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Examining Product Liability



Marijuana businesses could be prime targets for lawsuits unless measures are taken to ensure proper labeling and standards

By Karen A. Canton and Martina L. Jaccarino

Product liability is the way that businesses are regulated through tort damages in the United States. There have been repeated attempts to create another standard for safety, but ultimately

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Most business owners have some awareness of liability based on negligence; you owe a duty, breach that duty and this is a direct cause of damage to someone. Your business' general liability insurance covers losses under this category, which includes slip-and-falls and commercial vehicle accidents.

Product liability is different. The business owner will not know about an incident until much later and it may involve the actual customer, or someone else who foreseeably came in contact with a product the business sold. An example can be found with regard to children. It is foreseeable that if patients are not advised of the risks to children, the entities who made and sold the product may have liability. People involved in the industry have a responsibility to acknowledge that injuries have occurred, and that the law places a greater burden on the industry that created the product than common-sense handling of the product by the consumer. A person injured by a product will most likely make a claim against the dispensary where the product was sold, but the law allows the plaintiff to initiate the lawsuit against anyone in the chain of distribution, including the grower or manufacturer. All of these players will become involved in the case and the lawyers will sort out who is held accountable.

STANDARD OF CARE

Product liability claims are analyzed under a strict liability standard. Strict liability means that all the plaintiff has to prove is that a product was either defective, contaminated or unreasonably dangerous, and that the product caused harm. There are defenses, of course, which will be addressed below.

The marijuana business has a two-fold exposure. One exposure is like any other consumable, such as food poisoning from improper food handling, or a contaminant coming in contact with a crop or a product. These are manufacturing defects. These losses have a statistically small probability of occurring, and can be settled for a relatively small amount in most cases. They also may be covered by available insurance policies.

The second type of exposure stems from marijuana as a medicine, as a product that in some forms is intended to be smoked, and as an intoxicating substance. These cases are areas where the business owners can have an impact on exposure. These losses stem from product liability claims arising from design defects, specific language in advertising and inadequate warnings.

As the marijuana business matures, businesses will be able to obtain insurance for most of these



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Breach of warranty

As business owners and marijuana advocates, it is tempting to ignore the panoply of scientific research indicating that marijuana has undesirable side effects that can lead to dangerous activities and that foreseeable misuse can have serious consequences. However, in order to protect our businesses and maintain the integrity of our movement, we have a responsibility to familiarize ourselves with the most significant potentially negative results and warn our patients and consumers to use marijuana responsibly.

People in the industry and society at large are becoming more aware of the risk of over-consuming edibles. While most people consider smoking unhealthy, some people new to marijuana do not realize how much stronger marijuana products are today, particularly with the delayed effect of edibles. For example, there is a growing class action lawsuit in Colorado arising from mislabeled products at the Denver County Fair. The plaintiffs allege that there were clearly visible signs stating that there was no marijuana in the free chocolate samples made available. In fact, there was marijuana in the chocolate candy.

According to the package instruction, there were three recommended servings of cannabis extract in a very small piece of chocolate. The entities in the chain of distribution of that product face potential liability for false advertising, failure to warn and design defect because the dose per bite was too high, which makes misuse foreseeable. If an employee acted on his or her own,

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WARNINGS OF GENERAL RISKS

While death caused by cannabis alone is very rare (if not completely nonexistent), there are still many serious consequences of an overdose. Obviously, hallucinations that lead to bizarre behavior, such as jumping off a building, are supposed to be avoided by responsible use. However, how can the industry use “responsible use” as a defense when some dispensaries forgo laboratory testing, sell product without dose information or use dose information that is inconsistent with traditional serving sizes? Compounding matters is that “hot spots” are known to occur when an extract is distributed unevenly throughout a product.

While this is the case, entities selling or distributing edibles must be very cautious about having more than one serving per consumable item or risk liability for adverse reactions to over-consumption, such as hallucinations or comas.

The only solution is proper warnings and a push for truly scientific, peer-reviewed research. The barriers to warnings and promises based on science are beyond the scope of this article, but there are those in our industry who are working diligently to overcome them.

PRODUCT LIABILITY TRENDS

One controversial area is warning about the risk of addiction and the need to generally use cannabis responsibly. According to the National Institute of Health, 1 in 6 teenagers who try marijuana ultimately become addicted to the drug. This statistic comes from scientific research that has been peer-reviewed and accepted by experts on the front line of treatment. Many of us

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It will be the dispensaries, producers and growers who will have fewer options for expert opinions.

According to the director of the National Institute on Drug Abuse, whose mission is to prevent and treat drug abuse, social consequences of heavy marijuana among teenagers include an average eight-point decrease in adult IQ and six times the possibility of having schizophrenia. These statistics are highly debatable, but a battle between expert witnesses in a courtroom is sure to have the same outcome every time – very high legal bills.

The battle over addiction and other social consequences is being fought in Illinois by the City of Chicago versus Johnson & Johnson, Purdue and others, as well as in California with Orange County as the plaintiff. The essence of the lawsuits is that Big Pharma launched a campaign in 1999 to change public perception about opioid use at the same time it was marketing drugs like OxyContin to doctors for use in treating chronic pain.

The consequences have been significant because patients develop a tolerance to these medications and addiction is likely. The plaintiff municipalities in those ongoing cases argue that the drug companies knew this when they engaged in a false advertising campaign and made representations to physicians that they knew were false. Individual patients have successfully sued doctors and manufacturers over addiction to these medications. The claims and defenses available in lawsuits between prescribers and patients is beyond the scope of this article, but will be covered in a later issue. The lesson is that while marijuana is becoming generally accepted, we continue to live in a society deeply divided on many issues, and the consequences of using cannabis products will be looked upon with a critical eye by many segments of the population.

Conclusion

Obviously, obtaining insurance that covers as many potential liabilities as possible is a necessary part of the cannabis industry. Unfortunately, many of the major insurers are not yet issuing insurance coverage for marijuana. Additionally, the insurers who are willing to take on the risk will have exclusions for some of the most expensive risks. At this point, the best benefit from some of the insurance policies will be the cost of defense. Most policies will cover the insured's legal expenses, even if the loss is ultimately excluded from coverage.

The most important thing growers, manufacturers and retailers can do to limit exposure is to focus on loss prevention. We have a wealth of history to learn from. Minimize youth-targeted advertising; we know from Big



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Last year, 2,000 studies were completed about the effects of cannabis, but only 6% of those studies were intended to establish the benefits it offers. The reason for this is the almost insurmountable obstacles to studying Schedule I narcotics. We must make it a priority to complete scientific, peer-reviewed research about our product's benefits. In the meantime, we must familiarize ourselves with the scientific, peer-reviewed studies that demonstrate the benefits of our product. Advertising that goes beyond the science must be specifically disclaimed as warranties or promises, and our actual promises or warranties should be limited. If we fail to do this and a patient has a negative outcome, the financial and social consequences on the cannabis industry may be its own negative outcome.

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