The New Massachusetts Recreational Marijuana Law – Impact on the Insurance Industry

Description

On December 15, 2016, *The Regulation and Taxation of Marijuana Act* (the "Act") became effective, decriminalizing marijuana ownership and use for private citizens in the Commonwealth, and mandating the creation of a regulatory system able to sustain state-legal recreational marijuana businesses by January 1, 2018. Such sweeping changes will impact various business sectors in ways both expected and not so expected.

One industry influenced by the Act is insurance. From a licensing and business perspective, this may be obvious. A new industry leads to new business opportunities. However, there are other less apparent ways the Act has, is and will impact the insurance industry.

In fact, the insurance market generally has had a head start to prepare as other states, such as Colorado and Oregon, have already legalized marijuana use. Though potentially influenced by other jurisdictions, Massachusetts law will develop on its own as insurance contracts are interpreted under state law and, therefore, will play out on a state-by-state basis.

One issue that will likely arise in the Commonwealth is the degree to which marijuana and marijuana accessories owned for personal use will be covered by personal insurance lines. Or to take that a step further, whether, in Massachusetts, property damage from a fire resulting from personal marijuana growth or processing will be insurable.

These questions could be resolved in different ways and will initially turn on the terms of each policy. However, there are some general points to consider. For example, even though many policies may insure trees, shrubs and other plants, the contracting parties may not have been contemplating the more valuable marijuana plant when the policies were drafted. Accordingly, the insurable value of trees, shrubs and other plants under the policy may be capped or at least challenged by the insurance company as exceeding the risk which the parties intended at consummation of the policy. Similarly, such risk concerns arise with regard to growing plants, which increase the risk of fire, theft, and water damage. Individuals looking to take full advantage of the Act should consult their insurance policy and their agent. Potential issues could be resolved by notifying the insurer or agent. Of course, such additional risks on the part of the insurer could also result in increased premium charges.

As the law becomes clarified, it may become less likely that an insurer will be able to deny coverage generally as to marijuana's insurable interest. Some insurers have taken the position (and some courts have agreed) that insurance contracts are not enforceable for loss of marijuana because of federal law's designation of marijuana as a Schedule I drug. However, some states have been proactive to combat this state versus federal law dilemma by drafting specific legislation.

As stated above, interpretation of insurance contracts is decided by state law not federal law. Some states are making it clearer that policy holders have an insurable interest in marijuana and that the use of marijuana cannot be used to deny the enforceability of a contract. For example, Oregon passed the *Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act* (the "Oregon Act"). The Oregon Act provides that "[n]o contract shall be unenforceable on the basis that manufacturing, distributing, dispensing, possessing, or using marijuana is prohibited by federal law."

The Massachusetts Act, on the other hand, is not quite as clear. In Section 7 of Chapter 94G, personal use of marijuana cannot be a disqualification or denial of any right or privilege. With regard to contracts, although the

title of Section 10 states “Contracts pertaining to marijuana enforceable”, the body of that section seems to be limited to “marijuana establishments”. The definition of “marijuana establishments” is limited to those holding a license under Chapter 94G, Section 1(j). Individuals are not required to hold a license in order to possess marijuana or to grow a limited number of plants.

Until the above statutory language is clarified through the Massachusetts courts, it appears the opportunity remains for an insurer to at least raise the challenge that an insurance contract is unenforceable due to federal law’s prohibition on marijuana use despite Massachusetts legalization thereof, at least in cases involving individual growers. Massachusetts policy holders may, however, have other avenues to use to counter such claims. For example, Massachusetts’ Chapter 176D, *Unfair Methods of Competition and Unfair and Deceptive Acts and Practices in the Business of Insurance*, may give an insurer pause to deny a claim where coverage is reasonably clear, particularly given the general nature of the Act.

As with any change to the status quo, it will take time for the laws and regulations under the Act to develop in areas where they intersect with other laws and regulations. Insurance will be one of those areas. We will continue to keep you updated.

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