



# Covered Events

Homeowners, Health, and Auto Insurance

## The Crossroads of Cannabis and Coverage

By Laura Meyer Gregory and Devon C. Bodey



State legalization of marijuana is rising—33 states and the District of Columbia have legalized marijuana in some form. However, marijuana continues to be illegal under

federal law. This trend is challenging for both insurers and insureds, posing the questions: when is coverage afforded for marijuana-related losses? Is there coverage for an insured's damaged or stolen marijuana if it is legal in the state where the loss was? Is there coverage for CBD products as treatment for injuries from an auto accident? These issues are discussed below. This area of law is rapidly changing. As we write this, Congress is reviewing a bill to legalize cannabis at the federal level. Thus, the first step in any legal analysis should start with updated research regarding both federal and state law.

The illegality of marijuana at the federal level creates a complex legal backdrop surrounding insurance coverage. See Comprehensive Drug Abuse Prevention and Control Act of 1970, codified at 21 U.S.C. §801, et. seq.; see also 21 U.S.C. §812 (noting marijuana as a Schedule I controlled substance); *Gonzalez v. Raich*, 545 U.S. 1 (2005) (holding federal law has right to criminalize purely intra-state manufacturing, distribution, or possession of marijuana, including for medicinal purposes). In 2005 in *Gonzales v. Raich*, 545 U.S. 1 (2005), the U.S. Supreme Court held that “the possession and cultivation of marijuana for medical use is illegal under federal law, even when it is permitted under state law.” *Gonzales* strongly asserted the supremacy clause, urging that federal law superseded and preempted all state laws, including state medical marijuana laws.

The divide between federal law and the many state laws, as they pertain to the legalization of marijuana for recreational and/or medical purposes, raises the issue of whether marijuana can be legally insured. To date, there is only one case addressing marijuana coverage under a personal policy—*Tracy v. USAA Cas. Ins. Co.*, Civil No. 11-00487 LEK-KSC, 2012 WL 928186 (D. Haw. Mar. 16, 2012); all other cases are in the commercial context.

## Homeowners Insurance

Coverage of marijuana as personal property under a homeowners policy remains a gray area, creating questions regarding coverage of stolen or destroyed marijuana. In 2012, the United States District Court in Hawaii when a homeowner sued their insurer, seeking coverage of her stolen marijuana plants under the “Trees, Shrubs and Other Plants” coverage in her homeowners policy. *Tracy, supra*. Notably, the plants in Tracy were legal under Hawaii's medical marijuana law. While the court acknowledged that the plaintiff's marijuana could be “personal property” within the meaning of the policy due to its legality under state law, it held that the plaintiff's recovery of benefits under the insurance policy was nonetheless barred on public policy grounds. The court wrote:

Plaintiff's possession and cultivation of marijuana, even for State-authorized medical use, clearly violates federal law. To require Defendant to pay insurance proceeds for the replacement of medical marijuana plants would be contrary to federal law and public policy, as reflected in the CSA [Controlled Substances Act], *Gonzales*, and its progeny. The Court therefore CONCLUDES that, as a matter of law, Defendant's refusal to pay for Plaintiff's claim for the loss of her medical marijuana plants did not constitute a breach of the parties' insurance contract.

In reaching this conclusion, the *Tracy* court relied in part on *Gonzalez v. Raich*, which essentially declared all state medical marijuana laws void. In *Gonzales*, the U.S. Supreme Court held that federal law regulating controlled substances superseded and preempted all state laws, including medical marijuana laws.

Despite the landmark holding in *Tracy*, two courts have discussed whether a state law legalizing possession and consumption of marijuana, for personal use or medicinal purposes, requires coverage of marijuana as insurable personal property. See *Green Earth Wellness Center, LLC v. Attain Specialty Ins. Co.*, 163 F.Supp.3d 821 (D. Colo. 2016); *K.V.G. Properties Inc. v. Westfield Ins. Co.*, 900 F.3d 818 (6th Cir. 2018). *Green Earth Wellness Center* involved a retail medical

marijuana business that operated an adjacent growing facility, which sued its insurance carrier for failing to pay claims for smoke damage and theft of marijuana plants. Green Earth sought coverage and asserted a statutory claim for bad faith breach of insurance contract, further alleging the insurer unreasonably delayed payment on the theft claim. In applying Colorado state law, which allows possession of marijuana for recreational use, the court disregarded the insurer's "illegality under federal law" argument. The Court ultimately held that there was coverage based on the fact that both parties intended, at the time of contracting, that coverage extend to Green Earth's marijuana inventory and harvested plants. In sum, the Court found that the insurer could not deny coverage because the insurer knew that Green Earth was in the business of marijuana cultivation and sale and still issued its insurance policy to the state-licensed grower.

Two years later, in *K.V.G. Properties*, the Court of Appeals for the Sixth Circuit, addressed coverage for a commercial landlord for damage to rental property by tenants who were growing marijuana. After the insurer denied coverage under the commercial property insurance contract, the insured filed suit for breach of contract, arguing there was no coverage because the tenants' conduct was criminal under either state or federal law and the illegal acts were the primary cause of the loss. The court agreed, reasoning that cultivating marijuana is a crime under federal law, but it is protected by Michigan state law under certain conditions. The court noted that "under different circumstances, [the insured] might have a strong federalism argument in favor of coverage." However, the insured's tenants did not comply with Michigan law when they cultivated marijuana outside the scope of any federal or state law, thereby making the act wholly illegal and therefore not covered.

## Health Insurance

The federal illegality of marijuana has continued to bar health insurance providers from covering medical marijuana. Unlike issues that arise with respect to other types of insurance, health insurance issues focus primarily on insureds seeking coverage for marijuana due to its alleged health benefits. Marijuana has been used to treat a variety of issues, including but not limited to, epilepsy, glaucoma, and chronic pain. Recently, CBD Oil and other products containing low amounts of cannabis are being touted as medicinal. However, because these products do not require a prescription, they are generally not covered under health insurance.

Despite the increase in physician recommendations for the use of medical marijuana, health insurers remain unwavering in their denial of coverage. Unlike the varying rationales behind affording coverage for marijuana under homeowners policies, insurers' rationale with respect to coverage of

marijuana under health insurance is far clearer. Insurers have rested their decisions on marijuana being a Schedule I drug under the Controlled Substance Act, which defines Schedule I drug as drugs with no currently accepted medical use and a high potential for abuse. 21 U.S.C.A. §§812(b)(1), (c)(10, 17). Therefore, under federal law, marijuana remains classified amongst some of most dangerous drugs, such as heroin. Thus, physicians cannot legally prescribe marijuana, due to its status as a Schedule I drug. As a result, the health insurance industry refuses to acknowledge the use of marijuana as "medical care."

Health insurers further rely on Section 213 of the Internal Revenue Code, which provides that the amounts paid to obtain a controlled substance such as marijuana, due to the violation of federal law, are not deductible expenses for medical. See 26 U.S. Code § 213. Therefore, medical marijuana is not recognized as a "medicine" which is eligible for federal tax deduction. Although the Internal Revenue Code addresses tax deductions and does not preclude a private health insurer from affording coverage, many companies rely on Section 213 to promote the same policy as *Gonzalez v. Raich*—that marijuana remains federally illegal and coverage is not required. See *Gonzales, supra*.

## Auto Insurance

The notion that insureds will seek coverage for medical marijuana following a car accident is far from speculative. With the rapidly growing market of cannabis-containing products, and a trend in many individuals seeking to medicate more naturally, insurers are now seeing an increase in claims for the cost of these treatments. Further, it is logical to anticipate an increase in the use of cannabis containing products as more states legalize cannabis use and society accepts cannabis. Personal injury protection ("PIP") claims seeking coverage of CBD oil for bodily injury are already being seen in the industry. For the reasons discussed above, insurers have a sound basis for denying coverage of marijuana as a medical expense under automobile insurance for the same reason that coverage is denied under traditional health insurance policies.

As previously noted, insureds have begun seeking reimbursement under PIP for Cannabidiol ("CBD") products, citing its lack of the principal psychoactive component of marijuana, tetrahydrocannabinol ("THC"). The Agriculture Improvement Act of 2018 (the 2018 Farm Bill), legalized the production of hemp and hemp extracts and removed hemp from the Controlled Substances Act, 21 U.S.C. §802(16). See Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 44490 (2018). Pursuant to the 2018 Farm Bill, hemp is legal under federal law so long as it contains no more than 0.3 percent THC. Notably, a hemp plant and marijuana plant are of the same species, but, a hemp plant is defined as



containing 0.3 percent or less of THC, whereas a marijuana plant is defined as containing 0.3 percent or more THC.

Despite the limited amount of THC in CBD, thereby making it seemingly legal, the Food and Drug Administration has prohibited the sale of CBD in any unapproved health products, dietary supplements, or food, which are unsupported by the FDA. To date, the only FDA-approved health product on the market that contains CBD is the prescription medication Epidiolex, used to treat seizures. While the federal prohibition of marijuana may be slowly lifting, until there are further changes at the federal level, insurers remain within their legal rights to deny coverage for medical marijuana or CBD under automobile insurance policies. As the issue develops and claims regarding coverage of marijuana and marijuana-related products increase, we anticipate similar issues will arise under Uninsured Motorist/Underinsured Motorist and Medical Payments coverages.

## Avoiding Coverage Disputes Between Insurance Carriers and Their Insureds

While insurers are currently within the law in denying coverage for marijuana products based on their federal illegality, insurers should promote consistency in their claims handling to avoid unnecessary disputes. Due to the limited number of reported decisions regarding insurance coverage of marijuana claims, particularly in the context of personal policies, many legal uncertainties remain. Further, it is unclear

whether federal efforts to legalize marijuana will be successful and to what extent changes at the federal level will impact on insurance coverage under homeowners, health or auto policies. As more and more states move toward various degrees of legalization, and depending on whether the federal government develops their position on marijuana in the upcoming years, the law on the issue is likely to rapidly develop. At this point, the insurance industry is just at the beginning of what is likely a long journey regarding insurance coverage of marijuana, whether medical or recreational. However, one place for insurers to start would be the inclusion of policy language clarifying the insurer's position regarding coverage.

Despite the federal law standing firm, the insurance industry has begun to acknowledge the need to recognize the impact of marijuana on the industry. Recently, the Insurance Services Office, Inc. ("ISO") released its first marijuana-related endorsement forms, which involve commercial policies. However, we anticipate that the ISO will next turn its attention to the impact of marijuana in a personal context and draft forms accordingly.

While the above-referenced cases, statutes, and federal laws are helpful in attempting to analyze the trends in marijuana coverage, gray area continues to exist. Ultimately, while some states have legalized marijuana, as long as federal law deems marijuana an illegal drug there will be plenty of room for inconsistencies regarding insurance coverage.

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