

Insuring the Risk in the Emerging Cannabis Market



***Green Earth Wellness Center LLC v. Atain Specialty Insurance Co.,
163 F.Supp.3d 821 (Dist. CO 2016)***

- “Contraband” exclusion / public policy arguments
 - “[E]xclusion is rendered ambiguous by the difference between the federal government’s *de jure* and *de facto* public policies regarding state regulated medical marijuana.”
 - Atain knew that Green Earth was operating a medical marijuana business.

“The parties shared a mutual intention that the Policy would insure the marijuana inventory and that the Contraband exclusion would not apply.”

Green Earth Wellness Center LLC v. Attain Specialty Insurance Co., 163 F.Supp.3d 821 (Dist. CO 2016)

- The court declined to follow prior decisions, including *Tracy v USAA Casualty Ins. Co.*, 2012 WL 928186 (Dist. HI 2012)
“Particularly in light of several additional years evidencing a continued erosion of any clear and consistent federal public policy in this area”
- See also:
 - *Mann v. Gullickson*, 2016 WL 6473215 (N. Dist. CA 2016) (Contract for sale of medical marijuana consulting business held enforceable despite federal illegality)
 - *Green Cross Medical, Inc. v. Gally*, 242 Ariz. 293 (2017) (Lease agreement by dispensary operator held enforceable against landlord despite federal illegality)

Indemnity and Additional Insured Issues



- Is an indemnity agreement legally enforceable in a state that has not yet legalized marijuana?
- Are there problems caused by naming out of state production and supply chain partners as additional insureds?

How Does the Policy Define Cannabis?

- Growing plants and/or finished product?
- Seeds, resin and/or derivatives?
- Manufactured concentrates?
- Medicinal and/or adult use cannabis?
- CBD only?
- Industrial hemp?

Beware of synthetic cannabis!



Current Challenges (GL/Product Policies)

- Shared Limits with GL on same Coverage form
- Non-Stacking Endorsement on Claims Made form
- No Duty to Defend
- Exclusions
 - Illegal Acts / Schedule 1 / Contraband
 - Smoking Product
 - Health hazard
 - Mental/physical impairment caused by cannabis
 - Vape cartridges/batteries

Coverage Needed by the Industry

- General Liability / GL Excess
- Product Liability / Product Excess
- Property / 3rd Party
- Crop / Living Plants
- Cargo / Money and Securities
- Commercial Auto / Personal Auto



Coverage Needed by the Industry

- Professional Liability
 - E&O, D&O, Management Liability
- Employment Practices Liability
- Intellectual Property
- Cyber
- Event / Vendor Liability
- Workers Compensation



What Cannabis Insurance is Required for a Licensed Operator?

- California

Bureau of Cannabis Control insurance requirement:

§ 5308. Insurance Requirements

(b) A distributor licensee shall at all times carry and maintain commercial general liability insurance in the aggregate in an amount no less than \$2,000,000 and in an amount no less than \$1,000,000 for each loss.

Some local jurisdictions in CA also require product liability insurance

WAC 314-55-082

Agency filings affecting this section

Insurance requirements.

Marijuana licensees shall provide insurance coverage as set out in this section. The intent of the required insurance is to protect the consumer should there be any claims, suits, actions, costs, damages or expenses arising from any negligent or intentional act or omission of the marijuana licensees. Marijuana licensees shall furnish evidence in the form of a certificate of insurance satisfactory to the WSLCB that insurance, in the following kinds and minimum amounts, has been secured. Failure to provide proof of insurance, as required, may result in license cancellation.

(1) Commercial general liability insurance: The licensee shall at all times carry and maintain commercial general liability insurance and if necessary, commercial umbrella insurance for bodily injury and property damage arising out of licensed activities. This insurance shall cover such claims as may be caused by any act, omission, or negligence of the licensee or its officers, agents, representatives, assigns, or servants. The insurance shall also cover bodily injury, including disease, illness and death, and property damage arising out of the licensee's premises/operations, products, and personal injury. The limits of liability insurance shall not be less than one million dollars.

(2) Insurance carrier rating: The insurance required in subsection (1) of this section shall be issued by an insurance company authorized to do business within the state of Washington. Insurance is to be placed with a carrier that has a rating of A - Class VII or better in the most recently published edition of *Best's Reports*. If an insurer is not admitted, all insurance policies and procedures for issuing the insurance policies must comply with chapters **48.15** RCW and **284-15** WAC.

(3) Additional insured. The state and its employees, agents, and volunteers shall be named as an additional insured on all general liability, umbrella, and excess insurance policies. All policies shall be primary over any other valid and collectable insurance.

[Statutory Authority: RCW **69.50.342** and **69.50.345**. WSR 16-11-110, § 314-55-082, filed 5/18/16, effective 6/18/16. Statutory Authority: RCW **69.50.325**, **69.50.331**, **69.50.342**, **69.50.345**. WSR 13-21-104, § 314-55-082, filed 10/21/13, effective 11/21/13.]

“The insurance shall also cover bodily injury, including disease, illness and death, and property damage arising out of the licensee’s premises/operations, products, and personal injury.”

Banking Issues



FinCEN Guidelines

UNITED STATES DEPARTMENT OF THE TREASURY



Department of the Treasury Financial Crimes Enforcement Network

Guidance

FIN-2014-G001

Issued: February 14, 2014

Subject: BSA Expectations Regarding Marijuana-Related Businesses

The Financial Crimes Enforcement Network ("FinCEN") is issuing guidance to clarify Bank Secrecy Act ("BSA") expectations for financial institutions seeking to provide services to marijuana-related businesses. FinCEN is issuing this guidance in light of recent state initiatives to legalize certain marijuana-related activity and related guidance by the U.S. Department of Justice ("DOJ") concerning marijuana-related enforcement priorities. This FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations, and aligns the information provided by financial institutions in BSA reports with federal and state law enforcement priorities. This FinCEN guidance should enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.

Marijuana Laws and Law Enforcement Priorities

The Controlled Substances Act ("CSA") makes it illegal under federal law to manufacture, distribute, or dispense marijuana.¹ Many states impose and enforce similar prohibitions. Notwithstanding the federal ban, as of the date of this guidance, 20 states and the District of Columbia have legalized certain marijuana-related activity. In light of these developments, U.S. Department of Justice Deputy Attorney General James M. Cole issued a memorandum (the "Cole Memo") to all United States Attorneys providing updated guidance to federal prosecutors concerning marijuana enforcement under the CSA.² The Cole Memo guidance applies to all of DOJ's federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

The Cole Memo reiterates Congress's determination that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Cole Memo notes that DOJ is committed to enforcement of the CSA consistent with those determinations. It also notes that DOJ is committed to using its investigative and prosecutorial resources to address the most

¹ Controlled Substances Act, 21 U.S.C. § 801, *et seq.*

² James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement* (August 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

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Weed and Work





Product Liability



Unfair Competition

Consumer Class Actions

