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Growing Products Liability Claims Against the Marijuana Industry

Marijuana products liability claims are inevitable. As the marijuana industry increases in size, and more states eventually legalize its use for medical or recreational purposes, it will become a target of litigation. Although only a small number of cases have been filed, manufacturers, retailers, and others along the marijuana supply chain need to prepare for the inevitable increase in claims against the industry, specifically those arising out of products liability.

With Legalization Comes Liability

Products liability claims arise from an [alleged harm](#) caused by the design, manufacture, or sale of a product.^[i] Typical products liability claims are grounded in tort law theories of negligence or strict liability.^[ii] In the marijuana context, such claims will likely be based on theories that (1) the products were defectively designed, (2) contained a manufacturing defect, or (3) those in the supply chain failed to warn the consumer about a potential danger associated with the product.

Marijuana “edibles” are likely to be particularly vulnerable to products liability claims.^[iii] Edibles are food products infused with chemical compounds released from the cannabis plant, such as tetrahydrocannabinol (THC) or cannabidiol (CBD). (THC is the chemical component that produces the euphoric feeling associated with marijuana use, whereas CBD has been described as beneficial to feelings of anxiety and sleep disturbances.)

However, products liability claims will not be limited to edibles. Various claims involving different products used to ingest or inhale marijuana – such as vaporizers or pre-rolled marijuana cigarettes or “joints” – are easily imaginable.

Recommendations

Marijuana businesses should anticipate products liability claims and take measures to increase the safety of their products for the end-user to help mitigate risks from litigation. The following is a

consolidated list of recommendations for marijuana businesses when creating cannabis-infused edible products:

- A single-serving size marijuana edible's THC content should be no higher than the recommended standard dose. For example, if a baked good – such as a cookie – is generally consumed in one serving, the baked good should contain no greater than a standard dose of THC, which some have recommended is around 10 mg.^[1]
- State law guidelines should be followed, where implemented, when using pesticides or fungicides on marijuana plants and proper investment in state-of-the-art testing equipment should be made to ensure final marijuana products are safe for human consumption. Note that while the federal Environmental Protection Agency (“EPA”) has not regulated pesticides for use in marijuana cultivation, manufacturers could follow guidelines set by the EPA for other agricultural commodities.
- Investment in adequate testing technologies and procedures should be made to ensure the concentration of chemical components within a given product is accurate, and that the product's label accurately reflects such content. Until there are proper industry standards, retailers should educate consumers about the dangers of inaccurate labeling and the dangers associated with consuming products with a high concentration of THC.
- Marijuana products should contain labeling that includes adequate warnings of any dangers associated with consuming the product as well as dosing instructions. Dosing instructions should advise the user that the dosing of medical marijuana is different for each individual, and that the individual is responsible for determining their own dose in consultation with their treating physician.
- In the medical context, physicians, manufacturers, and retailers need to provide adequate warnings to the patient of potential side effects or dangers of marijuana use. Given the evolving state of science as to the uses and side effects of medical marijuana, these warnings should be carefully crafted

with advisors knowledgeable in labelling laws.

Marijuana Product Defect Claims

A marijuana product defect can manifest itself in three ways: (i) in the design of the product, (ii) the manufacturing of the product, or (iii) in the warnings or instructions that accompany the product.^[iv] The same product defect can form the basis for an action based on a “failure to warn.”^[v] Provided below are a few recommendations for how to avoid liability under various product defect claims.

a.) Avoid a Defective Design Claim by Aligning the THC Content of an Edible with the End-User’s Consumption Expectation

A defectively designed product is one designed in a way that is not suitable or safe for its intended purpose.^[vi] In Ohio, a product is defective in design if at the time it left control of the manufacturer, certain foreseeable risks of the product exceeded its benefits. [ORC 2307.75](#).^[vii] Marijuana edibles are the most likely culprit of defect design claims because edibles can contain high concentrations of THC that can cause consumer health complications if ingested in one dose.

Leafly.com recommends that the standard dose of THC in an edible is around 10 mg and recommends only 5 mg for new users.^[viii] However, some companies sell baked goods – like a rice krispy treat – with up to 60 mg of THC. If following a standard dose of THC, to properly dose this type of edible, a user should separate the one rice crispy treat into six equal doses. Nevertheless, a new user is unlikely to be aware of proper dosing instructions for edibles. Instead, the new user will ingest the edible how he or she has always ingested a rice crispy treat, in one single serving. This can lead to marijuana overdose, which can cause panic attacks, psychosis, a fast heart rate, uncontrollable shaking, and other symptoms.^[ix]

Because it is likely that a new user will overdose on the small serving size, it could be alleged that the rice crispy treat is defectively and dangerously designed. The creation of a product with such a high THC content in a single-serving portion size increases the danger of the product or its addiction potential. While

no defective design claim has been brought against an edibles company, it is only a matter of time before a new or average user consumes a dangerous amount of THC in a single serving and is injured or injures a third party.

To avoid such liability, companies should properly dose edibles to the generally understood serving size of the product. If something like a cookie, rice crispy treat, or brownie is traditionally consumed in a single serving, the THC content should match the generally understood serving size. Indeed, some states, including Colorado, require edibles to be sold in 10 mg or fewer increments of THC.^[x]

b.) Avoid a Manufacturing Defect Claim by Ensuring the Product is Safe for Human Consumption & Accurately Tested for THC Content

A product contains a manufacturing defect when the product departs from its intended design, even if all possible care was exercised in the preparation and marketing of the product.^[xi] For example, in *Flores v. Livwell, Inc.*, the plaintiffs brought suit against a cannabis grower and dispensary operator for using an unapproved fungicide on their marijuana plants.^[xii] Interestingly, the plaintiffs did not assert bodily injury, only that they overpaid for a product with a manufacturing defect.^[xiii] Because they did not suffer damages, the case was dismissed for lack of standing in 2016. *Flores v. Livwell, Inc.*, District Court, Denver County, Case no. 2015-CV-33528.

Although *Flores* was dismissed, similar cases are conceivable if the plaintiff is damaged. Marijuana products can be sprayed with pesticides like any other plant, but without EPA oversight.^[xiv] Some legalized states have adopted EPA regulations for cannabis production, but a lack of federal oversight could lead to lackluster enforcement of the adopted regulations by state agencies.^[xv] In a nightmare scenario, lack of federal oversight could lead to damages through the improper use or overuse of harmful pesticides – leading to the inevitable commercial questioning whether “you or a loved has been harmed by the inhalation or ingestion of pesticide-tainted marijuana.”

Furthermore, some medical marijuana has been reported to be laced with heavy metals and fungus.^[xvi] In one case, a cancer patient died from a rare fungal infection that may have been traced to contaminated cannabis.^[xvii]

Another route to a manufacturing defect claim can present itself by improperly testing the THC content of cannabis products. If a cannabis product purports to be of a certain THC content but was improperly tested, the label is incorrect. The incorrect testing and labeling can cause liability to multiple parties along the supply chain if injury is caused by the unintentional intake of high-levels of THC.^[xviii] To avoid liability for improper testing, and ensure safety for the end-user, manufacturers need to invest in proper testing equipment and enact accurate quality control procedures. Retailers should encourage manufacturers to enact such procedures and educate consumers about the dangers of inaccurate labeling on cannabis products.

c.) Avoid a Failure to Warn Claim by Labeling the Product with Adequate Warnings and Instructions

A product is defective when it contains inadequate instructions or warnings of its foreseeable risks or harms if such instructions or warnings could have reduced or avoided the harm.^[xix] In *Kirk v. Nutritional Elements*, the plaintiffs based their products liability action on a failure to warn theory.^[xx] No. 2016CV31310 (2d Dist. Colo. filed May 9, 2016). The sons of Richard Kirk filed suit against the manufacturer and dispensary of a cannabis-infused candy edible after Richard ate the 101 mg THC edible in one dose, suffered a psychotic break, and shot and killed his wife.^[xxi] The sons claim that the defendants misrepresented the edible product and knew or should have known the product would cause harm to users or third parties because it omitted specific warnings of the risk of psychotic behavior that was not reasonably apparent to a cannabis edible consumer.^[xxii] The case is currently pending.

Additionally, the cigarette industry may provide helpful guidance to marijuana manufacturing and retailers on labeling and providing adequate warnings. Failure to warn litigation is inevitable, manufacturers and retailers should be proactive rather than reactive to regulatory legislation. Marijuana products should contain

warnings regarding the possible risk to pregnancy, possible side effects of psychosis, or other possible side effects to marijuana use or overdose.^[xxiii] The labeling should also provide dosage instructions and information for how to manage an overdose if one were to occur. Moreover, retailers should counsel consumers about proper dosage and potential side effects of the various products they sell.

In the medical context, physicians, manufacturers, and retailers need to provide adequate warnings to the patient of potential side effects or dangers of marijuana use.^[xxiv] For additional information on how physicians or healthcare providers can mitigate risks, please see these articles [Medical Marijuana and the Terminally Ill: How Ohio Hospice Programs Can Learn to Cope with Dope](#), [Ohio Physicians Guide to Cannabis Compliance 1.0](#), and [Physicians Guide to Cannabis Compliance 2.0](#).

Conclusion

Products liability actions in the marijuana industry are inevitable. Since over 30 jurisdictions have legalized marijuana in some form in the United States, more consumers are trying marijuana products, and many are unaware of the effect that such products can have on their physical and mental state. Thus, marijuana industry players need to make sure their products conform to state laws and that they properly inform an end-user of all potential effects associated with a product's use.

^[i] Product Liability Claims, Defenses, and Remedies, Practical Law Practice Note 2-504-1711.

^[ii] Id.

^[iii] Perlmutter, [High Times Ahead: Products Liab. in Med. Marijuana](#), 29 Health Matrix 225, 266 (2019); <http://abnormaluse.com/?s=The+Birth+Of+The+Marijuana+Product+Liability+Litigation>; <https://www.marijuanalawyerblog.com/marijuana-product-liability-lawsuits-may-pick-up-in-2019/>.

^[iv] Product Liability Claims, Defenses, and Remedies, Practical Law Practice Note 2-504-1711.

[v] Id.

[vi] Perlmutter, High Times Ahead: Products Liab. in Med. Marijuana, 29 Health Matrix 225, 266 (2019).

[vii] R.C. 2307.75.

[viii] <https://www.leafly.com/news/cannabis-101/5-tips-to-safely-dose-and-enjoy-cannabis-edibles>.

[ix] <https://drugabuse.com/marijuana-abuse/overdose/>.

[x] <https://www.thecannabist.co/2015/01/29/colorado-marijuana-edibles-fire-sale-regulations-feb-1/28775/>

[xi] Product Liability Claims, Defenses, and Remedies, Practical Law Practice Note 2-504-1711.

[xii] Id.

[xiii] Perlmutter, High Times Ahead: Products Liab. in Med. Marijuana, 29 Health Matrix 225, 260 (2019).

[xiv] Perlmutter, High Times Ahead: Products Liab. in Med. Marijuana, 29 Health Matrix 225, 257 (2019).

[xv] Id. at 261.

[xvi] Id.

[xvii] Id.

[xviii] Perlmutter, High Times Ahead: Products Liab. in Med. Marijuana, 29 Health Matrix 225, 261 (2019).

[xix] Product Liability Claims, Defenses, and Remedies, Practical Law Practice Note 2-504-1711.

[xx] Perlmutter, High Times Ahead: Products Liab. in Med. Marijuana, 29 Health Matrix 225, 274 (2019).

[xxi] Id.; *see also* <https://www.lexology.com/library/detail.aspx?g=7951a85e-0b57-4ab1-b33a-4025c40962f8>.

[xxii] Id.

[\[xxiii\]](#)Perlmutter, High Times Ahead: Products Liab. in Med. Marijuana, 29 Health Matrix 225, 280 (2019).

[\[xxiv\]](#) Perlmutter, High Times Ahead: Products Liab. in Med. Marijuana, 29 Health Matrix 225, 273 (2019).

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