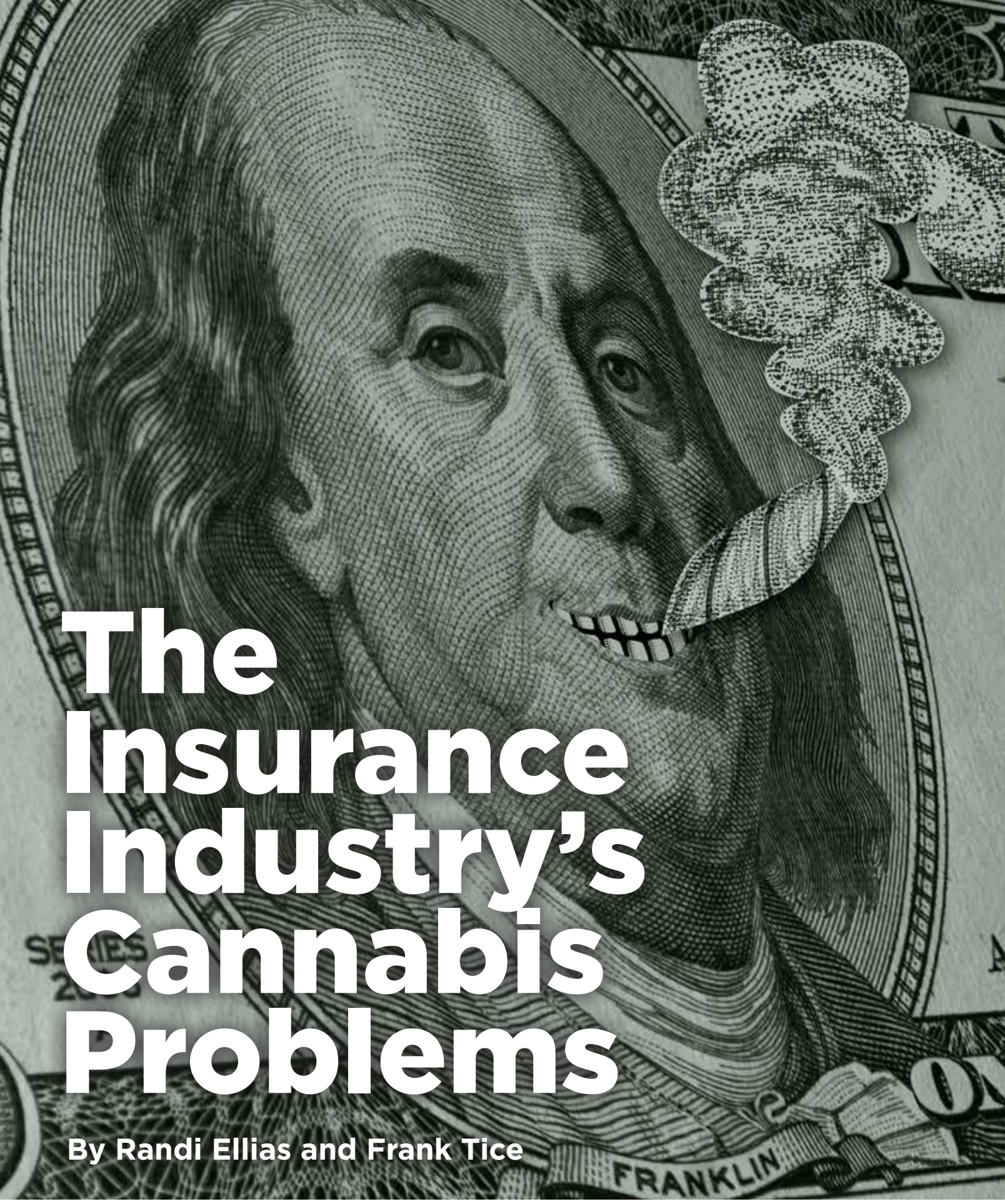

The Insurance Industry's Cannabis Problems

By Randi Ellias and Frank Tice

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The cannabis industry is one of the fastest-growing markets in the United States. In 2019, U.S. cannabis sales hit an estimated $12.2 billion—an approximately 34 percent increase over 2018 sales.[1] The insurance needs of this industry run the gamut, including everything from products liability and commercial general liability (CGL) coverage to more niche coverages, such as crop insurance and crime coverage.

Insurers seeking to position themselves in this potentially lucrative new market face at least one unique challenge: while certain derivatives from the cannabis plant, such as hemp and cannabidiol (CBD), can be legal under federal law, marijuana remains illegal under federal law, notwithstanding that 33 states and the District of Columbia have legalized some form of marijuana use.[2] Thus, lawyers seeking to counsel cannabis industry clients must ensure that they understand both the federal regime and the various state regulatory regimes to which their clients may be subject—and which are rapidly evolving as the industry continues to grow.

This article first provides an overview of how certain forms of cannabis are treated differently under federal law. We then explore the hemp insurance market, its applicable regulations, and the types of insurance coverage and coverage gaps that exist in the hemp industry. Last, we analyze the federal framework under which marijuana insurance markets must currently operate and discuss how courts have handled marijuana-related insurance coverage questions to date, in light of the conflict between federal and state law.

Primer on the Cannabis Market: Hemp vs. Marijuana

The term "cannabis" encompasses hemp, marijuana, and CBD, each of which is derived from the cannabis plant. The distinctions among these derivatives are both highly nuanced and particularly important because federal law treats the various cannabis plant derivatives differently.

Until recently, federal law did not differentiate hemp from marijuana, meaning that both were considered "marihuana" (the law dates back decades and uses an older spelling of the word "marijuana") and outlawed as a Schedule I controlled substance under the Controlled Substances Act (CSA).[3] In late 2018, Congress passed the Agriculture Improvement Act of 2018 (2018 Farm Bill). The 2018 Farm Bill removed hemp (defined further below) and hemp-derived products from the definition of "marihuana," effectively paving the way for legalized hemp cultivation, processing, and sale.[4] Marijuana, by contrast, remains an unlawful Schedule I controlled substance—on par with drugs such as heroin.[5]

CBD, a nonintoxicating cannabinoid with numerous putative health and wellness benefits, can be derived from hemp or marijuana. Accordingly, the legal status of CBD turns on whether it is derived from hemp or marijuana. If derived from hemp, CBD is federally legal to process and sell (though the federal Food and Drug Administration (FDA) still has regulatory responsibility for CBD that is consumable in food and drinks or contained in cosmetics). If CBD is derived from marijuana, then it is a Schedule I controlled substance and is illegal under federal law. CBD derived from marijuana is, however, lawful at the state level if processed and sold under state-sanctioned marijuana programs.

The Insurance Market for Hemp Companies

Because hemp and hemp derivatives are legal under federal law, the insurance market for hemp is somewhat distinct from the insurance market for marijuana. In this section, we discuss the hemp industry's general insurance needs and challenges stemming from the applicable regulations that govern lawful hemp. We then discuss the types of insurance policies and coverages currently available in the hemp industry. Last, we discuss some considerations for practitioners guiding clients through insurance issues in the hemp industry.

Hemp insurance industry overview and challenges. Hemp industry participants need insurance coverage similar to that of traditional agricultural commodity market participants. For example, common coverages sought by hemp industry participants include the following:

- Directors and officers coverage
- Excess/umbrella
- General liability
- Equipment breakdown
- Premises liability
- Property
- Professional liability
- Cyber
- Loss of income
- Products liability
- Crop insurance
- Workers' compensation coverage

One major challenge that separates the hemp industry from more traditional agricultural commodities, however, is the complex set of regulations governing what constitutes lawful hemp. The 2018 Farm Bill created a joint federal-state regulatory regime requiring states to take certain steps before hemp can be considered lawful. First, lawful hemp is defined as "the plant Cannabis sativa L. and any part of that plant . . . with a delta-9 tetrahydrocannabinol [THC] concentration of not more than 0.3 percent on a dry weight basis."[6] Second, per sections 297B and 297C of the 2018 Farm Bill, the hemp must be cultivated and processed in accordance with a U.S. Department of Agriculture (USDA)–approved plan regulating hemp. Individual states and Indian tribes can develop and submit such plans, or the USDA will set up plans for those states and tribes that choose not to do so.

The 2018 Farm Bill tasked the USDA with devising rules and regulations to implement the bill's substantive provisions. The USDA published its interim final rule on October 31, 2019, which provided details regarding how hemp industry participants should understand compliance obligations with

TIP: Practitioners working with cannabis industry participants should stay up to date on developments in cannabis law and work with regulators and knowledgeable insurance providers.

activity authorized by the 2018 Farm Bill.[7] Under the USDA's final interim rule, the testing standard for assessing THC by dry weight requires using a "total THC" standard, which includes in the THC computation compounds that can convert into THC through chemical reactions, such as the acidic form of THC known as THCA.[8] If the hemp cultivated by a licensed entity tests over the acceptable THC level, that crop must be destroyed.[9]

Further complicating matters, states are authorized to continue operating hemp pilot programs set up under the authority conferred by section 7606 of the Agricultural Improvement Act of 2014 (2014 Farm Bill). The 2014 Farm Bill gave states more latitude than the current USDA rule for determining the acceptable THC level for hemp and does not require that THCA be included in the acceptable THC level computation.

The presence of competing standards between the USDA's rule and those rules set forth under the various state pilot programs means that the permitted level of THC in "lawful" hemp currently depends on the state in which the hemp-related business operates.

Available insurance coverage for hemp industry participants. The types of insurance available to hemp industry participants depend in large part on what business segment the participants occupy. The hemp industry has only a handful of business segments. Most states offer licenses under their hemp regulatory programs for only two business segments: cultivators, which run growing/harvesting operations; and processors, which are responsible for turning the raw hemp flower and fibers into consumable products such as CBD. In some cases, states offer different types of cultivation or processing licenses depending on the applicant's intended use of the hemp. For example, because hemp is an extremely versatile plant, uses can include cultivation and processing of hemp flower to make CBD products or extraction and processing of hemp fiber to make items such as clothing.

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Insurance companies participating in the hemp industry are hesitant to offer insurance that "touches the plant" for hemp cultivators and processors due to the complications in assessing hemp's legality at the federal level. Accordingly, the hemp insurance market currently is confined primarily to insurance policies that relate to non-plant-touching operations.

In the hemp cultivation space, there are direct markets offering admitted coverages akin to those available in the agriculture industry, but with two glaring exceptions: crop insurance and products liability coverage.

There are essentially two sources for crop insurance available to hemp cultivators. One covers only catastrophic loss events, such as hail damage to crops. These policies are typically expensive and offer narrow coverage. For example, these policies may require hail of a certain size or contain acreage limits and value-of-loss restrictions. Pilot programs and insurance initiatives sponsored by the USDA provide another option for crop insurance, including the following:

- The Multi-Peril Crop Insurance (MPCI) program offers coverage against loss of yield attributable to insurable causes of loss for hemp fiber, grain, and hemp-derived CBD oil. Such insurable causes include drought, excessive moisture, freeze, and disease. MPCI is only available, however, in select counties of 21 states for the 2020 crop year.[10]
- The Noninsured Crop Disaster Assistance Program (NAP) protects against losses associated with lower yields, destroyed crops, and prevented planting. The NAP is available only where no permanent federal crop insurance program is available.[11]
- The Whole-Farm Revenue Protection (WFRP) program allows certain industrial hemp cultivators in areas covered by USDA-approved hemp programs to obtain up to $8.5 million in coverage for the loss of revenue that the hemp cultivator expects to earn from hemp produced or purchased for resale.[12]
- The Nursery Value Select (NVS) pilot crop insurance program, not available until 2021, will provide an asset-based form of insurance coverage for hemp cultivators located in select counties of nine states (Alabama, Colorado, Florida, Michigan, New Jersey, Oregon, Tennessee, Texas, and Washington). Under the NVS program, a hemp cultivator will be able to insure against the risk of crop loss due to events such as adverse weather, drought, fire, wildlife, collapse of buildings/structures, disease, and other listed insurable causes.[13]

Most of these insurance programs are made available through private crop insurance agents, which can be found using the USDA's Risk Management Agency website.[14]

Notably, none of the available hemp crop insurance covers the risk of loss posed by the requirement that the crop must be destroyed by law if it tests over the acceptable THC

threshold. The inability to obtain coverage for this risk currently represents one of the biggest coverage gaps that hemp cultivators face.[15]

Hemp industry participants also find it challenging to secure products liability coverage. While products liability coverage is available, such policies are often expensive and narrow in scope, due in part to the complex regulations governing lawful hemp and CBD. In addition to the strict rules regarding acceptable THC levels, the 2018 Farm Bill also expressly reserves to the U.S. Food and Drug Administration (FDA) regulatory authority for consumable CBD products. Accordingly, CBD products must meet applicable FDA requirements and standards.[16]

The FDA's current position on consumable hemp and CBD products is complex and beyond the scope of this article. Generally speaking, the FDA views any CBD food, drink, or purported dietary supplement product in interstate commerce as a violation of the Food, Drug, and Cosmetic Act.[17] Because the FDA views CBD unfavorably, insurers are hesitant to provide extensive products liability coverage to hemp cultivators and processors that participate in converting hemp into CBD that will then be put into food or consumable products.

Notably, hemp processors have significantly more limited insurance options than hemp cultivators. Processors typically must use potentially explosive and environmentally hazardous materials to properly extract desirable components and cannabinoids from hemp. In addition, the processed products, such as CBD, exist in a complex area of law under which the FDA has yet to issue definitive regulatory guidance defining the extent to which CBD products can be safely consumed by the public. Given these additional risks, hemp processors typically must work with insurance brokers to find packages of insurance coverages that fit their needs. Often, CBD processors can obtain products liability coverage only through excess and surplus lines carriers.

Insurance companies are hesitant to offer insurance that "touches the plant" for hemp cultivators and processors due to the complications in assessing hemp's legality.

Considerations for practitioners. For practitioners guiding insurance clients in the hemp industry, there are a few key points to keep in mind.

First, any participants in the hemp insurance industry must devise basic due diligence programs to confirm the lawful status of applicants for hemp insurance coverage. Such diligence can be done largely by collecting information during intake (such as on the application for insurance coverage), with independent confirmation of licensure with the pertinent state or USDA authorities. This due diligence should include (1) confirmation of the applicant's licensure in the jurisdictions in which it operates, (2) a basic review or understanding of the applicant's operating policies such that the insurer can confirm compliance with the pertinent jurisdiction's hemp regulatory plan, (3) confirmation that the applicant regularly tests its product in accordance with applicable regulations concerning THC levels, and (4) disclosure of any previous situations in which the applicant's hemp tested above the acceptable THC threshold and confirmation that such product was destroyed.

Second, legal practitioners advising clients in the hemp industry must make it a point to stay up to date on the legal aspects of the cannabis industry. Rules and regulations in this space change frequently, and practitioners must remain diligent to stay on top of those changes. For example, the hemp pilot programs set up under the 2014 Farm Bill that allow for more lenient acceptable THC levels for hemp producers will sunset on October 31, 2020. Accordingly, as of November 1, 2020, the total THC standard articulated in the USDA's rules will become a nationwide standard.[18]

Third, practitioners should understand that the type of hemp license involved will have a significant impact on the types of insurance coverage available. For example, hemp cultivators can be treated mostly like agricultural producers for purposes of most types of insurance coverage (the exceptions being products liability and crop insurance) and can generally obtain insurance on an admitted basis. Hemp processors, by contrast, operate in a market with fewer insurance options, most of which are provided by excess and surplus lines carriers.

Fourth, practitioners can and should become familiar with the available admitted and nonadmitted markets and scopes of coverage available. In addition, legal practitioners should identify knowledgeable insurance brokers with expertise in the cannabis industry to stay informed on the types of policies and scope of coverages currently available to hemp industry participants.

Last, practitioners should recognize that certain risks for hemp industry participants are nearly impossible to insure at this point in time, for example, crop insurance that covers the risk that a cultivator's hemp product must be destroyed because it tests over 0.3 percent THC. The cannabis plant's THC level can be significantly impacted by temperature, climate, length of cultivation, and weather patterns, so

understanding what seed varieties will thrive and stay below 0.3 percent THC is inherently complex. Moreover, hemp has not been legally grown in many states for decades, so there is limited data available to analyze and predict whether certain hemp seed varieties will satisfy that limitation. These complications make it difficult for insurers to price certain types of crop insurance, at least until more data is available.

Given the federal illegality of marijuana-related activity, providing insurance to a marijuana business could result in criminal penalties.

Insurance Coverage for Marijuana-Related Businesses

The insurance needs of marijuana-related businesses mirror those of the hemp industry. The insurance of marijuana-related businesses, however, faces an obstacle that no longer confronts the hemp industry: the continued illegality of the possession, use, and distribution of marijuana under federal law. This section first discusses how that federal law might impact insurance companies seeking to enter the market and describes the federal authorities' historical approach to the enforcement of such federal law in states with some form of legalized marijuana use. Next, we address the courts' willingness to enforce insurance policies issued to marijuana-related businesses in view of the federal law prohibiting the very business in which they engage.

Impact of marijuana's federally illegal status. Insurance companies are somewhat insulated from federal oversight under the McCarran-Ferguson Act, which, under most circumstances, leaves the regulation of "the business of insurance" to the states.[19] There is one important caveat, however: under the McCarran-Ferguson Act, an act of Congress preempts state law relating to the business of insurance when that act "specifically relates to the business of insurance."[20]

At least three federal statutes that potentially impose criminal penalties on financial institutions doing business with marijuana-related businesses expressly apply to insurance companies—and therefore specifically relate to the business of insurance.[21] First, the Bank Secrecy Act requires financial institutions to report to the Treasury Department any transactions over $5,000 that the institution knows or has reason to know involve assets derived from illegal sources.[22] Second, the federal criminal code makes it a felony to engage in a financial transaction that the financial institution knows involves the proceeds of an unlawful activity.[23] Third, engaging in an "unlicensed money transmitting business," including a transaction that involves the transportation or transmission of funds that are known to have been derived from a criminal offense or are intended to be used to promote unlawful activity, also constitutes a felony under the federal criminal code.[24] Given the federal illegality of marijuana-related activity, any of these federal statutes could be implicated by the provision of insurance to a marijuana-related business, and the McCarran-Ferguson Act likely does not provide a "get out of jail free" card to insurance companies that choose to write in this market.

Insurance companies hoping to enter the market therefore find themselves grappling with how to avoid federal criminal action while writing insurance for marijuana-related businesses in the jurisdictions where those marijuana-related businesses are operating legally. The federal government's appetite for enforcing federal laws against cannabis-related activities in jurisdictions where those activities are otherwise legal thus becomes an important consideration. To date, the federal government has not demonstrated much of an inclination to prosecute federally illegal activities related to medical marijuana, while its position on the prosecution of federally illegal activities related to recreational marijuana has been erratic at best.

Since 2014, Congress has afforded medical marijuana the protection of the Rohrabacher-Farr Amendment, included as a rider to the omnibus spending bill each year.[25] The Rohrabacher-Farr Amendment prohibits the Department of Justice (DOJ) from using federal funds to interfere with the implementation of state laws authorizing the use, distribution, possession, or cultivation of *medical* marijuana.[26] In other words, the DOJ cannot use its funding to prosecute conduct that complies with state laws regarding medical marijuana. The amendment was first passed in 2014 and must be renewed each fiscal year (and, in fact, has been renewed each fiscal year). Thus, although all marijuana use remains illegal at the federal level, federal authorities have not demonstrated an appetite for prosecuting cases involving medical marijuana businesses operating in compliance with state law, at least since the Ninth Circuit Court of Appeals found that the DOJ violated the Rohrabacher-Farr Amendment when it attempted enforcement action against medical cannabis operators in California.[27]

When it comes to recreational marijuana, however, the DOJ's approach to enforcement of federal drug laws has been inconsistent—and somewhat dependent upon the prevailing politics at the time. In August 2013, Deputy Attorney General James Cole issued a memorandum outlining the department's approach to enforcement of the CSA with respect to marijuana-related conduct (Cole Memorandum).[28] The Cole Memorandum indicated that, in order to use its limited

resources in a rational way, the DOJ would not actively seek to prosecute state-legalized cannabis transactions but instead would consider eight specific enforcement priorities when determining whether to prosecute any given instance of marijuana-related conduct. Those priorities included preventing distribution of marijuana to minors, preventing criminal enterprises from obtaining revenue from the sale of marijuana, preventing other drug trafficking, and preventing the use of public lands or federal property in marijuana-related conduct.

Consistent with the Cole Memorandum, in February 2014, the Financial Crimes Enforcement Network (FinCEN) issued guidance "to clarify Bank Secrecy Act ('BSA') expectations for financial institutions seeking to provide services to marijuana-related businesses."[29] That guidance set out requirements for three different types of "suspicious activity reports" that a financial institution seeking to do business with a marijuana-related business is required to file with FinCEN depending on whether the institution believes that any—and, if so, which—of the enforcement priorities in the Cole Memorandum are implicated by a particular transaction. The February 2014 FinCEN guidance remains in effect insofar as it relates to marijuana; a subsequent guidance makes clear that the strictures of the 2014 guidance no longer apply to hemp-related businesses, given the legalization of hemp.[30]

Three years later, Jeff Sessions became the attorney general and, in January 2018, issued a memorandum (Sessions Memorandum) rescinding the Cole Memorandum and stating that the DOJ would enforce federal laws against marijuana-related conduct without regard to the enforcement priorities set forth in the Cole Memorandum.[31] Sessions resigned as attorney general 10 months later.

William Barr succeeded Jeff Sessions as attorney general on February 14, 2019.[32] During his confirmation hearing and in a subsequent written response to questions posed to him by Senator Cory Booker (D-N.J.), Barr stated that on his watch, the attorney general would not actively seek to prosecute parties engaged in cannabis-related transactions who "complied with state law in reliance on the Cole Memorandum."[33] Barr's written statement is murkier than it may appear at first glance because it is unclear whether Barr was referring to the time period when the Cole Memorandum was in effect at the DOJ, prior to its rescission by the Sessions Memorandum, or to the Cole Memorandum generally, regardless of the point in time. To date, the DOJ appears to have operated in accordance with the Cole Memorandum, notwithstanding its rescission by Sessions.[34] That could, of course, change at any time, and recent reports suggest that Barr has started to consider other ways to disrupt the industry.[35]

Lawyers seeking to counsel insurers that want to enter the marijuana market must recognize that the enforcement of federal law as it pertains to marijuana-related businesses has been, at best, haphazard and that the only constant is change. Practitioners should ensure that clients understand that there is an inevitable legal risk inherent in providing insurance to marijuana-related businesses that does not exist with respect to policyholders in other business segments and that such risk will remain unless and until federal law regarding marijuana-related conduct changes.

Courts and enforceability of insurance policies. Once an insurer decides to write insurance for marijuana-related businesses in one or more jurisdictions where marijuana has been legalized, the question becomes whether a court will enforce an insurance policy issued to a marijuana-related business that is operating legally in the state where it is doing business, notwithstanding the illegality of the conduct under federal law. The case law remains unsettled on this issue. We note that while several of the cases discussed in this section arise in a personal lines context rather than a commercial lines context, they are nonetheless instructive as to how courts view insurance policies that occupy this legal no-man's-land.

One of the earliest cases to address the enforceability of an insurance policy that arguably provided coverage for marijuana-related activity was *Tracy v. USAA Casualty Insurance Co.*[36] In *Tracy*, the policyholder grew medical marijuana in her home. The policyholder did so in compliance with applicable Hawaii law, but apparently without the insurer's knowledge. The cannabis plants were stolen, and the policyholder submitted a claim under her homeowner's policy. The insurance company asserted that it was not liable under the homeowner's policy for a number of reasons, including that the policyholder did not have an insurance interest in the cannabis plants and that federal public policy barred coverage because the possession and use of marijuana violated federal law. The federal district court in Hawaii found that the plaintiff had an insurable interest in the plants and that the policy covered the theft of the plants, but agreed with the insurer that enforcing the homeowner's policy would violate federal law and public policy. Accordingly, the court granted summary judgment to the insurer, relieving the insurer of any obligation under the insurance policy to reimburse the policyholder for the stolen cannabis plants.

Similarly, in *Hemphill v. Liberty Mutual Insurance Co.*,[37] a policyholder sought to recover expenses incurred in legally purchasing medical marijuana, which was prescribed by her physician to help with chronic pain that she suffered as a result of a car accident. The federal district court in New Mexico adopted the reasoning of the court in *Tracy* to find that requiring the insurer to pay those expenses would constitute the enforcement of an illegal contract. Accordingly, the court granted summary judgment in favor of the insurer.

The federal district court in Colorado came to a different conclusion in its 2016 decision in *Green Earth Wellness Center, LLC v. Atain Specialty Insurance Co.*,[38] which differs from *Tracy* and *Hemphill* in that it arose in a commercial context. The decision in *Green Earth* is notable for the disdain that the court exhibited toward the insurer's attempts to avoid liability under the commercial property and general liability insurance policy

that it issued to a retail medical marijuana business and growing facility. The policyholder made two claims under the policy: a theft claim and a claim for property damage relating to harm that its marijuana plants sustained as a result of a wildfire. The insurer sought summary judgment in its favor on both claims.

The court found that a theft exclusion barred the theft claim but that the policy covered at least a portion of the property damage claim, notwithstanding the insurer's contention that an exclusion for "contraband" applied to bar coverage. The court first found that the exclusion for "contraband," defined as "property in the course of illegal trade," was ambiguous and therefore proceeded to make a determination regarding the parties' mutual intent regarding coverage. The court found that the parties' mutual intent was that the policy would cover wildfire damage to certain components of the marijuana plants. In so holding, the court pointed out that the insurer was well aware of the nature of the policyholder's business when it issued the policy. Indeed, the insurer had asked several questions on the policyholder's insurance application about the policyholder's inventory and storage of the marijuana plants. In addition, when the insurer chose to issue the policy, it knew—or should have known—that federal law nominally prohibited such a business. Accordingly, the court found that the parties had a mutual expectation that the policy would cover the policyholder's marijuana inventory and, therefore, found that the contraband exclusion did not apply.

The unique risks posed by the cannabis industry have resulted in significant coverage gaps in the cannabis insurance market.

The insurer in *Green Earth* also essentially asked the court for an advisory opinion stating that coverage was barred as a matter of federal public policy, even if the insurance policy were construed to cover the claim. The court soundly rejected the insurer's request. First, the court noted that it lacked the authority to issue an advisory opinion and so treated the insurer's "request" as a motion for summary judgment. Next, the court asserted that the federal authorities had made "ambivalent" statements about the enforcement of the CSA as it related to marijuana-related businesses operating in accordance with state law, indicating an erosion of any clear and consistent federal public policy regarding that issue. Accordingly, the court expressly declined to follow the reasoning set forth in *Tracy* and ruled that the insurance policy was not void on public policy grounds.

As a result of those rulings, the court denied the insurer's motion for summary judgment and found that the policyholder was entitled to a trial on its claim for breach of contract on its property damage claim. Interestingly, the court did not stop there but dropped a footnote to say that even if it had been compelled to find the policy void, it would have permitted the policyholder to amend its complaint to include an unjust enrichment claim and then exercised the court's equitable powers to award expectation damages to the policyholder.

Finally, in *K.V.G. Properties, Inc. v. Westfield Insurance Co.*,[39] a commercial landlord sought coverage under a commercial property policy for property damage caused by a tenant who, unbeknownst to the landlord, was growing marijuana on the property. The damage at issue was caused by things that were done to the property to facilitate the growing operation. The insurer refused to pay the claim on the basis of an illegal acts exclusion, notwithstanding the landlord's lack of knowledge. The court found that the illegal acts exclusion applied to bar coverage, although, in doing so, it explicitly set aside the question of whether the growing operation was legal under state law because the parties had not raised the issue.

The line of cases starting with *Tracy* and the court's decision in *Green Earth* can be harmonized by pointing to the insurer's knowledge or lack of knowledge that marijuana would be involved in any claim. Alternatively, the *Green Earth* decision may herald a trend toward finding in favor of coverage as more states legalize some form of marijuana use. The sparseness of case law on this issue, however, suggests that any attempt to extrapolate from this sample is premature. Practitioners seeking to counsel both insurers and policyholders in this space should keep a close watch on developing case law so that they can best advise their clients as to how to navigate this complicated legal environment.

Conclusion

Given the complex regulations governing lawful hemp and the precarious legal status of marijuana at the federal level, insurers have been hesitant to enter the cannabis market. Those that have entered the cannabis insurance market have faced significant challenges, such as how to price the coverages and how to structure policies specific to the unique risks posed by the cannabis industry. These challenges have resulted in significant coverage gaps in the cannabis insurance market and expensive policies for cannabis operators.

However, with the cannabis industry expected to continue its explosive growth, there is considerable opportunity for early insurance industry participants to establish a foothold in a new and dynamic market. Understanding the basics of the cannabis industry is a necessary first step for those who see the opportunity and wish to be a part of this novel, budding industry. ◄

Notes

1. Michael Arrington, *2019 Was a Big Year for Legal Cannabis*, Benzinga (Feb. 4, 2020), https://www.benzinga.com/markets/cannabis/20/02/15246573/2019-was-a-big-year-for-legal-cannabis.

2. Annual Marijuana Business Factbook: Second Quarterly Update 13 (7th ed. 2019). Thirty-three states have implemented comprehensive marijuana regulations, while three states have high-CBD/low-THC laws that authorize limited medical marijuana use.

3. 21 U.S.C. § 812(c)(10) (2018).

4. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 7605(b), 132 Stat. 4490, 4829 (2018); 7 C.F.R. § 990 (2019).

5. 21 U.S.C. § 812(c)(10).

6. Agriculture Improvement Act § 10113, 132 Stat. at 4908.

7. *See* 7 C.F.R. § 990.

8. *Id.* § 990.1.

9. *Id.* § 990.27.

10. Press Release, U.S. Dep't of Agric., USDA Announces Details of Risk Management Programs for Hemp Producers (Feb. 6, 2020), https://www.usda.gov/media/press-releases/2020/02/06/usda-announces-details-risk-management-programs-hemp-producers.

11. *Noninsured Crop Disaster Assistance Program (NAP)*, U.S. Dep't Agric., https://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/noninsured-crop-disaster-assistance/index (last visited Aug. 5, 2020).

12. *Whole-Farm Revenue Protection (WFRP)*, U.S. Dep't Agric., https://www.rma.usda.gov/en/Policy-and-Procedure/Insurance-Plans/Whole-Farm-Revenue-Protection (last visited Aug. 5, 2020).

13. *Nursery Value Select*, U.S. Dep't Agric., https://www.rma.usda.gov/en/Topics/Nursery/Nursery-Value-Select (last visited Aug. 5, 2020).

14. *Agent Locator*, U.S. Dep't Agric., https://www.rma.usda.gov/Information-Tools/Agent-Locator-Page (last visited Aug. 5, 2020).

15. Nat'l Ass'n of Ins. Comm'rs, Regulatory Guide: Understanding the Market for Cannabis Insurance (2019) [hereinafter NAIC Regulatory Guide], https://content.naic.org/sites/default/files/inline-files/cmte_c_cannabis_wg_exposure_understanding_cannabis_marketplace_0.pdf.

16. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, § 10113, 132 Stat. 4490, 4914 (2018); *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, U.S. Food & Drug Admin. (Mar. 11, 2020), https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd [hereinafter *FDA Regulation of Cannabis*].

17. *FDA Regulation of Cannabis*, *supra* note 16.

18. Agriculture Improvement Act § 7605(b), 132 Stat. at 4829.

19. 15 U.S.C. § 1012.

20. *Id.* § 1012(b).

21. NAIC Regulatory Guide, *supra* note 15, at 11.

22. 31 U.S.C. §§ 5311, 5312(a)(2)(M) (defining "financial institution" to include "an insurance company"); 31 C.F.R. § 1020.320 (referring only to "banks," however).

23. 18 U.S.C. §§ 1956–1957; 31 U.S.C. § 5312(a)(2)(M).

24. 18 U.S.C. § 1960.

25. Julie Hamill, *Protection of Adult-Use Cannabis from Federal Enforcement Passes House in Resounding Bipartisan Vote*, Harris Bricken (June 22, 2019), https://harrisbricken.com/cannalawblog/protection-of-adult-use-cannabis-from-federal-enforcement-passes-house-in-resounding-bipartisan-vote; Zach Harris, *A Brief History of Rohrabacher-Farr: The Federal Amendment Protecting Medical Marijuana*, Merry Jane (Dec. 19, 2017), https://merryjane.com/news/a-brief-history-of-rohrabacher-farr-the-federal-amendment-protecting-medical-marijuana.

26. The District of Columbia also falls within the group of jurisdictions to which the Rohrabacher-Farr Amendment applies.

27. United States v. McIntosh, 833 F.3d 1163, 1178 (9th Cir. 2016).

28. Memorandum from James M. Cole, Deputy Attorney Gen., to U.S. Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

29. Fin. Crimes Enf't Network, FIN-2014-G001, BSA Expectations Regarding Marijuana-Related Businesses (2014).

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