuring illegal actions. If marijuana is lawful under state law then, at least under state law, it should be insurable. However, if marijuana is still classified as a banned controlled substance under the federal Controlled Substances Act, insurers could still use illegality as a defense; however, should the pending legislation pass removing marijuana from the Controlled Substances Act, the illegality defense is no longer viable.

Given the rescinding of the Cole Memo, the question is whether a crack-down could lead to a defense of illegality for insurers. However, it is probably unlikely for insurance industry purposes because many agents and brokers are now insuring risks with full knowledge that they are insuring the marijuana industry. This waives any illegality defense. The 2016 *The Green Earth Wellness Center L.L.C. v. Atain Specialty Insurance Co.* case in a federal district court in Denver addresses this issue. Green Earth operated a retail medical marijuana dispensary and a growing facility. A wildfire damaged its operation. The insurer sought to deny coverage on many grounds, one of which was that the policy was void on public policy grounds because the subject of the risk was illegal marijuana. The court disagreed, stating that the insurer knew what the risk involved when it entered into the policy.

Regarding first-party coverage, it appears that marijuana industries are being insured under the same forms as any other industry. The coverage as to the marijuana industry has unique aspects. Specifically, with respect to business interruptions and theft insurance. Coverage for marijuana plants and concerns of mold, water damage, vermin, pollution, fires (from lighting and heating), and flooding issues are all factors which could come in to play.

Failure-to-warn claims will also probably occur, alleging a business failed to communicate the hazards of marijuana to a purchaser or end user. One particular area to be examined is whether there can be coverage for any raid and seizure conducted by the federal government in a location where marijuana is legal under state law but where the federal government is enforcing federal law.

Commercial general liability insurance will also be needed, which would be comparable to CGL policies obtained by the alcohol industry. A major risk would be dram shop liability cases. No state has yet imputed vicarious liability to a marijuana business for an injury caused by a person to whom the business sold marijuana.

Moreover, all insurance policies that possess exemptions and exceptions related to the potential impairments from marijuana use need to comply with the varying state laws as some states only permit certain products while others prescribe varying forms of marijuana. For individuals who use medical marijuana in the manner prescribed by a licensed physician and an injury occurs, most state specific insurance policies provide coverage.

III. Marijuana's Effect on Liability

Most states have statutory provisions that allow licensed businesses where alcohol is consumed on premises to be held liable for selling or serving alcohol to individuals who cause injury or death as a result of their intoxication. Such laws are known as "dram shop" statutes. Additionally, most employers have regulations where their employees are not able to drink, consume, or arrive on the premises intoxicated using alcohol.

Given the growing legalization, in some form or another, of marijuana, it is more likely than not that similar statutory provisions and regulations will be applied to individuals consuming cannabis products where injuries result because of the cannabis intoxication.

As thirty-three states and the District of Columbia permit the use of medical marijuana for a multitude of treatment options, when prescribed by a licensed practitioner. The fact that the marijuana use is prescribed does not limit an individuals' potential liability for injuries or damage to a third person; the use of medical marijuana can still attribute to mental and physical impairments that result in injuries. The known side effects reported from the use of medical marijuana include depression, dizziness, bloodshot eyes, irregular heartbeats, hallucinations and low blood pressure. Marijuana use can also affect judgment and coordination of individuals, resulting in injuries.¹⁰

For auto liability, medical marijuana is treated that same as alcohol consumption and the use of illicit drugs that cause an impairment upon a tortfeasor; courts have shown a willingness to enforce the exclusions and exemptions of insurance policies when it comes to the use of marijuana (there is a potential for this to change should marijuana be removed from the Controlled Substance Act). Such liability issues may also relate to medical marijuana dispensaries related to specific products sold and consumption amounts of cannabis in said products.

IV. Future Trends

Congress in the midst of deciding whether to vote on pending legislation, which would remove marijuana's classification as Schedule 1 controlled substance under the Controlled Substance Act. See Controlled Substance Act, 21 USC § 801, et seq. Should the pending legislation come to pass, the various insurance policies, and the accompanying liability issues, would depend upon the individual state's laws without any hinderance by the federal laws.

A lot of uncertainty still remains and should such a law pass, the individual states may maintain their current policies or alter them to become stricter or freer.

¹⁰ Neil Lava, M.D., "Medical Marijuana FAQ", WebMD, December 15, 2018.