

Marijuana Products May Provoke Product Liability Suits



Law360, New York (May 09, 2014, 2:23 PM ET) -- Colorado and Washington have legalized the recreational use of marijuana. Some predict that 14 more states will legalize marijuana for recreational use over the next five years. Legal marijuana is among the fastest-growing markets in the U.S., with a projected \$10.2 billion market by 2018.[1]

As the market continues to expand, product liability lawsuits are likely to follow, which may assert a wide variety of claims. While these lawsuits will assert novel claims, there may be ways manufacturers and distributors could potentially reduce their risk in this new and uncertain market.

Failure to Warn

Legalization of the recreational use of marijuana raises issues about whether manufacturers and distributors have a legal obligation to give consumers warnings and, if so, the specificity of the warnings. The possible range of topics that may require a warning for marijuana products are broad, ranging from potential health issues to its potentially addictive nature to potential mental health issues to issues that may arise when operating machinery while under the influence of marijuana.

In addition to the numerous topics that may require a warning, issues arise as to how specific the warning should be. The necessary specificity of the warning is perhaps most unclear when considering health warnings. As a preliminary matter, studies conflict over whether marijuana use poses a health risk. So, there is an issue if a health warning should be given at all. Assuming that a health warning is necessary, because it is unclear whether marijuana use causes health problems and, if so, what health problems, knowing what potential health problems to warn consumers about may be difficult. If a warning is necessary, would a warning that marijuana use “may” cause health problems be sufficient, or would the full scope of potential health problems need to be listed?

As states continue to legalize recreational marijuana use, one way that manufacturers and distributors could attempt to reduce their risk of failure-to-warn claims is to petition Congress to pass a

comprehensive law addressing marijuana labeling with respect to any relationship between marijuana and health. In particular, the law could specify a mandatory warning label and provide an explicit express-preemption clause.

Congress has passed similar laws for other products for adult consumers that may have health risks.[2] If Congress enacted a similar act with respect to marijuana, under the doctrines of express and implied conflict preemption, failure-to-warn claims may be barred.[3]

Negligence

Because it is unclear whether marijuana use results in health problems and what those health problems may be, manufacturers and distributors may owe consumers a duty to determine if marijuana use poses a health risk and what the specific health risk may be.

If a duty is owed, manufacturers and distributors will need to consider how to best discharge that duty, whether through internal testing, external testing or the formation of an industry group that focuses on the potential health risks. Furthermore, the industry will need to consider how best to communicate scientific findings on marijuana's health effects to consumers. Failure to communicate such results could itself result in fraudulent concealment and punitive damages claims.

Design Defect

Tetrahydrocannabinol ("THC") is the psychoactive component of marijuana. Because some people use marijuana to experience the effects of THC, some strains of marijuana have been bred to enhance THC content. But altering the THC content could potentially lead to design-defect claims under a couple of theories.

First, in some strains, by enhancing the THC content, cannabidiol, a nonpsychoactive component of marijuana, has been bred out. Some studies indicate that cannabidiol may have medicinal value. Notably, cannabidiol may "turn off" a gene that causes cancer to metastasize. While there are conflicting studies whether smoking marijuana causes certain cancers, carcinogens could potentially be created when marijuana is burned. If a causal link is established between marijuana use and specific cancers, marijuana users who develop cancer and smoked strains in which cannabidiol was reduced or removed could potentially allege design-defect claims. In particular, they may claim that the marijuana they consumed was defective because the removal of cannabidiol increased marijuana's carcinogenic potential.

Second, population studies indicate that one out of 11 people who have ever smoked marijuana become addicted. THC is marijuana's active component that affects the brain. Individuals who consume marijuana with enhanced THC levels may claim that the marijuana they consumed was defectively designed because it had a greater propensity to addict its users and caused them to become addicted. Furthermore, they could potentially allege that the marijuana was designed with the intent to addict its users, thereby increasing sales. Depending on the jurisdiction's threshold, such an allegation could

potentially lead to a punitive damages claim.

Warranty Claims

Many states have legalized "medical marijuana" that doctors prescribe. The term medical, its association with doctors, may cause consumers to believe that marijuana has medical benefits or is a form of medicine. Medical marijuana advertisements that have been run both in print and on TV may also enhance this perception.

There is the risk that the advertising for medical marijuana may carry over even outside of the medical marijuana context. Specifically, recreational marijuana users may believe that marijuana has medical benefits, even if they do not buy it from a medical marijuana dispensary.

Whether marijuana has health benefits — and what those benefits may be — is unclear. Some studies show that marijuana may have purported medical benefits, including that marijuana may reverse alcohol-induced brain damage, treat social anxiety, relieve nausea, reduce neuropathic pain and work as an anti-psychotic. Yet, scientific research has not confirmed all of these potential benefits.

If marijuana is shown to lack specific medical benefits, consumers may bring lawsuits alleging that express or implied warranties were breached. To reduce the risk of warranty claims, in addition to avoiding making any health claims, manufacturers and distributors of recreational marijuana may also need to disclaim any health-associated warranties.

Youth Marketing

As states legalize marijuana's recreational use, they will likely place age restrictions on who can buy marijuana and prohibit marketing to underage users. For instance, Colorado prohibits selling marijuana to persons younger than 21 years of age. Additionally, it bans marketing that may appeal to children. The apparent goal of these restrictions is to prevent marijuana use among youth as much as possible.

One reason that states may be concerned with underage marijuana use is that some studies indicate that individuals who use marijuana before age 18 may be more susceptible to addiction because their brains are still developing.[4] Because of this, youth marketing could be a focus in product liability lawsuits. Specifically, an individual could claim that he became addicted because he began using marijuana before age 18. He could further claim that he was enticed to use marijuana by advertisements that targeted underage users and that the companies specifically targeted underage users to get them addicted and maximize profits.

While youth marketing could be a focus in product liability lawsuits, it is unclear what may qualify as youth marketing. For instance, while Colorado's ban on marketing to children specifically mentions the use of cartoon characters, it does not provide much other guidance.

Additionally, what may qualify as youth marketing may not be limited to advertisements. In particular,

some critics in the public health community are concerned that THC-infused products, such as cookies, candy, soda, ice cream and ring pops, may either directly or indirectly target underage users. Likewise, the names of some marijuana strains may appeal to children. For example, there are strains of marijuana called "Blueberry Yum Yum," "Bubble Berry," "Cotton Candy," "Fruity Pebbles," "Girl Scout Cookies" and "Rock Candy."

Because the regulatory framework governing the sale of marijuana may prohibit targeting underage users and there is the potential for youth marketing allegations in product liability lawsuits, manufacturers and distributors should be sensitive to any products or advertisements that may appeal to children.

Conclusion

Ultimately, the legalized use of recreational marijuana will likely lead to product liability lawsuits. Because this is a new area of product liability law, it is unclear what specific claims plaintiffs will make. Even so, manufacturers and distributors can take steps now to potentially reduce their risk.

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[1] http://www.huffingtonpost.com/2013/11/04/marijuana-market_n_4209874.html

[2] See Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 et seq.

[3] See *Cipollone v. Liggett Group Inc.*, 505 U.S. 504 (1992).

[4] See, e.g., U.S. DEP'T OF HEALTH AND HUMAN SERV., SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., HHS PUBL'N NO. (SMA) 13-4795, RESULTS FROM THE 2012 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS, at 79 (2013).