


Michigan Marijuana Liability – Seeing the Weed Through the Trees

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Michigan's new marijuana laws are dope, at least for those that understand the playing field. Given the recency of the changes, and the likely mainstream use of marijuana in the coming months and years, it is time for practitioners to rehash the issues that are already starting to bud. However, it is also important to note that experience, whether it be in other similar areas of the law or after final implementation of the recreational marijuana statutes, will be the gateway to understanding this green landscape.

The Implementing Statute

In November 2018, voters in Michigan approved Proposal 1, which enacted the Michigan Regulation and Taxation of Marihuana Act ("the Act"). MCL 333.27951 et seq. Among other things, the Act was intended to make the use of marijuana legal for those 21 or older:

> The purpose of this act is to make marihuana legal under state and local law for adults 21 years of age or older, to make industrial hemp legal under state and local law, and to control the commercial production and distribution of marihuana under a system that licenses, regulates, and taxes the businesses involved. The intent is to prevent arrest and penalty for personal possession and cultivation of marihuana by adults 21 years of age or older; remove the commercial production and distribution of marihuana from the illicit market; prevent revenue generated from commerce in marihuana from going to criminal enterprises or gangs; prevent the distribution of marihuana to persons under 21 years of age; prevent the diversion of marihuana to illicit markets; ensure the safety of marihuana and marihuana-infused products; and ensure security of marihuana establishments. To the fullest extent possible, this act shall be interpreted in accordance with the purpose and intent set forth in this section.

The implementation of the Act is left to the Department of Licensing and Regulatory Affairs, including the licensing of dispensaries.

Notably absent from the Act are any provisions that pertain to civil liability that arises or may arise from the sale or distribution of marijuana that causes personal injury. While it is possible the Legislature intends to deal with this issue prior to the issuance of licenses in December 2019, currently it has provided no direction on how to handle these situations. Thus, practitioners that either defend or consult with dispensaries are left to manage this landscape themselves.

Parallels to Alcohol

With the potential for the use (or misuse) of marijuana to cause personal injury, parallels can be drawn between its consumption and the consumption of alcohol. As noted above, the Act does not provide for a framework for the identification of liability for the sale or distribution of marijuana that leads to personal injury.

In the vacuum that has been legislatively created, one could be tempted to liken the liability related to the distribution of marijuana to the liability related to the distribution of alcohol. In Michigan, liability for the improper distribution or service of alcohol to an allegedly intoxicated person is governed by the Dram Shop Act. The elements for a claim under the Dram Shop Act are as follows:

1. the immediate tortfeasor was an intoxicated person;
2. defendants, or their agents, sold intoxicating liquors to the tortfeasor;
3. as a result of the sale, the tortfeasor continued in an intoxicated condition until the time of the accident; and
4. the intoxication was the cause or contributing cause of plaintiff's injury.

While it is certainly understandable why one might conflate the service of marijuana with the service of alcohol, the Dram Shop Act pertains only to "intoxicating liquors." Additionally, the Social Host Liability Doctrine only pertains to those who supply liquor to minors. See, *Longstreth v Gensel*, 423 Mich 675; 337 N.W.2d 804 (1985). Therefore, while there may be parallels between the distribution and service of alcohol and the distribution and service of marijuana, the current state of the law does not address the provision of intoxicating substances that are not liquor (i.e., marijuana).

Instead, it appears that common law negligence principles will apply when marijuana is the intoxicating substance at

issue. This is certainly subject to change given the recency of the legalization of marijuana and the continued legislative discussions about the same. But, given that marijuana was recently a Schedule 1 substance, the common law does not provide any more guidance than the Act.

That said, dram shop limitations on liability and provisions of the Dram Shop Act that permit indemnification from the allegedly intoxicated person and preclude the dismissal of him or her from the suit until it is fully and finally resolved are not benefits that a marijuana distributor can rely upon to share or transfer risk. That leaves open the question of whether there are other methods of risk sharing that a marijuana dispensary can use to limit or completely transfer liability should it be named in a personal injury negligence matter.

Other Theories of Indemnification – Common Law

Marijuana dispensaries, with a lack of a statutory framework to share risk, may be tempted to limit liability at the point of sale of their goods or thereafter with one of Michigan's indemnity theories, including common law or contractual indemnity.

"Common law indemnification is available only if the party seeking it is not actively negligent." *Palomba v City of Detroit*, 112 Mich App 209 (1982). The key focus here is whether the sale or distribution of marijuana is "active negligence." Indeed, as risk transfer and indemnity attorneys know, in common law indemnity situations determining whether the underlying complaint alleges active negligence is of vital importance to the success of such a claim. Given the enactment of statutory law that permits the sale and use of marijuana, it is unlikely that its sale is active negligence in the context of State law. That said, the issue is not as clear cut as one would expect since the sale of marijuana is currently a Federal crime. Regardless, it seems evident that if the sale is more than the amount permitted by law, that is likely to be active negligence. Accordingly, it is important to understand what the statute permits because if a potential client's sale of marijuana complies with the statutory scheme, common law indemnity *may* provide respite.

Contractual Indemnification

Further, there is an opportunity at the point of sale to include indemnity language and waivers of liability. Assuming that the indemnity language is properly displayed, the purchaser is aware of it, and there are no issues with adhesion contracts, a contract that seeks to shift liability to a purchaser *may* be valid. In fact, the Act states as much –"It is the public policy of this state that contracts related to the operation of marihuana establishments be enforceable." However, "an adhesion contract is simply a type of contract *and* is to be enforced according to its plain terms just as any other contract." *Rory v Continental Ins. Co.*, 473 Mich 457 (2005). Accordingly, the Act and relevant case law provides safe harbor for the argument that a point of sale indemnification provision is enforceable as written.

Regardless, transferring risk in this manner is not guaranteed. First, an innocent third party may still have a cause of action for negligence against a dispensary, and certainly that is a claim that would likely be brought given the deeper pockets a business is likely to have. Seeking indemnity against a purchaser and allegedly intoxicated individual likely does not provide much of an avenue for recovery, making an indemnity theory practically worthless from the perspective of the dispensary.

It is noteworthy to mention that in the circumstances that it does make sense to pursue indemnity, there is the potential that such an agreement could be invalid as against public policy, regardless of the impact of MCL 333.27960 since public policy is also anti-indemnity. See, e.g., *Chrysler Corp v Brencal Contractors Inc.*, 146 Mich App 766 (1985). (When there is an ambiguity in a contract, the language is "construed most strictly against the party who drafts [it] and against the party who is the indemnitee.") Thus, while risk transfer is always an avenue to pursue, the knowledgeable practitioner will advise her client that indemnity may not result in its insulation should an innocent third party obtain a judgment.

Insurance Coverage

There are coverage issues that must be considered in standard policies, including CGL policies. Most policies have exceptions to coverage that may impact a dispensary from obtaining coverage for personal injury claims.

The first that comes to mind is the exclusion for illegal activities. Under Michigan law, this exclusion would likely not apply, although the continuing illegality of marijuana use under federal law makes the answer less clear.

But another exclusion, often overlooked, that could apply in either state or federal court when a dispensary seeks coverage, is the Products-Completed Operation Hazard exclusion that is found in form CGL policies.

> Coverage C Medical Payments
>
> 2. Exclusions
> We will not pay expenses for "bodily injury":
>
> * * *
>
> f. Products-Completed Operations Hazard
>
> Included within the "product-completed operations hazard."

Since the insurance industry is continuing to evolve in this field, a full analysis of all potential coverage issues would be speculative at best for claims arising in Michigan. However, this topic is ripe for discussion once dispensaries are licensed

as there are sure to be issues with the implementation of insurance coverage, as has occurred in other states.

For example, on the question of the illegal activities exclusion, consider *Green Earth Wellness Center, LLC v. Attain Specialty Insurance Company*, 163 F.Supp3d 821 (D.Colo. 2016). (A claim for breach of insurance contract could continue to trial and the insurance policy was not void as against federal public policy, reasoning that a recent erosion of federal public policy suggests that the federal Controlled Substances Act will not be enforced in states that have approved recreational medical marijuana.)

Of note, there are specialty lines that do provide coverage for dispensaries for recreational use that are currently available in states where dispensaries are operational. As those policies are not yet available or needed in Michigan, it is also speculative to presume the contents of them at this time.

Conclusion

While the prospects of mainstream recreational marijuana use are becoming clearer, the liability that businesses such as dispensaries may endure is hazy. There is a framework in place under the Dram Shop Act that could be a guidepost for issues such as liability and cost sharing, but until Legislative action is taken, cutting through that haze of liability remains difficult. Therefore, common law and traditional negligence claims will fill the void, with the opportunity for clever practitioners to utilize those traditional avenues to protect their clients before their ambitions go up in smoke. ■

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No-Fault Reform 2019: A Counterpoint

By Jack L. Hoffman, *Kuiper Kraemer PC*

"It wasn't him, Charley. It was you."
Marlon Brando as Terry, from *On the Waterfront*

I read with interest Wayne Miller's article in the July 2019 issue of the *Journal of Insurance and Indemnity Law,* "No-Fault Reform 2019: Shame."

I consider Wayne one of the finest attorneys and gentlemen that I have had the privilege to meet. He is an articulate advocate for the health services industry. But he is that, an advocate. I offer a counter-point.

In truth, the original no-fault act was reasonably well crafted to achieve its goals. What brought the system to the point of unworkability was a spirit of legal skepticism of Enlightenment values which enticed the Michigan judiciary to in effect amend the statute, in violation of separation of powers, in the interest of the health services industry. Having achieved hegemony, the health services industry bitterly opposed necessary reforms, such as a medical fee schedule, which would have preserved the system. Having done everything in its power to divert the act from its original purposes and turning the system into a rainy day fund for the health services industry to cover perceived losses in other lines of business, the industry and Wayne now decry the reform act as a failure of the legislative process. Given the history of the application of the act by the courts, it is more accurate to describe the collapse of the original system as a failure of the judicial branch to exercise judicial self-restraint and deference to the legislature.

I commence with legal skepticism because I understand that to be the root of the problem. A primary source on legal skepticism is Judge Posner's 1988 article in the University of Michigan Law Review, *A Skeptical Jurisprudence*. There the distinguished judge, economist and philosopher of law lays down the credo of the legal skeptic: Facts are real, values are not. Since values are not real, there is no reason for an intelligent judge to be bound by the Enlightenment based judicial values of judicial self-restraint, deference to the legislature, separation of powers, impartiality, respect for the law, and a government of laws and not men.

In the last analysis, as that other prominent legal skeptic Oliver Wendell Holmes famously pronounced, the law is nothing but a prediction of what judges will do. This of course gives no guidance to a judge trying to decide a case, because it merely tells the judge to predict what he or she is going to