Cannabis: Potential Implications

On December 15, 2016, the Regulation and Taxation of Marijuana Act (the "MA Act") became effective in the Commonwealth of Massachusetts, decriminalizing marijuana ownership and use for private citizens and mandating the creation of a regulatory system able to sustain state-legal recreational marijuana businesses by January 1, 2018. The impact of such sweeping changes (along with what seems to be a national trend) has not been confined to Massachusetts, and is clearly influencing its smaller neighbor to the South.

With the legalization of medical marijuana already in effect in Rhode Island, Senator Josh Miller and others have sponsored the Adult Use of Cannabis Act, seeking the legalization of recreational marijuana use by adults age 21 and over and a system for business cultivation and distribution of marijuana. This proposed legislation has been held for further study and will not likely receive a floor vote this session. On the other hand, H 5551, a joint resolution to create a special legislative commission to study the effects of legalizing marijuana, was approved for passage by the House Judiciary Committee and is awaiting action on the House floor. Should H 5551 be approved, the commission is required to report its findings to the General Assembly by March 1, 2018, which permits ample time for passage of legislation in 2018 to completely legalize marijuana use beyond medical purposes.

If the complete legalization of marijuana reaches Rhode Island, its effects will extend to markets and industries in ways both expected and unexpected. Insurance is no exception, and there are a myriad of ways that legalized use of marijuana will complicate the status quo.

One complication is that insurance is controlled by state law, so each state will develop its own set of insurance laws and regulations with respect to legal marijuana. We might have a head start in preparing since other states, such as Massachusetts, Colorado, and Oregon, have already legalized marijuana use. But even if these other states provide some influence, the reality is that the impact of legal marijuana use on the business of insurance in Rhode Island remains to be seen as insurance contracts are interpreted under state law.

Take for example the degree to which marijuana and marijuana accessories owned for personal use will be covered by personal insurance lines; or whether 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 entered. 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. Similar risk concerns arise with regard to growing marijuana plants, which increases the risk of fire, theft, and water damage. Additionally, 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.

Some states have been proactive in addressing this state law versus federal law dilemma through specific legislation to make clear that policyholders have an insurable interest in marijuana and that the use of marijuana cannot be used to deny the enforceability of a contract. Oregon, for example, passed the Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act. This legislation provides that "[n]o contract shall be unenforceable on the basis that manufacturing, distributing, dispensing, possessing, or using marijuana is prohibited by federal law".

Massachusetts law, on the other hand, is not quite as clear. Although the title of Section 10 of the MA Act 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 the MA Act. Individuals are not required to hold a license in order to possess marijuana or to grow a limited number of plants. Therefore, it is unclear whether personal lines insurers in Massachusetts could challenge the insurable interest in marijuana.

In Rhode Island, policy regarding marijuana use is already subject to shifting sands. The Rhode Island Superior Court recently held that a local company is guilty of discriminating against a prospective employee for refusing to hire the employee because the employee actively used medical marijuana pursuant to a state-issued medical marijuana card and would admittedly not be able to pass a mandatory drug test or comply with the company's drug-free workplace policy. The decision in Callaghan v. Darlington Fabrics and the Moore Company made clear that the Hawkins-Slater Medical Marijuana Act (the "Hawkins-Slater Act"), which prohibits discrimination against card-carrying medical marijuana users, also protects the cardholder's actual use of marijuana. The Court went so far as to find that the company's attempted distinction between holding a card and using the drug to be "incredulous" as such a reading of the law would render the Hawkins-Slater Act almost meaningless.

It should be noted that while protecting the cardholder's "use" in general, the Hawkins-Slater Act also provides some protection to the employer. First, the Hawkins-Slater Act makes clear that the employer is not required to "accommodate the medical use of marijuana in any workplace". This is of some assistance. However, although the Hawkins-Slater Act does not require "accommodation", neither does it state that an employer may discipline or terminate any employee under the influence of medical marijuana while at work. Second, the Hawkins-Slater Act does not require or allow a person under the influence of medical marijuana to engage in certain work. But even this provision is limited; the actual language of the Hawkins-Slater Act is that work is not permitted under the influence of marijuana "when doing so would constitute negligence or professional malpractice".

Will Rhode Island insurers amend their employment practices liability policies in light of the holding in this case? Will they revisit other policies in light of the hazy line of what may constitute permitted work under the influence of marijuana without running afoul of state law?

These are only a few examples of what Rhode Island may encounter. As with any change to the status quo, there will be growing pains as the laws and regulations relating to marijuana use – whatever they may be – intersect with laws and regulations in other areas. Insurance most definitely is one of those areas. We will continue to keep you updated.

Date Created
May 26, 2017