The Property & Liability Insurance Implications of the Legalization of Medical Marijuana

Brenda Wells, Ph.D., CPCU, AAI
Robert F. Bird Distinguished Scholar of Risk and Insurance
East Carolina University
Owner, Risk Education Strategies
Marijuana Legalization: Implications for Property/Casualty Insurance

Brenda Wells, Ph.D., AAI

Abstract: In 2012, two states legalized marijuana for recreational use. An additional 18 states, plus the District of Columbia, had already legalized medical marijuana. Even though marijuana is still illegal at the Federal level, President Barack Obama said very clearly that his administration will not seek to enforce the law in states that have deemed the green plant legal. Further, a majority of Americans indicate that they do not want Federal resources used to arrest and convict marijuana smokers in states that have legalized the substance (Fenner, 2012).

The legalization of marijuana is now a reality. With it comes interesting implications for the property and casualty industry. This paper presents the current status of marijuana’s legality, addresses coverage issues that have been litigated, and analyzes the various standard insurance forms on today’s market for coverage implications. Finally, areas for future research are presented. [Key words: insurance, marijuana, legalization]

MARIJUANA TODAY

Legal Status and Public Opinions

Currently, marijuana is classified as a “Schedule 1” substance by the Food and Drug Administration (FDA). As a result of its Schedule 1 status, it is illegal to possess or use marijuana under Federal law. Schedule

---

1East Carolina University; author contact information: e-mail wellsbr@ecu.edu, phone 252-481-2777.

This article is dedicated to the late Dr. Don Hardigree. Without Don, I would have never ended up in academia in the first place. I also would like to thank the kind participants at the 2013 Western Risk and Insurance Association annual meeting for their suggestions and
HISTORY
How Long Have We Used It?

- “…a known medicine in 2000 BC…”
- “…found a large stash of cultivated cannabis belonging to a shaman of the Gushi people in the Gobi desert, dating from 2700 BC. (CNN, 2008).”

Source: http://www.slatercenter.com/about-cannabis/about-history#
• American production of hemp encouraged for the production of rope, sails, and clothing.
• 1619:
  – Virginia Assembly required every farmer to grow hemp
  – Hemp was legal tender in PA, VA and MD
1700’s

• Which famous U.S. dignitary...
  – Grew hemp for 30 years?
  – Was very interested in medicinal use of marijuana?
  – Grew marijuana with a very high THC content?
1799?

• Who brought marijuana from Egypt to France?
1840’s

- Victorian times: used for muscle spasms, rheumatism, convulsions.
- French doctor found that it
  - Relieved headaches
  - Increased appetite
  - Aided sleep
- Became accepted in Western medicine
**United States Pharmacopeial**

**1820–1890**

- **1820**
The U.S. Pharmacopeial Convention founded in Washington, DC. All state societies of medicine invited to send delegates—11 attended. USP creates a system of standards, and a national formulary. Only 217 drugs meeting the criteria of "most fully established and best understood" admitted. Dr. Lyman Spalding, Dr. Samuel Mitchell and Dr. Jacob Bigelow credited with establishing the United States Pharmacopeia (USP) compendium.

- **1830**
Committee of Revision created (seven members). First revision of the USP published; revisions continue at 10-year intervals. Surgeons General of U.S. Army and Navy became first federal agencies to participate in USP revision.

- **1848**
Drug Import Act passed. Federal legislation recognizes the USP as an official compendium.

- **1850**
Colleges of pharmacy invited to participate in revision of the USP.
1850

- Marijuana put in *United States Pharmacopeial*:
  - Treatment for: neuralgia, tetanus, typhus, cholera, rabies, dysentery, alcoholism, opiate addiction, anthrax, leprosy, incontinence, gout, convulsive disorders, tonsillitis, insanity, excessive menstrual bleeding, and uterine bleeding, among others.
“cures dysentery and sunstroke, clears phlegm, quickens digestion, sharpens appetite... freshens the intellect, and gives alertness to the body and gaiety to the mind.”
Post-Civil War

- Imports and other domestic materials replaced hemp for many purposes.
- Marijuana became a popular ingredient in many medicinal products and was sold openly in public pharmacies.
MARIJUANA ILLEGALIZATION
1920’s – 1930’s

• Prohibition
• League of Nations’ “Second Opium Conference”
  – Signs ban on cannabis against anything other than scientific or medical research.
• 1931: 29 states have banned marijuana
1936

- Aspirin and other analgesics are supplanting cannabis
- All states have outlawed for anything other than a prescribed medical purpose
1937

• Cannabis is made illegal in the U.S. via the Marijuana Tax Act
  – Opposed by the American Medical Association
  – restricted possession of the drug to individuals who paid an excise tax for certain authorized medical and industrial uses.

• Who was anti-Hemp? Speculation suggests....
William Randolph Hearst

PAPER/TIMBER
Dupont Family

NYLON
Andrew Mellon

INVESTED IN DUPONT
“Hemp For Victory”

- U.S. Government gave to farmers:
  - Seeds
  - Draft deferments
- 1943: Registered American farmers harvested 375,000 acres of hemp.
1944

- LaGuardia Report
  - marijuana did not induce violence, insanity or sex crimes, or lead to addiction or other drug use.
1950’s

• Boggs Act, 1952; Narcotics Control Act, 1956
  – mandatory sentences for drug-related offenses, including marijuana.
  – First-offense for marijuana possession
    • 2-10 years imprisonment
    • Up to $20,000 fine
1970

- Federal Controlled Substances Act passed.
- Declares cannabis a “Schedule 1” drug:
  - High potential for abuse
  - No recognized medical use
  - Lack of accepted safety
  - Insufficient clinical trials to show benefits outweigh risks
  - Inconsistency in levels of active ingredients from one batch to another
ATTEMPTS TO “RE-LEGALIZE”
Let’s Reschedule...

• 1972: Petition to reschedule to Schedule II, enabling legal physician prescription.
  – Court battle lasts 22 years
  – 1994: US Court of appeals upholds the DEA’s decision not to reschedule.
• 1995: Second petition filed to reschedule it.
• 1997: *NEJM* publishes editorial calling for rescheduling.
Our Friends in Canada

  – In response to an Ontario court order for the Canadian government to make a legal supply of marijuana available to authorized patients.
U.S. Medical Marijuana Legalization

- Alaska (1998)
- Arizona (2010)
- California (1996)
- Colorado (2000)
- Connecticut (2012)
- D.C. (2011)
- Delaware (2011)
- Guam (2014)
- Hawaii (2000)
- Illinois (2013)
- Maine (1999)
- Maryland (2014)
- Massachusetts (2012)

- Michigan (2008)
- Minnesota (2014)
- Nevada (2000)
- New Hampshire (2013)
- New Jersey (2010)
- New Mexico (2007)
- New York (2014)
- Oregon (1996)
- Rhode Island (2006)
- Vermont (2007)

## Summary Chart: 23 states and DC have enacted laws to legalize medical marijuana

<table>
<thead>
<tr>
<th>State</th>
<th>Year Passed</th>
<th>How Passed (Yes Vote)</th>
<th>Fee</th>
<th>Possession Limit</th>
<th>Accepts other states' registry ID cards?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>1998</td>
<td>Ballot Measure 8 (58%)</td>
<td>$25/$20</td>
<td>1 oz usable; 6 plants (3 mature, 3 immature)</td>
<td>No</td>
</tr>
<tr>
<td>Arizona</td>
<td>2010</td>
<td>Proposition 203 (50.13%)</td>
<td>$150/$75</td>
<td>2.5 oz usable; 0-12 plants</td>
<td>Yes</td>
</tr>
<tr>
<td>California</td>
<td>1996</td>
<td>Proposition 215 (56%)</td>
<td>$66/$33</td>
<td>8 oz usable; 6 mature or 12 immature plants</td>
<td>No</td>
</tr>
<tr>
<td>Colorado</td>
<td>2000</td>
<td>Ballot Amendment 20 (54%)</td>
<td>$15</td>
<td>2 oz usable; 6 plants (3 mature, 3 immature)</td>
<td>No</td>
</tr>
<tr>
<td>Connecticut</td>
<td>2012</td>
<td>House Bill 5389 (96-51 House, 21-13 Senate)</td>
<td>$100</td>
<td>One-month supply (exact amount to be determined)</td>
<td>No</td>
</tr>
<tr>
<td>DC</td>
<td>2010</td>
<td>Amendment Act B18-622 (13-0 vote)</td>
<td>$100/$25</td>
<td>2 oz dried; limits on other forms to be determined</td>
<td>No</td>
</tr>
<tr>
<td>Delaware</td>
<td>2011</td>
<td>Senate Bill 17 (27-14 House, 17-4 Senate)</td>
<td>$125</td>
<td>6 oz usable</td>
<td>No</td>
</tr>
<tr>
<td>Hawaii</td>
<td>2000</td>
<td>Senate Bill 862 (32-18 House, 13-12 Senate)</td>
<td>$25</td>
<td>3 oz usable; 7 plants (3 mature, 4 immature)</td>
<td>No</td>
</tr>
<tr>
<td>Illinois</td>
<td>2013</td>
<td>House Bill 1 (61-57 House; 35-21 Senate)</td>
<td>TBD</td>
<td>2.5 ounces of usable cannabis during a period of 14 days</td>
<td>No</td>
</tr>
<tr>
<td>Maine</td>
<td>1999</td>
<td>Ballot Question 2 (61%)</td>
<td>No fee</td>
<td>2.5 oz usable; 6 plants</td>
<td>Yes</td>
</tr>
<tr>
<td>Maryland</td>
<td>2014</td>
<td>House Bill 881 (125-11 House; 44-2 Senate)</td>
<td>TBD</td>
<td>30-day supply, amount to be determined</td>
<td>No</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>2012</td>
<td>Ballot Question 3 (63%)</td>
<td>$50</td>
<td>60-day supply for personal medical use</td>
<td>unknown</td>
</tr>
<tr>
<td>Michigan</td>
<td>2008</td>
<td>Proposal 1 (63%)</td>
<td>$100/$25</td>
<td>2.5 oz usable; 12 plants</td>
<td>Yes</td>
</tr>
<tr>
<td>Minnesota</td>
<td>2014</td>
<td>Senate Bill 2470 (46-16 Senate; 89-40 House)</td>
<td>$200/$50</td>
<td>30-day supply of non-smokable marijuana</td>
<td>No</td>
</tr>
<tr>
<td>Montana</td>
<td>2004</td>
<td>Initiative 148 (62%)</td>
<td>$75</td>
<td>1 oz usable; 4 plants (mature); 12 seedlings</td>
<td>No</td>
</tr>
</tbody>
</table>

Pending Legislation to Legalize Medical Marijuana

- **Florida** (failed November 2014)
- **North Carolina** (2014 allowed limited use for epilepsy patients)
- Ohio
- Pennsylvania

Public Opinion Regarding Legalization: 2012


Do Not Approve: 52%
Approve: 48%
Public Opinion Regarding Legalization: 2013

A Favorable International Climate

• 2011: Canadian judge required auto insurer to pay for greenhouse, soil and plants for man injured in car accident
U.S. Federal Climate

• 2009: Obama Administration instructs Federal prosecutors not to target medical marijuana dispensaries/users in compliance with their respective state laws

(Source: Barrett, 2009)
What Happens Now?

Colorado saw retail prices drop 30% over two years.
Legal Marijuana Market Size ($Billions)

- 2013: $1.53
- 2014: $2.57
- 2019: $10.2

The graph shows the growth of the legal marijuana market size from 2013 to 2019.
TODAY’S INSURANCE INDUSTRY
How Does Insurance Treat Other “Vices”?
Problems for P&C Insurers

• An emerging industry needs coverage.
• We know how many people smoke cigarettes and drink alcohol...but....
  – No way to accurately underwrite marijuana exposure
• Potentially high concentrations of value in any one structure.
• Potential liability exposure for an insured who makes marijuana available to a third party
• Workers Compensation coverage issues
Problems for Life & Health Insurers

• Limited research has been done to know and understand health effects of ongoing use, thus...
  – How do we underwrite that risk?
• In states where medical marijuana is legal, should health plans pay for it?
Medical Marijuana Insurance

• Handled through excess & surplus lines markets

• Available Coverages Include:
  – Theft coverage (for valuable crops and harvested products)
  – Workers compensation coverage (for employees of the facilities)
  – Auto liability (for employees who deliver marijuana to customers)
  – Professional liability (for doctors that prescribe it)
  – Product liability (for producers and growers)
  – Electronic data (for dispensaries if client database is breached or stolen)

– Source: Ceniceros (2010)
EXAMPLE POLICY ANALYSIS: HOMEOWNER POLICIES
HO Section I: Property Coverage

- No explicit exclusion for loss of contraband, including marijuana.
- But, the courts would not make insurers pay for something against public policy, right?
- Conflict between state and federal law:
  - If it’s legal at the state level and illegal at the Federal level, is it against public policy?
  - Insurance exempts itself from federal oversight, so....?
• Business Personal Property limitation of $1,500 off premises and $2,500 on premises
  – Would apply to marijuana if kept for business purposes
• Appears to be no other limitation on medicinal supplies of marijuana
Provisions for Marijuana Plants

• Additional coverages for trees/shrubs/plants limit coverage to selected perils, up to 5% of limit of liability, but no more than $500 per tree or plant.
  – Has a specific exclusion for items grown for “business purposes.”
  – So, it seems:
    • No coverage whatsoever for business plants
    • Limit of $500 per plant for medicinal plants, but only where legal
Barnett v. State Farm

• In 2007, a California man had marijuana plants confiscated and destroyed by police officers.
• He filed a claim with State Farm
  – Theft of the $98,000 worth of plants
  – Plants were prescribed by a physician
• The carrier denied the claim—denial was upheld on appeal.
• WHY???
Medical Marijuana Coverage Challenge

• The police seizure by did not meet the definition of “theft”
  – There was no criminal intent behind the seizure (Murphy, 2011)
Tracy v. USAA

• Hawaii resident asked her homeowner’s carrier to pay over $45,000 for 12 marijuana plants.
  − Initially, USAA offered to settle with her for approximately $8,800.
  − Tracy demanded more money, plus bad faith damages.
• USAA asserted there was no valid insurable interest in the plants, because of Haw. Rev. Stat. § 431:10E-101, which states:
  − “No contract of insurance on property or of any interest therein or arising therefrom shall be enforceable... except for the benefit of persons having an insurable interest... Insurable interest means any lawful and substantial economic interest....”
  − USAA argued that because the plants were illegal under Federal law, to cover marijuana would be against public policy.
• The court agreed with USAA. Tracy’s claim was denied entirely.
Section II: Liability Coverage

• Business pursuits exclusion
  – Bodily injury" or "property damage" arising out of the use, sale, manufacture, delivery, transfer or possession by any person of ... marijuana and all narcotic drugs.
  – However, this exclusion does not apply to the legitimate use of prescription drugs by a person following the lawful orders of a licensed health care professional.”
Section II: Insurer Responsibilities

• No responsibility to cover any liability for damages caused out of the homeowner’s recreational possession or use of marijuana, whether it is legal or illegal in the state.

• Possible (?) responsibility to cover liability arising out of the use of medical marijuana in a state where medical marijuana is legal.
Conclusions

- As states legalize medical marijuana,
  - Claims adjusters will see more claims and challenges in this arena
  - ISO standard forms need modification to preclude coverage for marijuana supplies, stock, and growing crops
- The underwriting processes need refinement to evaluate the exposure to loss
WORKPLACE ISSUES
Issues

• Because of its Schedule 1 Classification:
  – There is virtually no research on side effects and long-term use effects, and thus...
  – No established medical guidelines

• No quality control or grading standards in place
Potential Side-Effects

- Respiratory damage/cancer
  - Memory loss
  - Impaired judgment
- Inability to focus
- Loss of coordination
  - Loss of balance
  - Depression
  - Anxiety
- Decreased motivation
Employer Concerns

- Must we provide medical marijuana as a w.c. benefit?
  - Workers are asking for it more frequently
  - Absence of a National Drug Code (NDC) makes reimbursement a problem
<table>
<thead>
<tr>
<th>Sort by: Proprietary Name</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Search Results: Proprietary Name &gt; &quot;victoza&quot;</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 - 5</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Product NDC: 0169-4060</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proprietary Name: Victoza</td>
</tr>
<tr>
<td>Non-Proprietary Name: liraglutide (rDNA origin) injection</td>
</tr>
<tr>
<td>Product Type Name: HUMAN PRESCRIPTION DRUG</td>
</tr>
<tr>
<td>Market Category Name: NDA</td>
</tr>
<tr>
<td>Application Number: NDA022341</td>
</tr>
<tr>
<td>Route Name: SUBCUTANEOUS</td>
</tr>
<tr>
<td>Substance Name: LIRAGLUTIDE</td>
</tr>
<tr>
<td>Package Description: 2 SYRINGE, PLASTIC in 1 CARTON (0169-4060-12) &gt; 3 mL in 1 SYRINGE, PLASTIC</td>
</tr>
<tr>
<td>Pharm Class: N/A</td>
</tr>
<tr>
<td>DEA: N/A</td>
</tr>
<tr>
<td>Labeler Name: Novo Nordisk</td>
</tr>
<tr>
<td>Start date: 01-25-2010 / End date: N/A</td>
</tr>
</tbody>
</table>
Employer Concerns

• Is marijuana addictive or harmful to employees?
  – Possible liability for future rehab treatments
  – Delays in return to work

• Many patients experience lingering side effects which may impact performance of regular work duties
  – 1991 Study: showed that performance of aircraft pilots was impaired 24 hours after consumption of marijuana
Employer Concerns

• Impossible through urine testing to quantify how much is being used, therefore it is also impossible to:
  – set a “safe” or “acceptable” level of consumption
  – determine if employee is “intoxicated”
Currently...

- No states
  - Allow employees to use in the workplace
  - Require employers to allow its use on the job.
Currently...

- An employee who can legally use medical marijuana while off duty may still face consequences for testing positive in a drug-free workplace
  - Rulings in California, Michigan, Oregon and Washington upheld the firing of medical marijuana users who test positive.
  - Some states have introduced legislation preventing employee termination for off duty medical marijuana use
New Mexico (2014)

- Court ruled that worker's compensation insurance policies in the state must cover medical marijuana
  - *Vialpando v. Ben’s Automotive Services and Redwood Fire & Casualty*
Colorado

• Injured worker was fired for using medical marijuana off duty.
  – Colorado Court of Appeals Upheld
  – Colorado Supreme Court has agreed to hear the case.
  – *Coats v. Dish Network LLC*
Americans with Disabilities Act

• “Must make reasonable accommodation....”
  – Worker must still be able to do the job
    • We would not let a crane operator work using oxycontin...but
    • what about a
      – Retail sales clerk?
      – College professor?
      – Computer programmer?
      – Fast food employee?

• If marijuana is reclassified as Schedule 2, will we have to accommodate workers who are prescribed marijuana?
Conclusions

• As states legalize medical marijuana:
  – Employers will see more claims and challenges in this arena
  – States need to prepare for these claims in advance, determining whether or not marijuana is required to be covered
• Clarification on how the ADA impacts coverage for marijuana is sorely needed.
QUESTIONS?