MEDICAL MARIJUANA: LEGAL UPDATE AND PROPERTY INSURANCE COVERAGE CONSIDERATIONS

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
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Although the Illinois Compassionate Use of Medical Cannabis Pilot Program Act (the Act) has been effective since January 1, 2014, licensed medical marijuana dispensaries still do not have any product to sell to qualifying patients in the state. Those sales are coming soon, although such sales will also be subject to a federal law that prohibits the sale, use, or possession of marijuana. This conflict between the state and federal law poses an issue for insurers when it comes to property claims related to the use, possession, or sale of marijuana. Unsurprisingly, Illinois courts have yet to decide any such insurance coverage disputes and court decisions in other states on the topic remain sparse. This article will examine the current status of Illinois and federal law as it relates to marijuana and the implications for property insurance coverage.

I. ILLINOIS LAW – COMPASSIONATE USE OF MEDICAL CANNABIS PILOT PROGRAM ACT

Located at 410 ILCS 130/1 et seq., the Act’s purpose is to “protect patients with debilitating medical conditions, as well as their physicians and providers, from arrest and prosecution, criminal and other penalties, and property forfeiture if the patients engage in the medical use of cannabis.” 410 ILCS 130/5(g). The Act notes that the “medical utility of cannabis is recognized by a wide range of medical and public health organizations, including the American Academy of HIV Medicine, the American College of Physicians, the American Nurses Association, the American Public Health Association, the Leukemia & Lymphoma Society, and many others.” 410 ILCS 130/5(c).

As the Act’s name implies, the lawful cultivation, sale, and use of medical marijuana in Illinois is considered a pilot program and is presently set to run through January 1, 2018. 410 ILCS 130/220. At least nineteen other states have laws authorizing medical marijuana, but those laws differ from state to state. 410 ILCS 130/5(e). For example, the Illinois Act only authorizes a limited number of cultivation centers and dispensaries within the state, each to be granted a license upon being selected after a competitive bidding process. 410 ILCS 130/85 & 115. Only licensed cultivation centers may actually plant, grow, and harvest medical marijuana plants and only licensed dispensaries may buy the marijuana from cultivation centers and resell it to qualifying patients. 410 ILCS 130/10. Cultivation centers may not sell medical marijuana plants to patients, and dispensaries may not plant, grow, and harvest medical marijuana plants. 410 ILCS 130/105(e). Notably, other states actually allow qualifying patients to grow up to a certain number of their own marijuana plants. See, e.g., Mich. Comp. Laws § 333.26424(a) (permitting qualifying patients to grow up to twelve plants).

“Qualifying patient” is defined under the Act as “a person who has been diagnosed by a physician as having a debilitating medical condition.” 410 ILCS 130/10(t). A “debilitating medical condition” may be any one of the over thirty medical conditions specifically identified in the Act.
including AIDS, hepatitis C, Crohn’s disease, traumatic brain injury, Multiple Sclerosis, Parkinson’s, and Tourette’s.

By reason of their debilitating medical condition, qualifying patients may buy up to and possess an “adequate supply” which is 2.5 ounces of usable cannabis every fourteen days. A physician may provide a written waiver of this limitation if the physician deems the amount insufficient to properly alleviate the patient’s symptoms. 410 ILCS 130/10(a) & 25(a). Qualifying patients do not have the right to plant, grow, or harvest their own marijuana plants. As of April 1, 2015, only 1,600 qualifying patients had been approved by the Illinois Department of Public Health. Illinois Department of Public Health, May 5, 2015, available at www.idph.state.il.us/healthwellness/medicalcannabis/physician_info.html.

The Act includes specific provisions to protect those involved in the pilot program including growers, sellers, patients, and physicians. For example, Section 25 provides:

A registered qualifying patient is not subject to arrest, prosecution, or denial of any right or privilege, including but not limited to civil penalty or disciplinary action by an occupational or professional licensing board, for the medical use of cannabis in accordance with this Act, if the registered qualifying patient possesses an amount of cannabis that does not exceed an adequate supply as defined in subsection (a) of Section 10 of this Act of usable cannabis and, where the registered qualifying patient is a licensed professional, the use of cannabis does not impair that licensed professional when he or she is engaged in the practice of the profession for which he or she is licensed.

410 ILCS 130/25(a). Similar language is provided for cultivation centers, dispensaries, and physicians. 410 ILCS 130/25(e), (g), (i).

II. FEDERAL LAW – CONTROLLED SUBSTANCES ACT

Marijuana is listed as a Schedule I drug under federal law, specifically 21 U.S.C. § 812. As a Schedule I drug, federal law considers marijuana to have a high potential for abuse with no currently accepted medical use and a lack of accepted safety for use of the drug. 21 U.S.C. § 812(b). Schedule I drugs qualify as “controlled substances” under the Controlled Substances Act. 21 U.S.C. 841(a). Consequently, federal law prohibits the manufacture, distribution, dispensing, or possession of the controlled substance, marijuana.

Notably, to the extent state laws such as Illinois’ affirmatively authorize the use of medical marijuana, federal law preempts such state laws. See Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus., 348 Ore. 159, 178 (2010). The federal government may still enforce its marijuana laws against medical marijuana users if the federal government chooses to do so. Emerald Steel, 348 Ore. at 178. See also Gonzales v. Raich, 545 U.S. 1, 32-33 (2005) (holding California’s state medical marijuana law was preempted by the Controlled Substances Act).
III. CASE REVIEW

Relatively few cases to date have tested the issue of whether insurers must cover property claims arising out of or related to medical marijuana use or possession. Those cases that have been decided involved homeowners’ or landlord policies.

A. Claims under Homeowners’ Policies

*Tracy v. USAA Casualty Ins. Co.*, No. 11-00487 LEK-KSC, 2012 U.S. Dist. LEXIS 35913, *2 (D. Haw. March 16, 2012), focuses on the police seizure of twelve marijuana plants from an insured’s home in Hawaii. The insured filed a claim under her homeowner’s policy claiming the loss was a covered theft, relying specifically on the policy’s coverage for “trees, shrubs, and other plants.” *Tracy*, 2012 U.S. Dist. LEXIS 35913, at *2-3. The insured argued she lawfully possessed the plants under Hawaii law for medical purposes. *Id.* at *3. The insurer initially agreed to pay the insured’s claim, but when the insured was unhappy with the amount paid by the insurer, the insured filed suit. *Id.* at *3-4.

In a motion for summary judgment, the insurer relied on the illegal status of marijuana at the federal level and made two primary arguments: (1) the insured did not have an insurable interest in the plants and (2) insurance coverage for the plants was against public policy. *Id.* at *5-6. With respect to the insurer’s first argument, the court recognized that Hawaii statutes defined an insurable interest as “any lawful and substantial economic interest in the safety or preservation of the subject of the insurance . . . .” *Id.* at *25-26 (citing Haw. Rev. Stat. § 431:10E-101). Upon review of Hawaii’s medical marijuana law, the court found the law provides an entitlement to the medical use of marijuana. *Id.* at *26-27. As a result, the court rejected the insurer’s argument and held “a qualifying patient who is in strict compliance with the Hawai’i medical marijuana laws has a lawful interest in her marijuana supply” for the purposes of finding an insurable interest. *Id.* at *30.

The insurer fared better, though, with respect to its second argument. The insurer argued it was precluded from providing coverage for the marijuana plants because such coverage would be contrary to federal public policy. *Id.* at *30-31. The court pointed to a number of decisions that held, despite a state’s underlying marijuana laws, marijuana possession and cultivation was still illegal under federal law. *Id.* at *35-36. Noting its right to “decline to enforce a contract that is illegal or contrary to public policy,” the court held that requiring the insurer to pay for the medical marijuana plants would be contrary to federal law and public policy, and consequently the court granted the insurer’s motion for summary judgment. *Id.* at *38.

In *Barnett v. State Farm General Ins. Co.*, 200 Cal. App. 4th 536, 539-40 (Cal. Ct. App. 2011), the insured filed a claim after police seized twelve marijuana plants, freezer bags containing approximately five ounces of marijuana, and a tray with loose marijuana and rolling paper upon execution of a search warrant. Notably, the insured argued the police seizure was unlawful.
because the affidavit on which the magistrate judge relied in signing the search warrant failed to disclose the insured’s cultivation and possession of marijuana was for medical purposes, as permitted under California’s Compassionate Use Act of 1996. *Barnett*, 200 Cal. App. 4th at 540. The state ultimately dropped its criminal charges against the insured approximately one year later, but not before destroying the seized marijuana in a bulk narcotics burn. *Id.* at 541.

The insured sought coverage for the seized marijuana and plants under his homeowners’ policy for theft. *Id.* at 539. After the insurer denied the claim, the insured filed suit. *Id.* at 542. The lower court granted the insurer’s motion for summary judgment, and the insured appealed. *Id.* The argument focused primarily on the definition of theft, which the California Court of Appeals held required felonious or criminal intent. *Id.* at 543-544. As a result, the court found the officers’ seizure was not theft because they had the right to seize the items under color of law thereby negating any criminal intent. *Id.* at 544-45. The court acknowledged that although the California medical marijuana law provides an affirmative defense against criminal prosecution, it does not provide immunity against the execution of a search warrant. *Id.* at 547. The court then affirmed the summary judgment ruling in favor of the insured, finding the seizure was not a covered theft under the insured’s homeowners’ policy. *Id.* at 551.

**B. Claims under Landlord Policies**

In *Anh Hung Huynh v. Safeco Ins. Co. of America*, No. C-12-01574-PSG, 2012 U.S. Dist. LEXIS 167389, *1* (N.D. Cal. Nov. 23, 2012), the insured sought coverage for damages to a residential rental property under a Landlord Protection insurance policy. After a report of a physical altercation, police broke into the rental property through a patio sliding glass door to find the tenant, another individual, and marijuana plants and cultivation equipment. *Huynh*, 2012 U.S. Dist. LEXIS 167389 at *2*. The tenant and other individual were arrested. *Id.* at *3*.

The insured landlord went to the property less than two weeks later to find the broken glass patio door among other damage and reported the damage to its insurer the next day. *Id.* After inspection, the insurer agreed to pay for the damage attributable to the forced entry by the police but denied the claim for damages attributable to the marijuana growth operations. *Id.* at *4*. Specifically, the insurer found damage to the property’s electrical system, holes in the drywall, and installation of shelves, grow light support wires, and floor tarps as a result of the growth operation. *Id.* In denying the claim in part, the insurer relied on the following exclusion:

16. **Illegal Manufacturing, Production or Operation**, meaning loss from:

   a. the illegal growing of plants or the illegal raising or keeping of animals; or
   b. resulting from the illegal manufacture, production, operation or processing of chemical, biological, animal or plant materials.

Such loss is excluded whether by vandalism or any other cause and whether or not within the knowledge or control of an **insured**.
Id. at *5. The insured disputed the denial arguing the exclusion was invalid under California law, which expressly permits the growing of such various plants. Id. at *6. The insured subsequently filed suit. Id. at *7.

Upon the insurer’s motion for summary judgment, the court acknowledged that California Health & Safety Code Section 11362.765 allows qualified patients to use marijuana for medical purposes without being subject to criminal liability. Id. at *15. However, the court found neither the insured’s tenant nor the other individual who was present in the apartment to be a qualified patient and as a result, the grow operation was clearly illegal. Id. The court sided with insurer, granting summary judgment with respect to the denial of claims caused by the marijuana growth operation. Id. at *18.

In a different case out of Washington, however, the landlord policy did not contain the illegal manufacturing exclusion at issue in Huynh, and so the insured landlord fared better. In Bowers v. Farmers Ins. Exchange, 99 Wn. App. 41, 42 (Ct. App. Wash. 2000), the insured’s tenant converted the rental house into a cultivation center resulting in damage to the house including mold damage throughout. Specifically, the tenants converted the basement into a hothouse by diverting all heat in the house to the basement grow room, covering the windows and placing foil on the walls. Bowers, 99 Wn. App. at 42. The excessive water condensation in the basement and lack of heat throughout the house caused rapid mold growth. Id.

The insured reported suspicious activity to the police who then discovered the operation. Id. The insured then filed a claim for warped wall paneling in the basement and mold cleanup. Id. The insurer paid for the warped wall paneling but then denied the claim insofar as it related to mold damage due to the policy exclusion for mold. Id. at 43-44. The insured then filed a lawsuit against the insurer arguing the loss was covered vandalism or malicious mischief. Id. at 44. Upon review of the lower court’s ruling on a motion for summary judgment, the appellate court agreed with the insured. Id. at 44, 48. The court found the tenants engaged in vandalism by acting in conscious disregard for the insured’s property rights, and the vandalism resulted in an unbroken sequence of events that produced the result for which recovery was sought. Id. at 47-48. The court directed an order be entered in favor of the insured as to the coverage issue. Id. at 48.

C. Section 25 as a Potential Defense for Insureds

Some commentary on marijuana laws suggests that the newer statutes authorizing medical marijuana use such as the Act include language that would prevent an insurer from denying insurance coverage for marijuana based on the Controlled Substances Act. The only language that could arguably be construed as having that impact in the Act, however, would be that in section 25, which protects qualifying patients from “arrest, prosecution, or denial of any right or privilege, including but not limited to civil penalty or disciplinary action by an occupational or professional licensing board, for the medical use of cannabis in accordance with this Act . . . .” 410 ILCS 130/25(a).
A case out of Michigan suggests, though, that section 25 of the Act would not prevent insurers from denying coverage for medical marijuana. In Casias v. Wal-Mart Stores, Inc., 695 F.3d 428, 432 (6th Cir. 2012), an employee was terminated after failing a drug test that revealed the employee’s marijuana use. The employee sued his employer for wrongful termination claiming the marijuana use was lawful and the termination violated the Michigan Medical Marihuana Act. Casias, 695 F.3d at 432.

Similar to section 25 of the Act, the Michigan Medical Marihuana Act provides a registered qualifying patient “shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege . . . for the medical use of marihuana in accordance with this act . . . .” Id. at 435 (citing Mich. Comp. Laws § 333.26424(a)). Although the employee argued his termination violated this section of Michigan’s law, the district court held the language did not limit the range of allowable private decisions by Michigan businesses but instead was intended to provide a defense to criminal prosecution or other adverse state action. Casias, 695 F.3d at 435. The district court dismissed the claim upon motion by the employer, and the employee appealed. Id. at 432. Upon review, the Sixth Circuit Court of Appeals affirmed the district court’s decision. Id. at 436-37.

The opinion in Casias seems to indicate that section 25 of the Act would not be interpreted to limit non-state action including private contracting and insurance. Consequently, the Act likely does not prohibit insurers from rightfully denying coverage, unless and until it is amended to state otherwise.

IV. CONCLUSION

Despite the current low number of qualifying patients in Illinois, the marijuana industry is expected to grow to $21 billion by 2020 even without legalization on the federal level. Christopher Ingraham, The marijuana industry could be bigger than the NFL by 2020, THE WASHINGTON POST, October 24, 2014, available at http://www.washingtonpost.com/blogs/wonkblog/wp/2014/10/24/the-marijuana-industry-could-be-bigger-than-the-nfl-by-2020/. If that is accurate, then the number of claims for coverage of marijuana or losses caused by marijuana will significantly increase in the years to come. Further, if Illinois should later decide to follow in the footsteps of other states like Michigan, California, and Hawaii and permit qualifying patients to grow their own plants or, like Colorado or Washington, legalize recreational use of marijuana, claims would exponentially increase. Regardless of any changes to the state law, though, the Controlled Substances Act as currently drafted complicates an insurer’s coverage decision for any medical marijuana. Although insurers may be able to deny coverage under a homeowners’ policy on the basis of federal public policy, such basis likely does not exist under a landlord policy unless expressly provided by the applicable policy. In any event, this is a rather undeveloped area of law, so insurers should consult with their attorneys to stay abreast of court decisions as more claims are tested in courts.
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Stacy focuses her practice on commercial and governmental transactions and litigation. Stacy assists her clients with the negotiation and drafting of a wide range of contracts including purchasing, consulting, equipment finance, and license agreements, and she also assists her clients with corporate governance and compliance issues. Her clients range from large to small businesses, non-profits and local units of government. Stacy works regularly onsite with a Fortune 50 manufacturing company assisting its in-house counsel with vendor agreements, open-source software and freeware licenses, and compliance issues. The company has touted the relationship as helping it actually lower the company’s legal costs while increasing its efficiencies. In the public sector, Stacy serves as general counsel to a local municipality and has represented governmental entities in various contract disputes.

Prior to attending law school, Stacy worked for a major insurance company for three years in auto claims and then commercial underwriting. During law school, Stacy served as a law clerk for United States District Court Judge Timothy J. Corrigan and interned with the United States Attorney’s Office for the Middle District of Florida. Stacy also participated on the school’s Mock Trial team and was an editor for the Florida Coastal Law Review. Stacy started her career with Heyl Royster in the summer of 2010 as a law clerk and then joined the firm full time as an associate in February 2011.

Publications
- “Sender Beware: How Your Emails or Letters may be Ruled a Binding Contract,” Heyl Royster Business and Commercial Litigation Newsletter (2014)
- “FOIA Update: When Texts and Emails on Your Cell Phone or Tablet Become Public Records,” Heyl Royster Governmental Newsletter (2014)

Public Speaking
- “Medical Cannabis: A Primer For Employers and Governmental Entities” Heyl Royster Lunch & Learn Seminar/Webinar (2014)
- “Risky Business of Accepting Credit Cards” Heyl Royster Business & Commercial Litigation Seminar (2013)
- “Social Media and Healthcare Professionals: Appropriate Uses versus Abuses” Crawford Memorial Hospital Physicians’ Group (2013)

Professional Recognition
- 40 Leaders Under Forty 2014 - Selected by InterBusiness Issues magazine

Professional Associations
- American Bar Association
- Illinois State Bar Association
- Peoria County Bar Association (Young Lawyers Committee, 2011-present; Continuing Legal Education Committee, 2013-present; Special...
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