

A New Look at Dram Shop & Gram Shop Liability

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AGENDA

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1. Introduction & Current Trends in Liquor Liability
2. Overview on Host Liquor Liability
3. The Insurability of Liquor Law Liabilities
4. The Stand-Alone Liquor Liability Policy
5. A Cannabis Primer
6. Is “Gram Shop” Liability the same as Liquor or Dram Shop Liability?

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Introduction

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- “Dram shop” is a term that can be confusing.
- Historically, a “dram” was any form of drink containing alcohol.
- A dram is an apothecary measure - about a teaspoon full.
- A “dram shop” was a place where drams were sold...we call them bars, taverns, and liquor stores.

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Introduction

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- “Dram Shop Acts” or “Dram Shop Laws” are the general name for statutes that states enact to regulate the liability which liquor servers have for serving people alcoholic beverages.
- Most often, dram shop laws have been enacted to broaden, rather than shrink, liability.

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Introduction

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- Under the common law (court made law), a person who furnished alcoholic beverages to another person would not be held liable for what subsequently happened.
- The bar owner could not be held to have been the causal factor of the later actions, or might not have any legal duties to a person who was subsequently hurt.

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Introduction

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- The responsibility, the law said, was with the intoxicated person only.
- Various state legislatures did not like that result, and so created statutes to place more responsibility with the dram shop owner.

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Introduction

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- TECHNICALLY:
 - a “dram shop” law explicitly creates a civil, not a criminal, liability on a bar owner.
 - Dram shop laws are not truly criminal or administrative and do not regulate manufacture or sale
- PRACTICALLY:

The common usage of the term “dram shop” does not make the distinction between the civil remedies and the criminal law.

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Introduction: Alcohol-related injuries

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Kansas University study collected:

- 40% of all traffic fatalities are related to alcohol
- 47% of ER patients test positive for alcohol; 35% are intoxicated

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Introduction: Alcohol-related injuries

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- In 2017, 10,874 persons were killed and over 300,000 were injured nationwide in alcohol related crashes.
- 7,368 of those persons killed were in crashes in which the highest blood alcohol content was .15 percent or higher

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Introduction: Dram Shop Liability In the News

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- “Jurors Award Jerry Brown's Mother \$25 Million in Drunken Driving Crash that Killed Her Son”

NBC 5 - Dallas-Fort Worth, December 13, 2018

- “Strip Club Hit With \$27M Verdict in Dram Shop Suit Over Fatal Wreck”

Law.com Daily Report, July 19, 2018

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Introduction: Dram Shop Liability In the News

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- “Ensley nightclub, former Birmingham police officer to pay more than \$40 million to family of man killed in drunken wreck”

AL.com Alabama, February 27, 2013

- “Paralyzed woman awarded \$23 million in case against Twin River, others”

Providence Journal, October 28, 2016

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Dram Shop Liability in the News

13

- “\$20 Million Judgment Against Restaurant That Gave Alcohol to Minor Was Not Covered by Insurance”

Law.com Insurance Coverage Law Center, June 26, 2018

- “Injured Man Wins \$37.5M In Dram Shop Suit Against Club”

• *Law360, March 14, 2018*

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Overview of Host Liquor Liability Statutes

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Nebraska Liquor Liability Statutes

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NE Code 53-404. Cause of action authorized.

Any person who sustains injury or property damage, or the estate of any person killed, as a proximate result of the negligence of an intoxicated minor shall have, in addition to any other cause of action available in tort, a cause of action against:

(1) A social host who allowed the minor to consume alcoholic liquor in the social host's home or on property under his or her control;

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Nebraska Liquor Liability Statutes

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(2) Any person who procured alcoholic liquor for the minor, other than with the permission and in the company of the minor's parent or guardian, when such person knew or should have known that the minor was a minor; or

(3) Any retailer who sold alcoholic liquor to the minor. The absolute defenses found in section 53-180.07 shall be available to a retailer in any cause of action brought under this section.

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Case Law Principles

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IN MOST STATES:

- *Responsibility and liability arise when the server knows, or in the exercise of reasonable care should have known, that the person was “visibly intoxicated,” or the person is a minor.*
- There may be a practical distinction between a professional server and a mere social host. Social hosts are not trained in how to recognize intoxication, and may not be held to the same degree of accountability.

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Case Law Principles

18

- The traditional evidence - slurred speech, unsteady gait, and the amount of alcohol consumed in the time - are all relevant in determining whether the server knew or should have known of the intoxication. So, too, is the blood alcohol content of the person.

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Compare: Illinois Case Law Principles

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- Illinois has no common law cause of action for injuries arising out of the sale or gift of alcoholic beverages...
- The legislature has preempted the field of alcohol-related liability
- [A]ny change in the law governing alcohol-related liability should be made by the General Assembly, or not at all.

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Compare: Indiana Case Law Principles

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- *Social hosts can have liability for service of alcohol to intoxicated persons.*
- Ashlock v. Norris: Can a friend's "one for the road" create liability?
- "Considering the carnage on our public highways involving intoxicated drivers, the answer [is] 'yes.'"

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Compare: Indiana Case Law Principles

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- *Liability for serving alcohol to minors does NOT depend upon the minor being intoxicated.*
- Indiana's dram shop laws create a defense based on misrepresentation of age.
- The defense is only applicable to proceedings by a criminal court or by the Alcoholic Beverage Commission.
- Also, the use of the defense requires extraordinary effort.

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Compare: Indiana Case Law Principles

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- *Employers can be held liable for employee or guest parties, but only if the circumstances justify liability under the statutes or case law.*
- *Estate of Cummings by Heck v. PPG Industries, Inc.*, (employer did not "serve" or "furnish" alcohol - no liability).
- *Gariup Construction Co. v. Foster* (employer's failure to stop drinking game at company Christmas party resulted in liability).

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Case Law Principles - A Quiz

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- No prior alcohol consumption
- At bar for 80 minutes or so; ten minutes later, accident
- Fails three field sobriety tests
- Smells of alcohol; watery, bloodshot eyes; flushed face; disarrayed clothes; slurred, profane-laced speech; and angry and crying.
- Registers a blood alcohol content of 0.15%, almost twice the 0.08% legal limit

Does the case against the bar go to trial?

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The Insurability of Liquor Law Liabilities

24

24

ISO Commercial Lines Manual Underwriting Grading

25

- Ten means virtually absolute liability; zero is no liability by statute.

State	Grade	
Iowa	0*/7**	* Off premises
Missouri	0*/4**	** On premises
Kansas	0	
Colorado	3	
Wyoming	5	
South Dakota	0	
Nebraska	3	

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ISO Commercial Lines Manual Underwriting Grading

26

- The “high ends” are
Alabama (10) Alaska (8)
District of Columbia (9) Pennsylvania (7)
Vermont (10)
- The “low ends” are
Delaware (0) Kansas (0)
Nevada (0) Maryland (0)

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HO Liquor Liability Exclusion (Home Business Endorsement):

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- This Exclusion 16 applies only if you:
 - (1) Manufacture, sell or distribute alcoholic beverages;
 - (2) Serve or furnish alcoholic beverages:
 - (a) For a charge whether or not such activity:
 - (i) Requires a license; or
 - (ii) Is for the purpose of financial gain or livelihood; or
 - (b) Without a charge, if a license is required for such activity.

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CGL Exclusion: Liquor Liability

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- [This insurance does not apply to] "Bodily injury" or "property damage" for which any insured may be held liable by reason of:
 - (1) Causing or contributing to the intoxication of any person;
 - (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

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CGL Exclusion: Liquor Liability

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- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.
- ***This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.***

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CGL Exclusion: 2013 Liquor Changes

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AFTER: The CGL Liquor Liability Exclusion CG 21 51 04 13
ADDS the following language

This exclusion applies ***even if*** the claims against any insured allege negligence or other wrongdoing in:

- (a) The supervision, hiring, ***employment***, training or monitoring of others by that insured; or
- (b) Providing or ***failing to provide transportation*** with respect to any person that may be under the influence of alcohol...

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CGL Exclusion: 2013 Liquor Changes

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Penn-America Ins. Co. v. Peccadillos, Inc., 27 A.3d 259 (Pa. Super. 2011)

- "Two sorely intoxicated patrons"
- "Brawling in the bar"
- "Reveal[ing] their lack of impulse control"
- With their "inability to control a deathly instrumentality like an automobile ... readily apparent."

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CGL Exclusion: 2013 Liquor Changes

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"[The] allegations neither assert nor rely on Peccadillos' violation of the Liquor Code or any statute, nor do they arise directly from Peccadillos' provision of liquor or contribution to the men's intoxicated condition.

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CGL Exclusion: 2013 Liquor Changes

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"Indeed, the plaintiffs could aver the same facts even had the two men merely entered Peccadillos' drunk and engaged in the conduct that prompted their ejection, regardless of whether Peccadillos' provision of alcohol had actually contributed to the men's intoxication or prompted their behavior.

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CGL Exclusion: 2013 Liquor Changes

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Penn-America Ins. Co. v. Peccadillos, Inc., 27 A.3d 259 (Pa. Super. 2011)

- "Instead, Plaintiffs' averments suggest a set of duties germane to Peccadillos' obligation to control the conduct of third persons."
- The trial court properly concluded:
 - Via summary judgment
 - That a duty to defend existed.

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CGL Exclusion: 2013 Liquor Changes

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Why the change?

- *McGuire v. Curry*, 766 N.W.2d 501 (S.D. 2009)
- McGuire, an underage employee with access to Speedway store liquor, not monitored
- McGuire intoxicated on job
- Drove and had accident with Curry
- "No alcohol" policy insufficient to prevent claim of negligent hiring and negligent supervision to go forward

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CGL Exclusion: 2013 Liquor Changes

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Secondary liquor liability change where the coverage is present:

- Broadening of "insured"
- "An insured who *permits any person to bring any alcoholic beverage on their premises*, for consumption on the premises, whether or not a fee is charged for such activity, will also be considered selling, serving or furnishing..."

Driven by *Simmons v. Homatas*, 925 NE 2d 1089 (Ill. 2010)

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Prop.-Owners v. Virk Boyz

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Photo: www.themost10.com

- Terry Woods was a patron at Stein Tavern, owned by Virk Boyz on December 28, 2013.
- Stein became intoxicated and was seriously injured in a bar fight.

Woods sued the tavern, which was insured by Property Owners.

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Prop.-Owners v. Virk Boyz

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Woods says Virk Boyz / Stein Tavern was negligent by:

1. Not intervening in the fight after he requested help
2. Not hiring a good bartender to help stop fights
3. Not training the bartender to know how to intervene
4. Violating Indiana's liquor control laws

The bartender was involved in the fight

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Prop.-Owners v. Virk Boyz

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Property-Owners invokes the liquor liability exclusion for:

"Bodily injury" or "property damage" for which any insured may be held liable for reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or...

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Prop.-Owners v. Virk Boyz

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Property-Owners invokes the liquor liability exclusion for:

"Bodily injury" or "property damage" for which any insured may be held liable for reason of:

- (3) Any statute, ordinance, or regulation relating to the sale, gift, distribution or use of alcoholic beverages,

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

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Prop.-Owners v. Virk Boyz

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A pair of coverage side notes:

1. "[C]laims of intentional injury committed by an employee can still constitute an 'accident' with respect to a negligence claim against the employer."
2. "Obviously, from the standpoint of Stein Tavern, it did not intentionally set about to hire someone unqualified, or to provide substandard training to an employee."

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Prop.-Owners v. Virk Boyz

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The upshot of all this? The "dram shop" claim is out, but the Court finds

"[T]he claims of failure to intervene and negligent hiring, supervision, and training, are claims that **do not rely upon or directly arise from Stein Tavern's service of alcohol**. In sum, I do not think the liquor liability exclusion unambiguously excludes coverage in this case."

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Prop.-Owners v. Virk Boyz

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Again, the changed language

This exclusion applies **even if** the claims against any insured allege negligence or other wrongdoing in:

- (a) The **supervision, hiring, employment, training** or monitoring of others by that insured; or
- (b) Providing or **failing to provide transportation** with respect to any person that may be under the influence of alcohol...

New question: did this language go far enough?

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The Stand-Alone Liability Policy (CG 00 33 04 13)

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Terms & Exclusions

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CGL 00 33 04 13: The Liquor Liability Form

45

- We will pay those sums that the insured becomes legally obligated to pay as damages because of "injury" to which this insurance applies...
- ...if liability for such "injury" is imposed on the insured by reason of the selling, serving or furnishing of any alcoholic beverage.

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CGL 00 33 04 13: The Liquor Liability Form

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- We may, at our discretion, investigate any "injury" and settle any claim or "suit" that may result. But:
- Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements.
- No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments.

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CGL 00 33 04 13: The Liquor Liability Form

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According to FC&S:

- The liquor liability coverage form is a liability policy specifically developed for covering the liquor related exposures of insureds *in the alcoholic beverages industry...*
- ...Such as clubs, package stores, manufacturers, restaurants, taverns, motels, and hotels
- It works with, not as a supplement to, a CGL.
- Can be written claims made or occurrence based.

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But does my business really need it?

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According to FC&S:

- The company holiday party, summer picnic, or retirement gathering could create liability.
- The exposure is not that different from that of a bar, restaurant or club
- However, “Where alcoholic beverages are provided without a charge of any kind, there is no exclusion in the CGL policy that would eliminate coverage in this situation.”

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But does my business really need it?

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- Yet...
- Are you “in the business” if you charge for alcohol or even charge admission?
- Liquor served for a charge is excluded, under the 1989 CGL endorsements, while it “is not excluded where no charge is made, if no license is required for the activity.”
- *But are we comfortable with that?*

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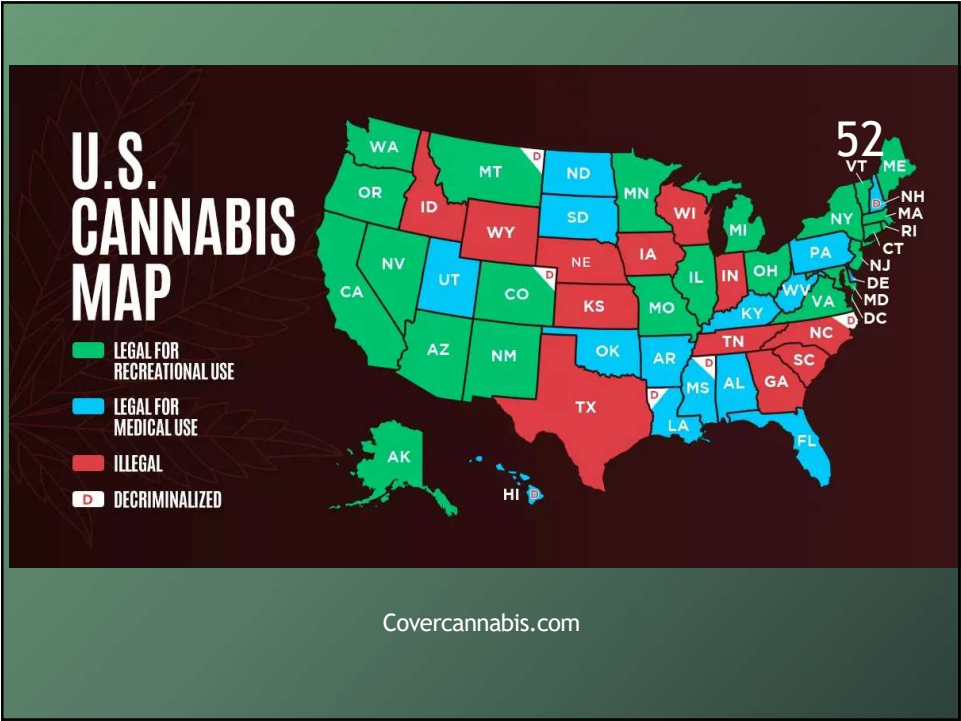
A CANNABIS PRIMER

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The Size of the Market: Grandview Research

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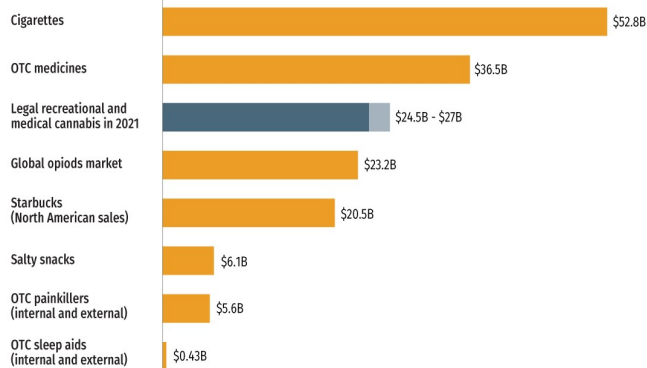
1. “The global legal marijuana market size is expected to reach USD **102.2 billion** by 2030 and is expected to grow at a CAGR of 25.5% from 2022 to 2030.”
2. “The medical segment accounted for the largest revenue share of over 80.0% in 2021 owing to the high demand among millennials and patients for medicinal marijuana”
3. “The oil and tinctures product type segment accounted for the largest revenue share of over 50.0% owing to the low price and ease of accessibility of flowers compared to other products”

<https://www.grandviewresearch.com/press-release/global-legal-marijuana-market>

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U.S. Cannabis Sales Vs. Other Industries



Source: MJBiz Factbook research, Statista, Consumer Healthcare Products Association, BCC Research, Mordor Research, Allied Research, Starbucks financial filings, IRI Market Advantage
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Note: All data reported for 2021.

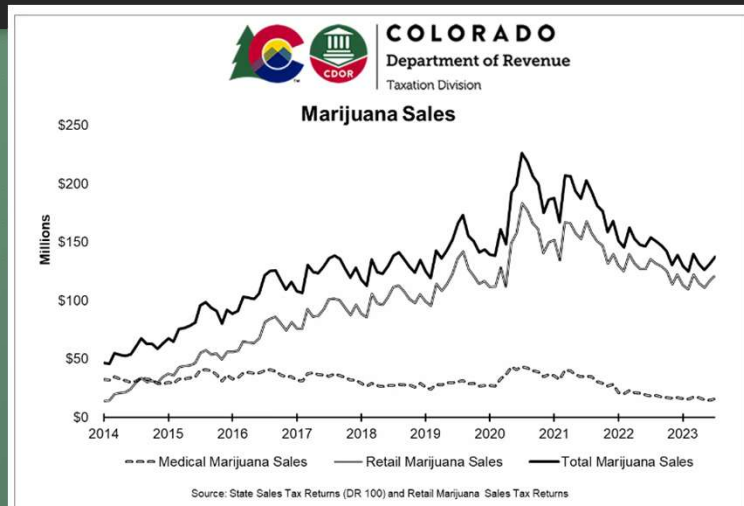
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Wholesale marijuana flower prices

Medical and adult-use cannabis is legal in most states listed, except for Oklahoma or Arkansas, which are still medical-only. Missouri and Maryland launched adult-use sales in February and July 2023, respectively.

State	Year-end 2021	Year-end 2022	August 2023	August YoY
Maryland	\$2,791	\$1,313	\$2,510	-41.1%
Alaska	\$2,567	\$2,139	\$2,406	-3.5%
Missouri	\$2,041	\$1,628	\$2,019	29.4%
Arizona	\$1,875	\$1,499	\$1,850	2.7%
Nevada	\$1,684	\$1,289	\$1,735	4.6%
Massachusetts	\$1,641	\$1,721	\$1,401	-27.7%
Washington state	\$1,565	\$1,174	\$1,378	5.1%
Arkansas	\$2,076	\$1,140	\$1,224	-19.9%
California	\$1,492	\$1,236	\$1,282	29.2%
Michigan	\$1,287	\$811	\$966	4.1%
Oklahoma	\$1,251	\$919	\$940	5.0%
Oregon	\$846	\$870	\$855	7.7%
Colorado	\$1,031	\$799	\$810	-2.6%

Table: © 2023 MJBiz, a division of Emerald X, LLC • Source: LeafLink • Created with Datawrapper



Michigan Marijuana Tax Revenue Grew By 49% Over The Past Year, Surpassing Alcohol Earnings *Marijuana Moment*, Nov. 13, 2023

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- \$266.2 million in tax revenue from legal marijuana sales
- Up 49.1%, or \$87.6 million from FY 2021-22's \$178.6 million
- Subject to 10% state excise tax, plus 6% sales tax
- Alcohol contributed \$192.6 million
- Illinois brought in \$451.9 million in tax revenue for cannabis, \$135.6 million more than alcohol
- Similar milestones have seen in Colorado, Arizona, and Washington State

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From the Headlines

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- 53 Percent Of Americans Now Live In A Legal Marijuana State, Report From Former Federal Officials' Firm Shows, *Marijuana Moment*, Nov 16, 2023
 - Nearly 75% of the population live in a medical or recreational state
- Ohio GOP Senate President Lays Out Process To Revise Marijuana Law, Arguing Voters Didn't Understand Some Provisions, *Marijuana Moment*, Nov 20, 2023
- Biden Should Smoke Marijuana To Understand 'Hypocritical' Legalization Opposition, Democratic Presidential Candidate Dean Phillips Says, *Marijuana Moment*, Nov 15, 2023

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The Current Legal Climate

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The 2018 Farm Bill

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- Sandy and Schiller
 - "The Farm Bill removes **hemp** from the Controlled Substances Act and allows farmers to pursue federal hemp cultivation permits, while individual states can regulate the industry within their borders as they see fit. Already, 40 states have established hemp cultivation 'pilot programs' for industrial and commercial purposes, although the plant has been strictly regulated."

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The 2018 Farm Bill

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- The Farm Bill, hemp legalization and the status of CBD: An explainer
 - *John Hudak of the Brookings Institute, Friday, December 14, 2018*
- "It's true that hemp policy in the United States has been **drastically transformed** by this new legislation. However, **there remain some misconceptions** about what, exactly, this policy change does."

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The 2018 Farm Bill

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- Hudak:
 - "First...hemp cannot contain more than 0.3 percent THC, per section 10113 of the Farm Bill."
 - "Second, there will be significant, shared state-federal regulatory power over hemp cultivation and production." This means...

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The 2018 Farm Bill

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- Hudak:

"[S]tate departments of agriculture must consult with the state's governor and chief law enforcement officer to devise a plan that must be submitted to the Secretary of USDA."

- "Third, the law outlines actions that are considered violations of federal hemp law (including such activities as cultivating without a license or producing cannabis with more than 0.3 percent THC).

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The 2018 Farm Bill

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- Hudak:

- "One big myth that exists about the Farm Bill is that cannabidiol (CBD)—a non-intoxicating compound found in cannabis—is legalized. It is true that section 12619 of the Farm Bill removes hemp-derived products from its Schedule I status under the Controlled Substances Act, **but the legislation does not legalize CBD generally.**"

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So, there is STILL Federal Law to Consider...

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- "[C]annabis is classified as a Schedule I substance under the CSA of 1970 (see Title 21-Food and Drugs, Chapter 11-Drug Enforcement Administration, Part 1308)...
- "Schedule I drugs are defined as '...substances that have a high potential for abuse, have no currently accepted medical use in treatment in the United States, and there is a lack of accepted safety for use of the drug or other substance under medical supervision.'"
- "*Other Schedule I substances include heroin, peyote, and lysergic acid diethylamide (LSD).*"
 - Dr. Brenda Wells, *Legalizing Marijuana: Risk Management And Insurance Implications*, The Risk Report (Jan. 2018)

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DEA Agrees To Reschedule Marijuana Under Federal Law

66

Marijuana Moment, April 30, 2024

- As recommended by the US Dept of Health and Human Services, DEA proposed moving cannabis from Schedule I to Schedule III under the Controlled Substances Act (CSA)
- Comes more than 50 years after cannabis first listed as a strictly prohibited drug, in the same class as heroin, with no known medical value and significant abuse potential

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The Eight Priorities of Cole Memo One

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Preventing

1. Sales to Minors
2. Revenue to Cartels and Gangs
3. State-to-state transport
4. Marijuana as a "pretext or cover" for other trafficking

Preventing

5. Violence and firearms use
6. Drugged driving and other health issues
7. Growing marijuana on public lands
8. Marijuana possession or use on federal property

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Cole Memo Two (2/14/2014)

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[I]f a financial institution or individual provides banking services to a marijuana-related business knowing that the business is diverting marijuana from a state where marijuana sales are regulated to ones where such sales are illegal under state law, or is being used by a criminal organization to conduct financial transactions for its criminal goals...

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Cole Memo Two (2/14/2014)

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...such as the concealment of funds derived from other illegal activity or the use of marijuana proceeds to support other illegal activity, prosecution for violations of 18 U.S.C. §§ 1956, 1957, 1960 or the BSA might be appropriate....

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The Specter of BSA Enforcement

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- "The state-legal marijuana sector operates in a largely cash-based economy—only about 400 banks and credit unions in the U.S. actively provide financial services to this sector—because marijuana remains illegal under federal law, despite the increasing number of states acting to legalize medical and/or recreational use. *There is no carveout for state-legal activity and no safe harbor for financial institutions to serve customers engaged in such activity.*"

Elizabeth A. Khalil of Dykema Gossett PLLC

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Atty. Gen. Sessions 1/4/18:

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In deciding which marijuana activities to prosecute under these laws with the Department's finite resources, prosecutors should follow the well-established principles that govern all federal prosecutions.... Given the Department's well-established general principles, **previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded**, effective immediately.

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New Amendments To Marijuana Banking Bill Revealed

(Forbes.com, Oct 2, 2023)

72

- Secure and Fair Enforcement Regulation (SAFER) Banking Act approved by the Senate Committee on Banking, Housing, and Urban Affairs
- Has bipartisan support
- Currently, many businesses operate in cash, leaving them and their customers vulnerable to crime
- Would open access for cannabis businesses to traditional banking services like checking accounts and credit cards
- Would allow employees of cannabis businesses to obtain residential mortgages funded by federal programs
- Amendments still being made as it moves through the Senate
- Similar legislation has passed in the House 7 times

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Where is the Insurance Marketplace?

73

73

THE "HISTORY": Widmer, "High Times," *Rough Notes Magazine*, February 1, 2016

74

- Big carriers aren't moving in to the market quickly
 - Most still want to follow federal law.
 - Most are afraid of losing Medicare and Medicaid contracts
- *Some insurers are declining renewals when the dispensaries come to the insured's area*
- Small insurers are having trouble meeting financial requirements.
 - Oregon is seen as most lenient on this

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THE "HISTORY": Widmer, "High Times," *Rough Notes Magazine*, February 1, 2016

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- *Financing is an underwriting problem.*
 - Banks are as shy as the major carriers.
 - Credit unions aren't so much so.
 - Dispensaries may have to use state-chartered banks.

75

THE "HISTORY": Widmer, "High Times," *Rough Notes Magazine*, February 1, 2016

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"For agents trying to open up a new sales channel, the marijuana industry represents a *yin-yang style of opposing forces*. [Pamela Adams, Chair and CEO of ISU Insurance Services of Colorado] says agents wanting to take on the marijuana insurance business have their work cut out for them."

"'You're going to have to go to the specialty market,' she says. 'It's causing more work. It may take you a while to find the right E&S market that will provide that coverage. When you do, the premium is likely higher.'"

'With higher premiums come higher commissions, she points out. However, she adds, 'Once you get to the excess and surplus lines carriers, they're paying less commission.'"

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TODAY: Understanding the Market
for Cannabis Insurance: 2023 Update
(NAIC, August 16, 2023)

77

- Per a 2021 report by New Dawn Risk, there are 30 US insurers offering cannabis coverage, up from just 6 in 2020
- Coverage availability mostly found in excess and surplus lines
- General commercial liability and basic property coverage are easier to come by
- May face more expensive coverage and constrained limits

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Is “Gram Shop” Liability the
same as Dram Shop Liability?

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Gram Shop Liability

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- With alcohol, we know each state has its own regulations related to on site consumption.
- Liability for injuries to customers or third parties varies by state and scenario.

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Gram Shop Liability

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- On site consumption cannabis businesses may be held liable to third parties in the same way.
- Like alcohol, the argument is that businesses should only be liable if the person served was obviously impaired.
- Not many cannabis-only laws on the books

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Case Study: *Kirk v. Nutritional Elements*

81

Kirk v. Nutritional Elements, is being litigated predominantly on a theory of failure to warn. It is a sad case, but its themes are instructive. Kristine and Richard Kirk, a married couple in Denver, had three sons, ages seven, eleven, and thirteen. In early 2014, Richard purchased a THC-infused edible, *Karma Kandy Orange Ginger* from Nutritional Elements. The product was packaged, sold, and distributed by Gaia's Garden.

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Case Study: *Kirk v. Nutritional Elements*

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- Contained 101 mg hybrid THC with Tears of Phoenix hash oil infused for a very high CBD concentrate.
- Packaging did not contain instructions about proper consumption or use (how much, with food/drink, how long it takes to take effect,) no warnings about possibility of overdose or what to do if one were to occur.

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Case Study: *Kirk v. Nutritional Elements*

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- No printed literature included with purchase
- Richard consumed the entire candy, when he should have had 1/20th of the candy. (He may have also taken a prescription painkiller.)

83

Case Study: *Kirk v. Nutritional Elements*

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- Richard became delirious, paranoid, and psychotic after consuming the Karma Kandy.
- Kristine called 911 at 9:30 p.m., relating to the operator that Richard was delusional and actively hallucinating, and the children were terrified.

84

Case Study: *Kirk v. Nutritional Elements*

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- He rambled about the end of the world and asked Kristine and the children to kill him. While Kristine spoke to the 911 operator, Richard shot her in the head with his revolver, killing her instantly.
- Fortunately, the children escaped. Police officers arrived on the scene and took Richard into custody.

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Case Study: *Kirk v. Nutritional Elements*

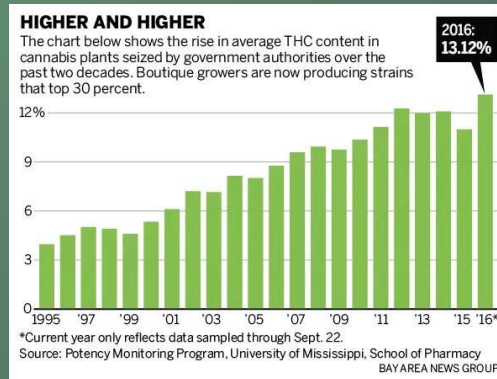
86

- A failure to warn suit was filed against the manufacturer and the dispensary under theories of strict liability in tort and negligence. Claims were also filed under strict liability for misrepresentation against the entities and negligence against Richard.
- February 2017, Richard pled guilty to 2nd degree murder and was sentenced to 30 years in prison. The civil case is still pending.

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Let's Not Forget...

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Let's Not Forget...(2)

88

According to FC&S

- [D]ispensaries will indicate a level of potency of the marijuana they have for sale; if the potency is not what the dispensary claims it is, a claim could be filed.
- Also, some dispensaries are getting into baked goods such as brownies, so there are product liability issues for baked goods as well.
- Maintaining quality control is extremely important, especially since the customers are often medically fragile.

88

A Side Note - “Prescribers”

89

- Michaela A. Poizner of Baker Donaldson writes:
- Because state laws govern all permissible activities related to medical marijuana, the rules for a provider recommending cannabis to his or her patients are unique to each state where medical marijuana is legal. [B]elow are a few questions (not an exhaustive list) that a provider should ask when determining how to recommend cannabis to patients:

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A Side Note - “Prescribers”

90

1. Is a special certificate or license needed to recommend marijuana?
2. How much contact must a provider have with a patient before recommending marijuana?
3. Are there ongoing treatment requirements after recommending marijuana?

90

A Side Note - “Prescribers”

91

4. Are there limits on the conditions for which a provider can recommend marijuana?
5. Is there a maximum number of patients a provider can recommend marijuana to?
6. What kind of documentation must a provider maintain for recommendations of marijuana?

91

A Side Note - “Prescribers”

92

7. How long can a recommendation for marijuana last?
8. Are there restrictions on a provider recommending marijuana to a family member or friend?
9. Does recommendation of marijuana impact whether a provider can bill insurance for the visit?
10. Is there required notice to or consent from patients receiving a marijuana recommendation?

92

Argument against using same legal standard as liquor

93

- “Gram shop” laws will likely be extended to dispensaries with onsite consumption facilities.
- Dispensary employees will need to be able to identify the signs of customers under the influence of drugs, BUT
 - Marijuana effects can take more than 30 minutes to be seen
 - Dosage will vary based on amount and product type
 - Customer's own physical makeup and tolerance may delay the onset of the “high”
- the dispensary employee might not notice the signs and the customer could leave

93

...All of which Leads to an Insurability Discussion...

94

94

The Commercial Property Form

95

- The Commercial Property Form
- CP 00 10 10 12
- A. Coverage
- “We will pay for direct physical loss of or damage to **Covered Property** at the premises described in the Declarations caused by or resulting from any **Covered Cause of Loss.**”

95

The Commercial Property Form

96

- 2. Property Not Covered “Covered Property does not include:”
- a. Accounts, bills, currency, food stamps or other evidences of debt, **money**, notes or securities. Lottery tickets held for sale are not securities;
- b. Animals, unless owned by others and boarded by you, or if owned by you, only as ‘stock’ while inside of buildings;
- c. Automobiles held for sale;

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The Commercial Property Form

97

- 2. Property Not Covered “Covered Property does not include:”
- d. Bridges, roadways, walks, patios or other paved surfaces;
- **e. Contraband, or property in the course of illegal transportation or trade;**
- f. The cost of excavations, grading, backfilling or filling;

97

The Commercial Property Form

98

- 2. Property Not Covered “Covered Property does not include:”
- g. Foundations of buildings, structures, machinery or boilers...
- h. Land (including land on which the property is located), water, **growing crops** or lawns (other than lawns which are part of a vegetated roof);

98

The Commercial Property Form

99

- 2. Property Not Covered “Covered Property does not include:”
 - i. Personal property while airborne or waterborne;
 - j. Bulkheads, pilings, piers, wharves or docks;
 - k. Property that is covered under another coverage form of this or any other policy in which it is more specifically described, except for the excess of the amount due (whether you can collect on it or not) from that other insurance;

99

The Commercial Property Form

100

- 2. Property Not Covered “Covered Property does not include:”
 - l. Retaining walls that are not part of a building;
 - m. Underground pipes, flues or drains;
 - n. **Electronic data, except as provided under the Additional Coverage, Electronic Data.** Electronic data means information, facts or computer programs stored as or on, created or used on, or transmitted to or from computer software...
 - o. The cost to replace or restore the information on valuable papers and records, including those which exist as electronic data....
 - p. Vehicles or self-propelled machines...

100

The Commercial Property Form

101

- 2. Property Not Covered “Covered Property does not include:”
- q. The following property while outside of buildings:
 - (1) Grain, hay, straw or other crops;
 - (2) Fences, radio or television antennas (including satellite dishes) and their lead-in wiring, masts or towers, trees, shrubs or plants (other than trees, shrubs or plants which are “stock” or are part of a vegetated roof), all except as provided in the Coverage Extensions.

101

The Commercial Property Form - Covered Causes of Loss

102

- The CP 10 10 10 12:
- When Basic is shown in the Declarations, Covered Causes of Loss means the following:
 - 1. Fire.
 - 2. Lightning.
 - 3. Explosion...

102

The Commercial Property Form - Covered Causes of Loss

103

- Covered Causes of Loss means the following:
- 4. Windstorm or Hail....
- 5. Smoke causing sudden and accidental loss or damage. This cause of loss does not include smoke from agricultural smudging or industrial operations.
- 6. Aircraft or Vehicles...
- 7. Riot or Civil Commotion...
- 8. Vandalism...

103

The Commercial Property Form - Covered Causes of Loss

104

- Covered Causes of Loss means the following:
- 9. Sprinkler Leakage...
- 10. Sinkhole Collapse...
- 11. Volcanic Action...

104

The Commercial Property Form - Covered Causes of Loss - Exclusion

105

- B. Exclusions
- 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss
- ...
- **c. Governmental Action**
- **Seizure or destruction of property by order of governmental authority.** But we will pay for loss or damage caused by or resulting from acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread, if the fire would be covered under this Coverage Part

105

So, why belabor the point?

106

- The issue really is which exclusions or which causes of loss will be applicable given the uncertainty regarding the legality of the product.
- Simply put, will the policy language be tested in new and unpredictable way?
- *Two possible answers...*

106

ISO's Oregon Response

107

- Commercial Lines Manual Oregon
 - Division Six
 - General Liability
 - Exception Pages
- Rule A3. Oregon - Marijuana Exclusion Endorsements

107

ISO's Oregon Response

108

- Oregon Bulletin 2017-04 provides, in part, the following stated "guidance":
- 1. "Insurers issuing property and casualty policies that could potentially cover loss, damage, or liability associated with marijuana items and marijuana activities *should explicitly state in the policy whether, and to what extent, these interests are covered or excluded.*"

108

ISO's Oregon Response

109

- (Still quoting Oregon Bulletin 2017-04)
- 2. "If the terms of the policy would otherwise cover marijuana items or marijuana activities, **general language excluding 'illegal activity', 'contraband', or 'coverage inconsistent with public policy' is not sufficient to describe the coverage provided.** Similarly, language that refers to 'illegal' or 'criminal acts under federal law' provides insufficient guidance to policyholders as to their rights under an insurance policy."

109

ISO's Oregon Response

110

- Commercial Property Endorsement CP 99 01 10 17
- OREGON - MARIJUANA EXCLUSION
- ...
- B. "Marijuana" is added to Property Not Covered.
- C. The Business Income (With Extra Expense) Coverage Form CP 00 30, Business Income (Without Extra Expense) Coverage Form CP 00 32 and Extra Expense Coverage Form CP 00 50 do not apply to that part of Business Income loss or Extra Expense incurred due to a "suspension" of your "operations" which involve the design, manufacture, distribution, sale, serving, furnishing, use or possession of "marijuana".

110

ISO's Oregon Response

111

- Commercial Property Endorsement CP 99 01 10 17
- D. Paragraphs B. and C. above do not apply to any "marijuana" that is not designed, manufactured, distributed, sold, served or furnished for bodily:
 - a. Ingestion;
 - b. Inhalation;
 - c. Absorption; or
 - d. Consumption.

111

ISO's Oregon Response

112

- Commercial Property Endorsement CP 99 01 10 17
- E. For the purpose of this endorsement, the following definition is added:
- "Marijuana":
 - 1. Means... Any good or product that consists of or contains any amount of Tetrahydrocannabinol (THC) or any other cannabinoid, regardless of whether any such THC or cannabinoid is natural or synthetic.

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ISO's Oregon Response

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Commercial Property Endorsement CP 99 01 10 17

- [Marijuana] includes, but is not limited to, any of the following containing such THC or cannabinoid:
 - a. **Any** plant of the genus Cannabis L., or any part thereof, such as seeds, stems, flowers, stalks and roots; or
 - b. **Any** compound, byproduct, extract, derivative, mixture or combination, such as, but not limited to:
 - (1) Resin, oil or wax;
 - (2) Hash or hemp; or
 - (3) Infused liquid or edible marijuana;
- whether derived from any plant or part of any plant set forth in Paragraph E.2.a. above or not.

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