

“HIGH TIME” FOR MARIJUANA INSURANCE

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State statutes legalizing marijuana create an array of challenges for insurers.

Though, in December 2016, Oregon issued a proposed bulletin which, if adopted, would require insurers to clarify the extent of marijuana coverage provided under all property and casualty policies. While other states have not yet followed suit, the proposed bulletin highlights the tension created by the paid fractured legal framework surrounding cannabis.



Twenty-eight states have legalized some form of cannabis cultivation, possession, and usage. Of those, eight states and the District of Columbia permit recreational uses. All twenty-eight, however, maintain differing criminal penalties for the possession and cultivation of marijuana. Overlying all of this, the Controlled Substances Act outlaws the manufacture, possession, use, and distribution of marijuana at the federal level. Although the Department of Justice in 2013 took a hard step back from marijuana prosecution with the “Cole Memo,” significant uncertainty persists regarding the future of marijuana policy and the likelihood of legalization at the federal level.

Insurer reluctance also likely stems from the unique risks the federal-state dichotomy creates. Growing operations and dispensaries typically operate as cash-only businesses since most banks have refused to serve marijuana businesses. Large amount of cash on-site raises the risk of theft and can increase losses from fires and floods. Similarly, indoor growing operations, which require moisture-rich environments and large-scale electric lighting, carry their own set of risks. And with any product, there is the potential for quality assurance, product liability, improper labeling, and failure to warn claims.

By 2025, the federal gov’t could legalize all marijuana sales nationwide, resulting in \$25 billion in sales, and growing... Marijuana Insurance could represent a new market

The tension between state and federal law makes most national and regional carriers reluctant to insure the cannabis industry. This is likely due to fears over whether providing such insurance constitutes profiteering, aiding and abetting, or even money laundering. Concerns abound over the whether the insurance contract itself would be enforceable since it could be construed as a contract for an illegal purpose. See *Tracy v. USAA Cas. Ins. Co.*, 2012 WL 928186 (D. Haw. Mar. 16, 2012).

Nevertheless, it is difficult for states and insurers to ignore the economics of the blossoming marijuana market: Colorado businesses reported \$1.3 billion dollars in marijuana sales for 2016, resulting in nearly \$200 million in tax revenue. Some major sources estimate over \$24 billion in nationwide marijuana sales by 2025.

To date, only one federal district court has found that providing coverage for marijuana related losses by a dispensary and growing operation does not violate public policy. See *Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821 (D. Colo. 2016). But, as that court noted, excluding coverage would make the insurance provided to marijuana businesses illusory. That reasoning should not apply to homeowners’, personal auto, or boat policies, which exclude coverage for criminal acts and contraband.

While nationwide legalization would resolve many of the foregoing uncertainties, the insurance industry cannot wait. The market needs risk management options and certainty if it is to continue to grow and profit. ⚖️

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