BUDDING TORTS: FORECASTING EMERGING TORT LIABILITY IN THE CANNABIS INDUSTRY

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The marijuana industry is booming. It is expanding into new states while it grows beyond the medical marijuana market into the recreational world. What was once illicit profit is quickly becoming on-the-books gains. As the industry matures, billions will be made, and companies once viewed suspiciously will become market giants. But this growth will not be without consequences. As marijuana use grows, and those who profit from it become established companies, the marijuana industry will become a target for tort claims that other industries have faced for decades. These claims, ranging from product liability claims to vehicular injury to consumer class actions, will expose actors in the industry to potentially ruinous damages. This is particularly true if the industry remains, as it is now, only partially prepared. Particularly dangerous will be third-party claims (claims filed by people who did not purchase marijuana themselves). In those claims, the illegal status of marijuana in federal law could make establishing liability against manufacturers, wholesalers, and sellers easier than it is for other products. This Article chronicles the most likely claims to emerge en masse in courts and puts forth potential, viable industry responses.

I. INTRODUCTION

This Article addresses what is likely to happen when the expanding, creative world of tort collides with the rapidly growing, ever-evolving world of marijuana. It rests upon a simple premise: as the marijuana industry expands, it will begin to face tort claims more regularly just as any other massive industry does. It has largely escaped such claims to date due to legal uncertainty and concerns about whether actors in the industry could pay judgments. This tort cease-fire will not last. This Article identifies the most likely consumer-based claims that will inevitably arise and discusses likely, and prudent, industry responses.

A. Torts

Tort law is marked by its ability to evolve. Examples abound. Intentional infliction of emotional distress emerged to cover outrageous behavior that did not cause physical harm but was, nonetheless, conduct worth deterring.[1] Privacy torts emerged to fill gaps in defamation law,[2] and product liability claims evolved from warranty claims so that manufacturers of products would be responsible to all those impacted by their designs, not just those in privity with them.[3] Dram shop claims developed to hold bars who overserved visibly drunk patrons who later caused a car accident[4] accountable. And almost every state enacted consumer fraud acts to cull the elements of common law fraud into a shorter list, more likely to be proven by consumers against large corporations engaged in mass deception.[5] This inherent flexibility, even creativity woven into the DNA of torts, means the field is always

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[1] MEREDITH J. DUNCAN & RONALD TURNER, TORTS: A CONTEMPORARY APPROACH 114 (2d ed. 2012).

[2] *Id.* at 1197.

[3] *Id.* at 999.

[4] 45 Am. Jur. 2d *Intoxicating Liquors* § 448 (2018).

[5] Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1, 12 (2010).

expanding.

This expansion happens not only through new torts. It also occurs when attorneys forge new paths, often into new industries, using old claims. For example, in the late 1990s and early 2000s, nursing home neglect claims became prevalent.[6] Once believed too difficult to pursue because it was hard to show that neglect caused the death of someone already fragile and because the economic damages for lost wages were too small, these cases began to produce large verdicts around the country.[7] The same could be said of asbestosis litigation, tobacco litigation, claims relating to PCBs,[8] and a host of consumer claims relating to credit and debt.

Indeed, a review of tort law makes one thing certain: like life, torts will find a way. Like water finding the cracks, when attorneys are faced with the need to identify workable theories and solvent defendants for their clients, they will. And these expansions produce eye-popping numbers. Asbestosis litigation alone accounts for billions of dollars paid to injured people.

B. Marijuana

There is another field that has also found a way, against long odds. In a relatively short period of time, the marijuana market has gone from a black market dominated in large part by Mexican cartels, to a legal market in thirty or so states that attracts investments from venture capitalists, farmers, and all sorts of entrepreneurs.[9] The industry has exploded with new products. Now, people buy marijuana-based products in all sorts of forms ranging from chocolate bars to vape juice to dabbing to THC-rich lasagna. They can also buy high-end carrying cases, t-shirts, games for getting high with friends, and weed-centric jewelry. In

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[6] David Studdert*, Nursing Home Litigation and Tort Reform: A Case for Exceptionalism*, THE GERONTOLOGIST, Vol. 54, Issue 5, 588-595 (2004).

[7] *Id.*

[8] A polychlorinated biphenyl (PCB) is an organic chlorine compound with the formula C12H10−xClx. Polychlorinated biphenyls were once widely deployed as dielectric and coolant fluids in electrical apparatus, carbonless copy paper and in heat transfer fluids.

[9] National Conference of State Legislatures, *State Medical Marijuana Laws*, (Mar. 28, 2018), https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

Colorado alone, marijuana sales produced $1.37 billion in total revenue in 2017, and since legalization in 2014, the total revenue is $4.36 billion.[10]

Along with this growth has come a variety of things common to other industries. Producers have formed trade organizations, regulators are regulating, insurers develop products to cover losses and mitigate risk, and millionaires are made.

Will these two inventive, expanding fields intersect? The answer is yes, and it is already beginning to happen. Consider how legal marijuana might be implicated in a common accident. A driver high on marijuana who causes a car accident is a probable defendant, but he may have very little money (or only minimum coverage insurance). Could the victim find a deeper pocket by suing the party that sold the drug? Or, since the drug remains federally illegal, could the lawyers sue everyone who produced or distributed the drug? Or consider how marketing of marijuana will give rise to claims. Consumer fraud statutes will be used to sue distributors who claim their product is organic. They'll also sue when the amount of THC promised is not delivered or when users get sick because the product was contaminated. Product liability claims related to the sale of marijuana will also grow. They'll be filed when a child gets into a parent's stash of edibles, leading to a hospital visit, or when a vape pen explodes. And patients will sue when they discover that the cannabidiol (CBD) levels, which provide the most medical benefit from cannabis, are not as high as the packaging suggests. There will also be the day-to-day torts that all businesses face – employment discrimination, slip-and-falls in stores, wage and hour claims, and the like.

The exploration of torts in the marijuana industry is made more complex, and more interesting, due to the schizophrenic federal-state legal landscape. The fact that marijuana remains illegal under federal law works in some cases as a sword, and in some cases as a shield for the industry. For example, a user who sues because he claims that the marijuana he purchased did not contain enough THC to get him sufficiently high has a significant

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[10] Thomas Mitchell, *Colorado Sold Over $1.5 Billion of Legal Marijuana in 2017*, WESTWORD (Feb. 13, 2018, 10:58 AM), https://www.westword.com/marijuana/colorado-sold-over-15-billion-of-legal-marijuana-in-2017-9981858.

uphill climb in any court. That is because, under federal law, it would be no different from suing a meth dealer, claiming their drug was no good. The fact that the buyer bought an illegal drug may well bar his claim. Conversely, when a third party is involved, the federal illegality of marijuana is likely to make things significantly worse for the industry. For example, imagine that a driver high on product he just bought from a local dispensary causes a car accident that leaves a young woman with traumatic brain injury, producing a life care plan of $20 million. A clever lawyer who recognizes the driver has only $50,000 in coverage may well sue the dispensary. The lawsuit would claim the dispensary contributed to cause the accident by selling an illegal substance to the driver. Here, the injured party would assert that selling marijuana that caused an accident is no different than selling PCP. The notable difference would be that the dispensary might soon, especially if federal restrictions loosen, have a bank account, assets, and real money to pay the claim.[11]

In sum, the increasing prevalence of marijuana sales (at least trackable, quasi-legal sales) and the increase in solvent businesses tied to the industry makes an increase in tort claims inevitable. This Article explores some of the most likely claims, including the likely theories attorneys will pursue. It also puts forth potential defenses, preventative measures, and legal strategies cannabis companies could take to counteract such claims.

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[11] It should be noted that, at the time of this writing, significant banking restrictions on state-legal cannabis companies prevent them from having bank accounts. See Memorandum for all U.S. Attorneys, Jefferson B. Sessions, III (Jan. 14, 2018), which revoked earlier guidance from the Department of Justice and Department of Treasury that loosened banking restrictions on cannabis businesses. There are also significant federal taxes levied onto cannabis businesses, which sometimes ends up in effective tax rates equal to 70% of company's gross revenues. See Expenditures in connections with the illegal sale of drugs, 26 U.S.C. § 280E (1982), which disallows cannabis companies from taking basic tax deductions and credits due to selling a Schedule I Substance. Thus, while the cannabis industry is indeed booming, not many companies will have deep pockets at the time of this writing due to federal regulations. This Article puts forth, however, that once these regulations change cannabis companies may soon be more likely to face claims discussed throughout this Article.

II. PRIMER ON CANNABIS AND CANNABIS PRODUCTS

Because this Article will venture into some uncharted territory, it's crucial for the reader to first gain a brief understanding of how state-legal cannabis markets typically operate. There might also be a multitude of terms used throughout the paper which, depending on the reader's level of prior knowledge, may need some further explanation. Finally, with more and more products being developed in state-legal cannabis markets, it's important for the reader to have an idea of what new cannabis innovations are out there, other than the raw form of cannabis itself.

A. Entity Types in States that Legalized Cannabis

First, for purposes of this Article, there are three types of cannabis entities that will be discussed. Perhaps the most known would be "dispensaries," or retail locations where consumers can purchase recreational and medical cannabis or cannabis products. Some employees of dispensaries, especially those serving cannabis, are known as "budtenders."

There are also growers, who solely grow cannabis and supply it to dispensaries to be sold. Some growers also provide their cannabis to "processors." The term is used differently between states, but for the purposes of this Article, "processors" will be entities that take raw cannabis and transform it into other products, such as cannabis edibles, concentrates, etc.

The Article will also briefly discuss companies such as cannabis cafés or "coffee shops," similar to the Dutch model of serving legal cannabis to consumers. However, it should be noted that at the time of this writing, no legal state is currently licensing such entities.[12] A number of localities have permitted the use of such entities, but none of their programs have been developed

[12] Mona Zhang, *Social Cannabis Use Gains in Denver and Alaska as Nevada Lags Behind*, FREEDOM LEAF (Sept. 20, 2017), https://www.freedom-leaf.com/social-use-cannabis-gains-denver-alaska-nevada.

enough for proper legal analysis.[13]

A crucial distinction to know for purposes of understanding this Article is that regulations vary greatly between states that have legal cannabis. Each has their own set of license types, and these licensees each adhere to their own set of guidelines and requirements.[14] And some states permit dual licensure - for example, an entity may be able to operate both a dispensary and a grow operation to supply it.[15] Further, depending on the state they are located in, some of these entities can supply both recreational and medicinal cannabis products.[16] But for the purposes of this Article, it is not necessary to know specific state regulations. The reader should just be cognizant that regulations are widely different between states.

B. THC or CBD? Hemp or Marijuana? Sativa or Indica?

Typically there are two compounds of cannabis sought out by consumers - THC and CBD.[17] Tetrahydrocannabinol, or THC, is the primary psychoactive compound of cannabis, and produces the "high" many recreational users seek out.[18] CBD (cannabidiol),

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[13] Jacqueline Collins, *Inside the Coffee Joint Denver's First Licensed Pot Lounge*, WESTWORD (Mar. 2, 2018, 4:48 PM), https://www.westword.com/slideshow/photos-the-coffee-joint-denvers-first-licensed-pot-lounge-10049988.

[14] Leafly Staff, *A State-by-State Guide to Cannabis Packaging and Labeling Laws,* LEAFLY (Sept. 22, 2015), https://www.leafly.com/news/industry/a-state-by-state-guide-to-cannabis-packaging-and-labeling-laws (demonstrates the variety and differences between state cannabis regulations.).

[15] 7 CAL. B.P.C. DIV. 10 § (A)(3) ("'Microbusiness,' for the cultivation of cannabis on an area less than 10,000 square feet and to act as a licensed distributor, Level 1 manufacturer, and retailer under this division, provided such licensee can demonstrate compliance with all requirements imposed by this division on licensed cultivators, distributors, Level 1 manufacturers, and retailers to the extent the licensee engages in such activities.").

[16] 1 COLO. CODE REGS. § R304.1(A)(1) (2015) ("A Medical Marijuana Center that authorizes only Medical Marijuana patients who are over the age of 21 years to be on the Licensed Premises may also hold a Retail Marijuana Store license and operate at the same location under the following circumstances…").

[17] Morgan Smith, *THC vs. CBD: What's the Difference?*, WESTWORD (Dec. 22, 2016, 5:49 AM), https://www.westword.com/marijuana/thc-vs-cbd-whats-the-difference-8613506.

[18] *Id.*

on the other hand, is a non-psychoactive component - meaning it produces very little to no "high" or mind-altering effects.[19] Both THC and CBD have been shown to have medical applications when used alone, or in combination together.[20] Thus, cannabis products will often have a THC-to-CBD ratio spectrum: some with higher amounts of THC and lower levels of CBD, and some the opposite.[21] The ultimate purchase decision depends on what type of high a recreational consumer seeks, or which ailment a medical patient may need to mitigate.

It will be helpful for the reader to also understand the dichotomy between the two main different forms of cannabis - "hemp" and "marijuana." To put it simply: hemp and marijuana are not the same plant. They are both simply part of the Cannabis genus.[22] More importantly, "marijuana" often contains THC levels upwards of 25%.[23] Hemp, on the other hand, will usually contain less than 1%.[24] This number is too low to trigger strong mind-altering or psychoactive effects.[25] The distinction is crucial depending on the product being discussed. Often, recreational products will be derived from "marijuana" and contain high amounts of THC.[26] Or, there could be products aiming to have high amounts of CBD only.[27] As mentioned, companies will utilize CBD-to-THC ratios as measurements for consumers to know what

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[19] *Id.*

[20] Katherine Scott, *The Combination of Cannabidiol and Delta9-Tetrahydrocannabinol Enhances the Anticancer Effects of Radiation in an Orthotopic Murine Glioma Model*, 13 MOLECULAR CANCER THERAPEUTICS (Issue 12) 2955, 2965 (2014).

[21] Smith, *supra* note 17.

[22] Kentucky Hempsters, *The 10 Most Common Misconceptions About Hemp,* LEAFLY (Sept. 25, 2015), https://www.leafly.com/news/cannabis-101/the-10-most-common-misconceptions-about-hemp.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Dr. Dustin Sulak, *6 Common Myths and Controversies About High-CBD Cannabis,* LEAFLY (Mar. 12, 2018), https://www.leafly.com/news/cannabis-101/separating-cbd-facts-from-myths.

[27] *Id.*

type of products they are getting.[28] It should be noted that high-CBD products could be derived from either hemp or marijuana, but products from hemp will not have significant mind-altering effects due to its low THC content.[29]

Cannabis "strains" are classifications of marijuana plants.[30] "Sativa" plants are known for their more uplifting, energizing, cerebral effects.[31] "Indica" strains tend to have a more sedating, relaxing high. There are also hybrid strains - typically a cross-breed of Sativas and Indicas.[32] The majority of strains today tend to be hybrids but could be "Sativa-Dominant" or "Indica-Dominant" hybrids, all depending on user preference.[33]

C. Types of Products

As state-legal cannabis markets expand and develop, cannabis companies come up with more and more varieties of products for consumers to purchase. But first, it's important to examine the most typical form of cannabis - the actual, raw, smokable form itself. To make this, the cannabis plant is grown, harvested, and trimmed.[34] After the process, one is left with the final product - "nugs" of cannabis that can either be sold at a dispensary, or further processed into edibles and other cannabis products.[35]

"Edibles" are food or even drink products infused with cannabis.[36] Popular edibles include things like chocolate bars,

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[28] *Cannabis Dosing Guide,* PROJECT CBD (Feb. 12, 2015), https://www.projectcbd.org/sites/projectcbd/files/downloads/pcbd_dosingguide_2-12-2015_2.pdf.

[29] Sulak*, supra* note 25.

[30] Bailey Rahn, *Sativa vs. Indica vs. Hybrid: What's the Difference Between Cannabis Types?*, LEAFLY (July 10, 2014), https://www.leafly.com/news/cannabis-101/sativa-indica-and-hybrid-differences-between-cannabis-types.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Trevor Hennings, *Stages of the Cannabis Plant Growth Cycle*, LEAFLY (July 18, 2017), https://www.leafly.com/news/growing/marijuana-plant-growth-stages.

[35] *Id.*

[36] Jessie Wardarski, *Edible Marijuana Is Booming but These Aren't Your Father's Pot Brownies*, NBC NEWS (Aug. 19, 2015, 3:00 PM),

candies, and the classic "pot brownie."[37] The cannabis edibles market is arguably popular, given the method of ingestion is less brash compared to inhalation of smoke for many.[38] Dispensaries around the country report that up to a third of their sales were edibles in the first half of 2016.[39]

Apart from edibles, there has been a recent surge in popularity among cannabis "concentrates." Concentrates are when the plant material is stripped from the cannabis through an extraction process, leaving an isolated, concentrated form of THC or CBD in a sticky, sometimes toffee-like substance.[40] There are numerous types of cannabis concentrates available in state-legal markets - shatter, rosin, BHO, CO2 oil, wax, crumble, live resin - to name a few.[41]

There are two distinct, primary ways to produce concentrates - either through solvent extractions, or non-solvent extractions. More common are solvent extractions, which takes raw cannabis and mixes it with a solvent solution.[42] The mixture is then placed into a vacuum to extract the THC, and purge out remaining solvents.[43] Finally, the mixture is poured out into a container where it hardens into a thin, sticky substance.[44] The concentrate can then be vaporized or "dabbed" by consumers.[45]

Further, cannabis products are now being infused into

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https://www.nbcnews.com/health/health-news/these-are-not-your-fathers-pot-brownies-n411881.

[37] *Id.*

[38] *Chart of the Week: Sales of marijuana concentrates and edibles surging in Colorado*, MARIJUANA BUSINESS DAILY (June 13, 2016), https://mjbizdaily.com/chart-of-the-week-sales-of-marijuana-concentrates-edibles-surging-in-colorado.

[39] *Id.*

[40] Bailey Rahn, *Explore the Diverse World of Cannabis Oil and Concentrates*, LEAFLY (Feb. 26, 2014), https://www.leafly.com/news/cannabis-101/the-great-wide-world-of-cannabis-concentrates.

[41] *Id.*

[42] Sean Black, *Concentrated Cannabis, Pt. I: Extractions 101*, HIGH TIMES (Mar. 16, 2017), https://hightimes.com/grow/concentrated-cannabis-part-i-extractions-101/.

[43] *Id.*

[44] *Id.*

[45] *Id.*

anything and everything - lotions, pills, sprays, even shampoos. It's clear that, if cannabis is ever federally legal, and uniform standards within the cannabis market are developed, consumers of these products might start bringing claims against growers, manufacturers, or dispensaries of legal cannabis.

III. PRODUCT LIABILITY

No industry of any size escapes product liability claims. Makers of vehicles, heavy machinery, industrial machinery, chemicals, furniture, jewelry, food, supplements, medical devices, and pharmaceuticals all face product liability claims. The nature of making products is that when one causes harm, a lawsuit is possible. The marijuana industry will be no exception.

A. Background on Traditional Product Liability Claims

Product liability claims evolved from warranty claims.[46] Originally, warranty claims could only be filed by the buyer, against the seller.[47] They required this privity because they were, in essence, breach of contract claims.[48] Recognizing this, sellers began to disclaim warranties and otherwise seek to avoid them.[49] In response, courts began to recognize product liability claims that did not turn on written or oral promises and did not require privity of contract.[50]

The reasoning by early courts was that manufacturers should bear the responsibility when their products harm others.[51] To make sure this was the case, product liability law evolved to hold the manufacturer and all sellers in the chain of distribution

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[46] Duncan & Turner, *supra* note 1, at 999; *see also* Greenman v. Yuba Power Prod., Inc., P.2d 897, 900 (Cal. 1963) (an early case describing why strict product liability is needed to fill gaps in existing warranty law).

[47] Duncan & Turner, *supra* note 1.

[48] *Id.*

[49] William K. Jones, *Product Defects Causing Commercial Loss: The Ascendancy of Contract Over Tort*, 44 U. MIAMI L. REV. 731, 787 (1990) (noting that warranties were often disclaimed, resulting in no liability in tort, and documenting that courts are more likely to disfavor waivers of tort claims than warranty claims).

[50] Duncan & Turner, *supra* note 1.

[51] *Yuba*, 377 P.2d at 700.

liable for product defects.[52] And it evolved to hold manufacturers liable whenever the product was "unreasonably dangerous when put to an anticipated use."[53] The result, at least in concept, was that manufacturers and sellers could be liable even if they were not negligent.[54] And they could be liable even if all they did was sell the product.[55]

Since the early days of product liability, several developments in the common law, and sometimes statutory law, have confined the doctrine, reducing the likelihood manufacturers and sellers will be held liable.[56] First, product liability claims cover only physical injury.[57] Claims for economic loss are typically still covered under warranty law and consumer fraud statutes. Second, the person harmed had to be using the product in a way that was reasonably anticipated by the manufacturer, and the product itself had to be in the same condition as it was when manufactured.[58] Third, the innocent seller doctrine is embraced by many states.[59] It allows those who only sold the product but did not manufacture or design it to escape liability so long as there is another solvent defendant in the case.[60] Fourth, the doctrine has evolved to look more like negligence, particularly in failure to warn claims, where knowledge of the dangerous condition is required.[61] The risk utility test employed by many courts asks, in the aggregate, if the risk presented by the product is outweighed by its utility.[62] This often takes on a "negligence feel," especially because it often means asking whether there was an alternative design available that

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[52] *Id.* at 900.

[53] *Id.*

[54] Duncan & Turner, *supra* note 1, at 1024.

[55] *Id.*

[56] *Id.* at 999.

[57] *Id.* at 1024.

[58] For example, California, a leader in product liability law, includes in its jury instructions a requirement the jury find "The defect in design existed at the time it left the defendant's possession." Cal. Civ. Jury Instr. § 9.00.5.

[59] 63B AM. JUR. 2D *Products Liability* § 1566 (2018).

[60] *Id.*

[61] Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549, 557 (Cal. 1991).

[62] 63A AM. JUR. 2D *Products Liability* § 877 (2018).

would have been safer.[63] Finally, even when dangers can't be designed out, it has become common practice to warn of those dangers in the hope of shifting at least some fault to the consumer.

As product liability has evolved, three distinct types of claims have emerged - all of which aim to hold parties accountable for products that cause harm.

Manufacturing defect claims focus on errors in the process of making the product.[64] These claims turn on the idea that design might have been safe but that a deviation from the specs caused the product to fail.[65] For example, imagine a machine that performs surgeries, guided by a doctor. It might call for a very specific type of metal to be on the tip of the instrument that performs cuts and then cauterizes to stop bleeding. If, during the manufacturing process, an improper blend of metals was used that allowed the electricity to sometimes arc, causing harm to the patient, this would be a manufacturing defect.

Design defects focus, as one would guess, on the design itself.[66] If a manufacturer builds a punch press (a machine that punches holes in metal in a factory) in such a way that reaching to turn off the machine can cause a worker's clothing to be snagged, dragging them into the machine and causing injury, this is a design defect.

Warning defects occur when there is a non-obvious danger that cannot be designed out of a product and the maker fails to warn.[67] For example, burning propane always produces carbon monoxide. It is inevitable. And carbon monoxide is deadly if inhaled in high amounts. It is also invisible and odorless. As a result, manufacturers warn users of this risk. If they did not, they would face claims for a warning defect.

In the marijuana product realm, the laws of product liability apply with equal force. And it is reasonable to expect that, as injuries occur, so will claims against the manufacturers, and sellers of marijuana will begin to face lawsuits. With this

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[63] *Id.*

[64] RESTATEMENT (THIRD) OF TORTS § 2(A) (1998).

[65] Duncan & Turner, *supra* note 1, at 1027.

[66] RESTATEMENT (THIRD) OF TORTS § 2(B) (1998).

[67] *Id.* § 2(C).

background, we turn to some of the products prevalent in the marijuana industry and discuss potential claims.

B. A Note on First-Party and Third-Party Claims

Before diving into the different claims that could exist in product liability, we need to address an issue that will pervade the remainder of this Article.

1. First-Party Claims

Broadly speaking, there are two types of potential plaintiffs in marijuana cases. The first is someone who purchases a marijuana-based product, uses it, and then files a lawsuit as a result. In this Article we refer to these as "first-party claims." People filing first-party claims might be complaining that contaminated edibles made her sick, that the product was misrepresented and therefore they are owed a refund, or that the product caused impairment that resulted in injury. In all of those cases, the fact that marijuana is illegal under federal law potentially undercuts the claim.

The person must admit, as a core part of their claim, that they broke federal law. This admission damages the claim in two fundamental ways. First, it likely suppresses some claims entirely. Many attorneys and some clients would be afraid to file a case that contains an admission that a person committed what is likely a felony. Second, even if the person files the claim, it is likely that the seller will argue that such a claim can't be pursued because the buyer broke the law. This may sound far-fetched, since the seller also broke the law, but it is not. For example, in *Green Earth Wellness v. Atain Specialty Insurance Company*, defendant – an insurance seller – argued that a contract it sold to a cannabis cultivator was federally illegal.[68]

Depending on the type of claim pursued, this sort of defense might beat a clam entirely, or at least reduce its value. For

[68] *See* Green Earth Wellness Center, LLC v. Atain Specialty Insurance Company, 163 F. Supp. 3d 821, 832 (D. Colo. 2016) (It should be noted that, despite the defendant's argument that contract was federally illegal, the Court did not apply federal law since defendant willingly entered into contract.).

example, doctrines like unclean hands, assumption of the risk, or the risk/utility test might be employed by courts to bar the claims entirely. And even if this is not the case, in claims that recognize comparative fault, one could imagine jurors heaping fault on anyone who purchased marijuana. As such, the strength of these first party claims is compromised.

2. Third-Party Claims

Third-party claims are those brought by someone who did not purchase or use marijuana. These are people harmed by others who used marijuana. Examples include a child who accidentally consumers marijuana thinking it is candy or a driver who is injured by another driver who was operating a vehicle while high.

These claims are the ones that are most likely to cost the marijuana industry. This is true for several reasons. First, third-party claims are more likely to be filed. A person injured by someone else who used marijuana is not admitting to any crime. Second, a third-party claim will not face a likelihood of being dismissed nor will it often be reduced by comparative fault. A child who consumes an edible does not have unclean hands and they did not assume the risk. Similarly, a person permanently injured in a car accident caused by an impaired driver may have no fault at all. Third, the fact that marijuana is federally illegal potentially helps the claims. As discussed in more detail in the appropriate sections *infra,* the fact that marijuana is federally illegal may actually establish liability. For example, a court may conclude that it is *per se* negligent to drive while using marijuana, even if it is difficult to prove the dose was high enough to cause impairment. Similarly, a court may hold as a matter of law that an edible marijuana product is "unreasonably dangerous" simply because it violates federal law. Finally, there is an economic incentive to pursue third-party claims. Because growing, packaging, and selling marijuana is federally illegal, it may well be that third-party claims name *everyone* who was involved in the distribution of the product. For example, a party injured by an impaired driver might sue the driver, the store that sold the marijuana to the driver, and the party who manufactured it. The argument would be that each broke the law, and that each contributed to cause the injury. This argument

is plausible. And it allows a third-party claim to implicate potentially deep pockets instead of the driver, who may have insurance coverage and nothing more.

C. Cannabis Products and Likely Product Liability Claims

1. Raw Flower

Whether it's a processor making cannabis products or extracts, or a dispensary dispensing raw cannabis, cannabis companies crucially rely on the flower they attain from growers. All products down the spectrum originate from the raw flower itself. If for any reason the flower is tainted, it could mean that all products made from that flower may also be contaminated. Because of this, the growing phase of cannabis is crucial to ensuring an effective, safe product.

a. Potential Claims Related to Raw Flower

As noted, manufacturing defects are defects that force the product to depart from its intended design as a result of errors or issues during the production process.[69] When it comes to cannabis, such defects might occur most easily with raw flower. It typically takes anywhere from five to thirteen weeks for cannabis seeds to germinate, form into seedlings, and vegetate enough to begin to flower.[70] Then, generally ten to sixteen weeks are given for Sativa-dominant strains to fully develop, and eight to twelve weeks for Indica-dominant strains.[71] There are a number of potential issues that may arise during this process, and if growers are not careful, potential manufacturing defects could arise throughout the growth process.

Like any plant, cannabis is subject to insects and pests.[72] For cannabis in particular, the most significant pest would be spider mites.[73] Mites are one-millimeter, crab-like spiders that

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[69] RESTATEMENT (THIRD) OF TORTS § 2(A) (1998).

[70] Hennings, *supra* note 33.

[71] *Id.*

[72] *Id.*

[73] Larry Godfrey, *Spider Mites*, UC STATEWIDE INTEGRATED PEST MGMT. PROGRAM PUBLICATION 7405 (Dec. 2011).

invade plants then leave eggs, webs, and exoskeletons behind.[74] While they are not necessarily harmful to consumers, the mites eat the insides of the plants they infest, and thus can drain cannabis of its psychoactive contents and medical compounds.[75] Further, mite infestations spread easily and can spoil an entire grow before harvest.[76]

Growers often use a variety of pesticides and insecticides on marijuana to combat mites and other pests.[77] However, growers need to be careful about when and what they spray onto their plants. Spraying too close to harvest, for example, might leave residual amounts of pesticides on raw cannabis, which could pose health hazards to users, or may cause further processed products to be tainted.

In some states with legal cannabis, there is a small percentage of users reporting ill effects related to heavy use.[78] The condition has recently been dubbed Cannabis Hyperemesis Syndrome ("CHS").[79] It includes symptoms such as cyclic vomiting, abdominal pain, and can possibly lead to kidney failure.[80] Yet some users report that symptoms stop just days after cessation of use, or by switching to a different dispensary or source of cannabis.[81] Once again, it should be noted that there is not a significant number of CHS cases.[82] Activists and individuals in the cannabis industry speculate that CHS may be occurring due to harmful pesticides, or

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[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] Elise McDonough, *Tainted: The Problem with Pot and Pesticides*, HIGH TIMES (May 5, 2017), https://hightimes.com/grow/tainted-the-problem-with-pot-and-pesticides.

[78] Mary Papenfuss, *Mysterious Marijuana-Related Illness Popping Up In Emergency Rooms*, HUFFINGTON POST (Jan. 2, 2017, 1:31 PM), https://www.huffingtonpost.com/entry/mysterious-marijuana-flu-emergency-rooms_us_5869d6bee4b0eb586489f7e6.

[79] *Id.*

[80] *Id.*

[81] Chloe Sommers, *Finally the Article on Cannabis Hyperemesis Syndrome that Readers Deserve*, THE MARIJUANA TIMES (Jan. 12, 2017), https://www.marijuanatimes.org/finally-the-article-on-cannabis-hyperemesis-syndrome-that-readers-deserve/.

[82] Papenfuss, *supra* note 76.

misapplication.[83] Further, the symptoms of CHS are similar to those reported from poisoning potentially related to pesticides such as Myclobutanil.[84]

b. Potential Responses by Industry

As the legal cannabis market expands, and proper, safe practices are discovered, cannabis growers should be quick to adopt and maintain them. Growers should properly inspect what kind of chemicals are inside the fertilizers, pesticides, and insecticides they intend to apply. They should also be cognizant of when they are spraying their plants. Application too close to harvest might potentially leave residual amounts of pesticide on product. Taking a batch of the flower to a testing organization (third-party companies that analyze samples of produce to detect the amount of any chemicals, mold, or contaminants on the product) might be a good final action to ensure the harvest is safe for use. Though costly, such practices would prevent potential claims. These are just a few examples of how growers can prevent defects arising from raw flower.

Further preventative actions arise down the supply chain. Dispensaries and processors, for example, could inspect each crop they intend to sell or use. Or, like growers, dispensaries and processors could bring samples of cannabis purchased to labs to be tested for any residual contaminants. Or, at a minimum, dispensaries should consider how they can avoid ultimate responsibility if they are sold an unsafe product. This could include indemnity contracts, the use of third-party certifying organizations funded by the industry, or only purchasing from distributors with transparent testing protocols and written certifications. If economically viable, these preventative actions will be crucial in preventing potential suits claiming manufacturing defects.

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[83] Madison Margolin, *The Curious Case of Cannabis Hyperemesis Syndrome*, MERRY JANE (July 27, 2017), https://merryjane.com/health/the-curious-case-of-cannnabis-hyperemesis-syndrome.

[84] Kate Letterick, *Lawsuit against Organigram Expands to Allege Tainted Pot Made Users Ill*, CBC NEWS (Dec. 6, 2017, 6:15 PM), https://www.cbc.ca/news/canada/new-brunswick/organigram-medical-marijuana-1.4436081.

In terms of providing adequate warnings, cannabis products could incorporate warning statements to accommodate cannabis, such as:

- "There may be health risks associated with use of marijuana"
- "Use of cannabis is not to be used during pregnancy"
- "Marijuana can impair concentration, coordination, and judgment. Do not operate a vehicle or machinery under the influence of this drug"
- "For use only by adults twenty-one and older. Keep out of the reach of children"
- "The intoxicating effect of this product may last up to two hours"
- "For medical use only" (Depending on product type)
- "This product has not been analyzed or approved by the FDA. There is limited information on the side effects of using this product, and there may be associated health risks"
- "Contains marijuana extract processed with butane." (For concentrates or products manufactured with concentrates)
- "Keep secured at all times"
- "For medical patients only. DO NOT EAT" (For medicinal edibles)

Even if the cannabis products themselves don't include such statements, dispensaries could be sure to provide them as some dispensaries already make their own, customized labels to place on each product.

Dispensaries could also develop robust training programs that cover safe, preventative measures employees can take. For example, the dispensary could mandate, in their standard operating procedure, that budtenders must remind customers how to properly use the specific cannabis product purchased. To further insulate the dispensary, budtenders in training programs could certify that they understand the company's standard operating procedures and will adhere to company policy throughout their

employment. Such warning statements and preventative actions provides adequate warning to consumers of the product, and ultimately, insulation to cannabis entities.

c. Cases Related to Raw Flower

At the time of this writing, there has been one notable case related to pesticide usage and cannabis, along with a pending case in Canada.

In *Flores v. LivWell*, plaintiff sued a dispensary for allegedly tainted cannabis. To explain, the Colorado Department of Agriculture periodically releases a list of pesticides and fungicides that are prohibited from use on commercial cannabis cultivations.[85] In early 2015, a pesticide containing high amounts of the chemical Myclobutanil was added to the list.[86] Myclobutanil, heated with a standard cigarette lighter, can be broken down and releases hydrogen cyanide.[87] The chemical is thus not approved for tobacco products.[88] Similarly, if traces of the chemical pesticide are left on cannabis plants, it would pose significant health hazards to consumers.[89]

One large-scale marijuana dispensary and cultivator in Colorado had already been applying the pesticide to their harvests, including a pending harvest.[90] As result, the company worked with the Marijuana Enforcement Division of Colorado to quarantine off much of the harvest and prevent further distribution.[91] The quarantine was reported throughout the City of Denver, causing a patron of the dispensary to hear about the incident and ultimately

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[85] Ashley Simpson et al., *Recent Developments in Toxic Tort and Environmental Law*, 2017 TORT TRIAL & INS. PRAC. L.J. (Winter Issue) 690 (2017).

[86] *Id.*

[87] *Id.*

[88] Complaint, Flores v. LivWell, Inc., No. 2015-cv-33528 (Colo. Dist. Ct. Oct. 5, 2015).

[89] *Id.*

[90] *Id.*

[91] Thomas Mitchell, *Denver Investigated 10 Pot Grows for Use of Banned Pesticides*, WESTWORD (May 18, 2015, 7:23 AM), http://www.westword.com/news/denver-investigated-10-pot-grows-for-use-of-banned-pesticides-holds-plants-6654706.

sue.[92]

Plaintiff, a medical-marijuana patient in Colorado, claimed they suffered economic injuries because of purchasing product that defendant knowingly tainted with Myclobutanil.[93] But the court dismissed the suit, as plaintiff's claim was for economic, rather than physical injury.[94] Plaintiff argued that he overpaid for the cannabis in light of the contamination but had not shown that the allegedly contaminated product had harmed them.[95] Perhaps this suit may have worked better as a consumer fraud claim, to be described later.

There's also a newly-filed suit involving a medical marijuana dispensary in Canada that may grow into a class action suit. The facts are very similar to *Flores*, except physical damages could be a factor in this case. In *Dawn Rae Downton and Organigram Holdings*, plaintiff was a patient of a cannabis licensee in New Brunswick.[96] Licensee had grown and sold their cannabis.[97] Plaintiff was prescribed cannabis for her recently-diagnosed back pain.[98] She had never used cannabis prior to prescription.[99] After approximately two weeks of daily use, plaintiff stated she experienced frequent nausea and vomiting.[100] Health Canada, the Canadian federal department responsible for administering the medical marijuana program, stepped in and inspected defendant's plants.[101] They found significant traces of Myclobutanil.[102] The pesticide had been used on products sold since February 2016, compelling Health Canada to issue multiple recalls of the company's product.[103] Plaintiff brought suit in March

[92] Simpson et al., *supra* note 84.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] Letterick, *supra* note 83.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] Letterick, *supra* note 83.
[102] *Id.*
[103] *Id.*

2017.[104] Claims are that the company "manufactured its organic medical-cannabis product without having in place adequate quality-control protocols."[105] Furthermore, the suit states that defendant "took no immediate steps to modify its manufacturing practices once it became aware of the presence of prohibited pesticides in the Affected Product…[defendant] has acted in such a high-handed, wanton and reckless or deliberate manner, without due regard to public health and safety as to warrant an award of punitive damages."[106]

This is a new case which will have a fundamental effect on the Canadian market if it moves forward. While Canadian cases do not have precedent on U.S. courts, their decisions could be examined for similar claims and instances, as their product liability and negligence law are similar. Further, plaintiff alleged that the cannabis she purchased was "organic," yet it was found to contain a pesticide that left traces of Myclobutanil.[107] This brings up an element of consumer fraud – also to be discussed later.

2. Edibles

Continuing down the spectrum of cannabis products, it was mentioned that raw flower could be used to produce "edibles." Edibles are food or drink products infused with cannabis.[108] It should be noted that oral ingestion of cannabis in edible form could access more of the plant's THC content compared to combustion.[109] Put plainly, edibles are far more potent. Hence the common implied rule among users - "don't eat the entire brownie." In other words, many cannabis edibles require special instruction before being used. Further, the increased expansion of state legal markets means more and more types of edibles becoming

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[104] *Id.*

[105] Grant Robertson, *Medical Marijuana Companies Face Proposed Class-Action Suits over Pesticide Use*, THE GLOBE AND MAIL (Mar. 6, 2017), https://www.theglobeandmail.com/news/national/mettrum-organigram-medical-marijuana-proposed-class-action-lawsuits/article34216937/.

[106] Notice of Action, Dawn Rae Downtown and Organigram Holdings, Supreme Court of Nova Scotia, HFX No. 460984.

[107] *Id.*

[108] Wardarski, *supra* note 35.

[109] *Id.*

available. Gone are the days of the "marijuana brownie." Innovations from state-legal cannabis has brought about cannabis chocolate bars, THC-infused chewing gum, pot chips, candies of all sorts, and even cannabis drinks. Full-course meals are even being marketed. Before it closed down, an entity in Denver operated a restaurant that infused cannabis into all dishes of a three-course meal.[110] Patrons could enjoy a hearty salad with cannabis-infused dressing, a juicy steak marinated in cannabis-infused butter, then top their dinner off with a delicious banana split drizzled in cannabis-infused chocolate syrup.

a. Potential Claims

As discussed, a product is defective in design when "the foreseeable risks of harm…could have been reduced or avoided by the adoption of a reasonable alternative design."[111] Comments of the Restatement (Third) of Torts §2 discuss a "risk-utility balancing" test as the standard to determine defectiveness of product designs.[112] This means courts will examine the design of the product and weigh its usefulness versus the potential dangers and risks it may have on a consumer.[113] If potential risk outweighs the usefulness, then the manufacturer might be liable in a products liability suit.[114] For Risk-Utility analyses, plaintiffs must prove that there was a potentially better way to design the product within the same range of economic costs - a concept known as Reasonable Alternative Design ("RAD").[115]

An edible chocolate bar is a good example of how a design claim might occur. Sometimes chocolate bar edibles can contain up to ten pieces, with each piece containing what is considered a full dose of cannabis.[116] As a result, a person should not eat the entire

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[110] Amanda Pampuro, *Talk About Pot Luck! Ganja Gourmet Gets Ready for Its Next Course*, WESTWORD (Apr.19, 2017, 6:55 AM), https://www.westword.com/marijuana/ganja-gourmet-prepares-for-the-next-step-in-the-edible-evolution-8985358.

[111] RESTATEMENT (THIRD) OF TORTS § 2(B) (1998).

[112] *Id.* at Comment D

[113] *Id.*

[114] *Id.* at Comment E

[115] *Id.*

[116] Cheri Sicard, *10 Extremely Potent Cannabis Edibles*, HIGH TIMES (July

bar, but this is likely unknown to new or inexperienced users who might eat a comparable, non-drug infused product, in one sitting. A new user who ate the entire bar, treating it like any other chocolate bar, would at a minimum become very intoxicated. Worse, they could operate a vehicle in that state, experience paranoia, or accidentally harm themselves.

And, that same candy bar could pose a real risk to children. A child who steals his parents "candy bar" and consumes the entire thing before she's caught could ingest tremendous quantities of THC, resulting in a visit to the emergency room. And that may not be the end of the damage. In many states, an act that causes someone to go the emergency room also exposes that actor to any harm that results from medical negligence at the hospital, which is more common than it sounds. There are cases throughout the country where a negligent driver causes an accident. The victim of that accident goes to the hospital for care, suffers from medical malpractice, and then sues the driver and the doctor. With the wide distribution of marijuana, it is only a matter of time before the same happens from one using too much marijuana.

The plaintiff who allegedly eats too much of the chocolate bar he bought could bring a product liability claim. He would argue the product was unreasonably dangerous. He may also argue that the manufacturer failed to warn of the risks. He would likely hire an expert in human factors who could testify under oath that it was reasonably foreseeable that people would eat the entire bar, just as it is reasonably foreseeable that people will misuse other products. Another expert may well opine on the efficacy of the warnings, if any, that appeared on the chocolate bar. Although no case is a guarantee, this case is colorable and could present real exposure for everyone in the distribution chain.

b. Potential Industry Responses

The industry needs to take lessons from more established industries that have faced design claims for decades. This requires

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22, 2016), https://hightimes.com/edibles/foods/10-extremely-potent-cannabis-edibles.

extensive user testing, employing human factor experts, writing detailed and careful warnings, and borrowing from other industries that sell pharmaceuticals and food products. Consider the marijuana bar. The manufacturer could reduce the dosage so that one bar contains one dose. Or, it could sell the chocolates in individual wrappers which say, in clear language and with pictograms, that each piece is a complete dose and that taking more than one could be dangerous. Those same manufacturers might consider hiring experts to learn how to make the packaging look less like a child's candy. There is at least some movement in this direction already. For example, some edible manufacturers have even gone as far as imprinting the numbers "10 mg THC" onto each separable piece of their chocolate bars as an extra reminder to the user. Further, a popular edibles manufacturer of cookies places dissolvable sugar labels containing the letters "THC" directly onto the cookie. This could prevent use by unwanted third parties, such as children, even while the product is out of its adult-proof packaging.

As mentioned, a product could be warning defective because of inadequate instructions on using the product.[117] Thus, cannabis processors of edibles must pay crucial attention to the packaging and labeling of their products to prevent such defects down the line. Labels should include proper instructions and dosage amounts to prevent one from ingesting too much of the edible. If their labels explicitly and noticeably state that each piece of the bar would contain a certain number of milligrams of THC, then the user should be aware of the dosage amounts before opening it.

Companies can also implement reasonable alternative designs to their products if need be. Many cannabis drinks, for example, may come in 8.5 fl. oz. bottles containing 100 mg of THC, or roughly ten doses. This produces a risk of overuse. A company can instead find an alternative way to manufacture their drink so that one bottle would perhaps equal one serving. Or, it could utilize clever packaging techniques, such as making the bottle cap of the drink equal to a single serving size that the consumer could in turn

[117] RESTATEMENT (THIRD) OF TORTS § 2(C) (1998).

use to measure out the dosage they intend to take.

Entities can also look for guidance to their state agency regulating cannabis, some of whom have adopted rules imposing serving size limitations on cannabis edibles. Washington regulations, for example, measure a single "serving size" as roughly equivalent to 10 mg of THC.[118] States also impose restrictions on the amount of cannabis these products can have. Colorado, for example, requires that edibles have a max limit of 100 mg THC for recreational products[119], and imposes testing requirements on batches to ensure the measurements are accurate.[120] It should be noted that adherence to these laws will help insulate cannabis companies to suits. This idea will be examined in more detail in Section V.

Of course, some responsibility here would lay with the sellers of the product. Dispensaries and their budtenders need to ensure they always properly inform their consumers regarding the edibles they buy and instructions on how to take them, especially if they contain more than one serving. Otherwise they could partially liable in a potential incident where one over-ingested cannabis. Dispensaries could, like many other industries, work together to create standardized signage and warnings, thereby reducing the cost to each dispensary while making it feasible to retain qualified experts, legal and non-legal.

Last, both dispensaries and processors of edibles can work closer together and come up with innovative solutions to mitigate risk. As mentioned, indemnification clauses or contracts could be utilized to divide or assign any potential loss amongst both entities.

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[118] Washington W.A.C Chapter 314-55-095 (2016) ("[a] Single serving. A single serving of a marijuana-infused product must not exceed ten milligrams active tetrahydrocannabinol (THC), or Delta 9.").

[119] 1 C.C.R 212-2 § R103 (2015) ("Multiple-Serving Edible Retail Marijuana Product" means an Edible Retail Marijuana Product unit for sale to consumers containing more than 10mg of active THC and no more than 100 mg of active THC.").

[120] *Id.* ("Test Batch" means a group of Samples that are derived from a single Harvest Batch, Production Batch, or Inventory Tracking System package, and that are collectively submitted to a Retail Marijuana Testing Facility for testing purposes. "Total THC" means the sum of the percentage by weight of THCA multiplied by 0.877 plus the percentage by weight of THC i.e., Total THC = (%THCA x 0.877) + % THC).

Another unique contractual solution would be the utilization of "talking points." To explain, in a contract between an edibles manufacturer and a dispensary, the manufacturer could include a provision mandating budtenders of the dispensary to use "talking points" during transactions of products. These talking points could include things like proper instructions on using the product, information about damaging, and adequate warnings. If an edibles manufacturer insists and contractually requires dispensaries to provide warnings to purchasers of their product, it provides an extra layer of insulation from potential clams. More examples of such preventative solutions will be discussed in Section V of the Article.

c. Cases Related to Edibles

At the time of this writing, there is one notable products liability suit related to commercial cannabis relevant for purposes of this article: *Kirk v. Nutritional Elements, Inc., and Gaia's Garden*. The case is ongoing at the time of this writing and happens to be a third-party claim. On April 14, 2014, an individual purchased a cannabis-infused taffy the size of a tootsie roll.[121] The taffy contained 101 mg of THC – arguably a large dosage for an edible that size.[122] It should be noted, however, that the label of the edible did state how much THC was in the product.[123] Despite this, the individual ingested the entire piece of candy.[124] Later that night, he allegedly experienced "possible psychotic behavior" and hallucinations.[125] Eventually he retrieved a gun and shot his wife in front of his three children.[126]

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[121] Complaint for Declaratory Judgement, United Specialty Insurance Company v. Gaia's Garden LLC, No. 1:17-cv-01113-NYW (Colo. Dist. Ct. May 4, 2017).

[122] Emma Gannon, *Insurer Refuses to Cover Marijuana Candy Murder*, COURTHOUSE NEWS (May 8, 2017), https://www.courthousenews.com/insurer-refuses-cover-marijuana-candy-murder/.

[123] *Id.*

[124] Complaint for Declaratory Judgement, United Specialty Insurance Company v. Gaia's Garden LLC, No. 1:17-cv-01113-NYW (Colo. Dist. Ct. May 4, 2017).

[125] *Id.*

[126] *Id.*

Criminally, the individual faces a first-degree murder charge. His three sons, witnesses to the horrific event, brought suit against the dispensary and producer of the edibles.[127] They argue that defendant companies failed "to warn that edibles could lead to paranoia, psychosis and hallucinations" and "negligently, recklessly and purposefully concealed vital dosage and labeling information from their actual and prospective purchasers . . . to make a profit."[128] Plaintiffs also argue defendants violated the Colorado Consumer Protection Act in selling a defective product shortly before the murders.[129]

The case is still pending and is one of first impression. It should be noted that the dispensary and producer of the edible happened to be compliant with all rules stipulated by the Marijuana Enforcement Division of Colorado at that time. This will make it potentially harder for plaintiffs to prove the product was potentially defective. Further, causation may be an issue, as it was later revealed in Mr. Kirk's criminal trial that he uses medications for anxiety, depression, high cholesterol, and sleep deprivation.[130]

Yet, this case, being the first third-party suit of its kind, will undoubtedly set precedent for future third-party claims, along with product liability claims, down the line.

3. Cannabis Concentrates

Like labeling practices with edibles, cannabis processors must be cautious when producing cannabis concentrates. To

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[127] Michael Roberts, *Murder and Pot Edibles: Group Defends Industry After Richard Kirk Sentencing*, WESTWORD (Apr. 10, 2017, 5:31AM), http://www.westword.com/news/richard-kirk-guilty-plea-in-wifes-murder-means-pot-edibles-wont-be-put-on-trial-8761620.

[128] Jordan Steffen*, Lawsuit against marijuana company over deadly Denver shooting could be first of its kind*, DENVER POST (May 10, 2016, 4:50AM), https://www.denverpost.com/2016/05/10/lawsuit-against-marijuana-company-over-deadly-denver-shooting-could-be-first-of-its-kind/.

[129] *Id.*

[130] Kirk Mitchell, *Richard Kirk, accused in Observatory Park slaying of his wife, pleads guilty to second-degree murder*, DENVER POST (Feb. 3, 2017, 9:52AM), https://www.denverpost.com/2017/02/03/richard-kirk-observatory-park-murder/.

prevent potential design defects, entities must ensure they are using safe, proper methods of extraction. As mentioned earlier, there are numerous types of concentrates and some are viewed as safer or cleaner than others. One such concentrate, for example – BHO – is created with butane or liquid hydrocarbon solvents.[131] And if companies aren't careful during the purging process, residual amounts of these solvents may be left in the final product. To some, this is known as "dirty oil." "Dirty oil" may contain chemical contaminants or excessive amounts of residual solvents that could present health hazards to consumers."[132]

a. Industry Responses

It should be noted that simply testing samples from the batch of the concentrate would show the quality or purity of finished goods, and processors would benefit greatly from doing so. If they find that their products contain dirty oil, they can choose not to sell the concentrate, and try to correct by examining their extraction process and finding the source of the problem. Yet, as stated earlier, each concentrate contains its own method of extraction, and the ultimate driving factors are options and user preference. But as more and potentially safer methods of cannabis extraction are being discovered, it will be critical for producers of cannabis extracts to adopt them in order to prevent potential liability from manufacturing defects.

Another obvious solution for processors of concentrates would be to inspect the flowers they attain from the growers before extraction. Testing the flowers might be a good step, as it will yield the amounts of pesticides left within the plant. If too many pesticides or residual chemicals are present, a company can choose not to process with that particular cannabis. Or, a processor can choose to continue, but it should make sure their purging process surely gets rid of the excess amounts of chemicals left within the product. These are examples of preventative measures processors

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[131] *Id.*

[132] Leafly Staff, *Dabbing 101: What Are Dabs and How Are They Made?*, LEAFLY, https://www.leafly.com/news/cannabis-101/is-dabbing-good-or-bad-or-both.

can take to potentially prevent "dirty oil" from hitting the marketplace.

D. An Overarching Issue – Risk of Inadvertent Use by Children

Beyond focus on specific cannabis products, there is a risk that applies to almost all of them. That is the risk of inadvertent or unauthorized use by children.

In some states that have legalized marijuana, reports of children ingesting marijuana has climbed, although slightly.[133] Additionally, there are concerns that marijuana harms developing brains.[134] As a result, the risk of children using marijuana is real. And it presents what is perhaps the strongest form of tort claim discussed thus far – a claim by an innocent party. In that setting, as discussed in the Third-Party Claims section, plaintiff can use all of the lingering questions about the legality of marijuana, and its status as illegal under federal law, as an argument in favor of liability.

Like with prescription drug manufacturers or even just makers of over-the-counter medication, care has to be taken to make sure that marijuana is not easily accessible to children. After all, a candy bar, a drink, or topical lotion all look like things kids regularly use.

1. Potential Industry Responses

How the industry responds to the risk of children coming into contact with marijuana depends on the setting. Regarding edibles, it is not advisable for companies to make the products look similar to common snacks. Further, the products should be plainly labeled with warnings that are clear, and they should be packaged in a way that makes it harder for children to access them.

Some of this innovation is occurring. The emergence of state-legal, commercial cannabis has allowed for innovative

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[133] George Sam Wang et al, *Unintentional Pediatric Exposures to Marijuana in Colorado*, JAMA: PEDIATRICS (Sept. 6, 2016), https://jamanetwork.com/journals/jamapediatrics/fullarticle/2534480.

[134] Kirsten Weir, *Marijuana and the Developing Brain,* 46 AMERICAN PSYCHOLOGICAL ASSOCIATION (Nov. 2015).

designing, packaging, and labeling to prevent warning and product defects. More importantly, these innovations make sure cannabis products don't end up in the hands of children. The most common example may be "joint tube." To explain, many dispensaries sell pre-rolled joints for consumers to purchase. To keep them away from children, many dispensaries implement the use of a "joint tube" - basically a plastic, cylindrical canister to encase a joint. Opening these tubes requires a surprising amount of strength, making them quite child-resistant. Joint tubes are a positive example of child-resistant packaging being adopted by the legal cannabis industry. Other examples are the use of child-resistant bags with locked zippers, and cases containing built-in sliding locks. These could be used for other cannabis products, such as edibles and concentrates.

Furthermore, many products carry a warning regarding children, such as the following:

- "Warning: Keep Out of Reach from Children"
- "CAUTION – MEDICATED PRODUCT"
- "Not Intended for use by Children"

Many state agencies administering legal, commercial cannabis also lay out specific packaging and labeling requirements for companies to follow. A number of these requirements are aimed particularly at preventing use by children. If a nationwide legal market is ever to be developed, it would be wise for the industry to uniformly adopt similar packaging and labeling practices. For the time being, at least, proof of adherence to state law could assist cannabis entities facing certain claims, such as failure to warn allegations.

Almost all major cannabis states, for example, mandate that cannabis products contain a very noticeable, universal symbol indicating that THC is in the product.[135] Other rules, such as California's former Medical Cannabis Code, go further and

[135] Leafly Staff, *A State-by-State Guide to Cannabis Packaging and Labeling Laws,* LEAFLY (Sept. 22, 2015), https://www.leafly.com/news/industry/a-state-by-state-guide-to-cannabis-packaging-and-labeling-laws (Example of the variety and differences between state cannabis regulations).

require edibles to be individually sealed in plain, opaque wrapping marked only with the marijuana universal symbol.[136] There are even prohibitions on the use of cartoons, characters, or images that might be appealing to children in state regulations from Maryland.[137] Even if these requirements are not regulations in their state, it would be wise for cannabis companies to incorporate as many of these preventative measures as possible to prevent future claims – and more importantly – injury to innocent third parties such as children. This will be discussed more in Section VI of the paper.

IV. CONSUMER FRAUD CLAIMS

Another tort claim that will emerge in the marijuana industry is the consumer fraud claim, and more specifically, consumer class actions. Consumer class actions are often filed under what are sometimes referred to as Unfair and Deceptive Acts and Practices statutes ("UDAPs"). UDAPs give consumers a private right of action. Although they vary across states, generally they require a showing that a company engaged in unfair or deceptive practices in the marketing or sale of goods or services. Some statutes allow for the doubling or trebling of damages, and almost all of them allow for attorney fees if the plaintiff prevails.[138]

Perhaps as important as what UDAPs require is what they don't. While common law fraud universally requires a showing that the consumer relied on a misrepresentation and that the reliance was reasonable (some states call this "justifiable"), many UDAPs were intentionally drafted by legislatures without this requirement.[139] This changes the nature of the claim dramatically. In a traditional fraud claim, a defendant often argues that even if they misrepresented a fact, the consumer should have known and

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[136] *Id.*

[137] *Id.* See Maryland's packaging prohibitions. "A package of medical cannabis finished product may not bear any: (4) Cartoon, color scheme, image, graphic or feature that might make the package attractive to children."

[138] Nat'l Consumer L. Ctr., *Unfair and Deceptive Acts and Practices*, 1.2 (9th. ed. 2016).

[139] Carolyn Carter, *Consumer Protection in the States*, NCLC, 7-10, available at http://www.nclc.org/images/pdf/udap/report_50_states.pdf.

didn't reasonably rely on it. Or, the defendant might argue that the consumer did their own investigation, knew the truth, and therefore did not rely on the representation.

These defenses required considering the specific communications by the defendant and the knowledge, behavior, and mindset of the consumer. As a result, class actions based on common law fraud were nearly impossible. Class actions require proving a case with common evidence.[140] Put in class action vernacular, common issues must predominate. What this means in practice is that if a defendant can show that in order for a plaintiff to prove each element of a claim, the trier of fact will have to consider individual evidence that is unique to each member of the class, then a class action is inappropriate.[141]

Because UDAPs eliminate reliance, they are far more amenable to class actions. Typically, so long as a plaintiff can prove that a defendant made a common misrepresentation or omission (or other unfair or deceptive practice) to the whole class, and that the whole class suffered some sort of harm (such as overpaying for a product), then a class can be certified. This means the defendant then faces liability to everyone who received the misrepresentation and purchased the product.

The availability of a class action both increases the likelihood that companies will pay out more in verdicts and settlements and increases the overall likelihood of lawsuits being filed. These two realities – higher exposure and more frequent claims – are connected. Individual claims of $50, $100, or even $1,000 don't attract attorneys and they are often economically irrational for plaintiffs.[142] The filing fee alone could exceed recovery.[143] And an attorney can't take a contingency fee from $50 and stay afloat. Nor can a client justify paying an attorney by the hour when the fees would exceed the recovery. A class action

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[140] Fed. R. Civ. P. 23(a).

[141] *See e.g.* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349, (2011) (in which Court decertified a class because it found that individual questions predominated in the litigation).

[142] John Campbell, *Unprotected Class: Five Decisions, Five Justices, and Wholesale Change to Class Action Law*, 13 WYO. L. REV., 463, 464 (2013).

[143] *Id.*

changes the calculus. By aggregating claims, 10,000 consumers who paid $100 each have a net claim worth $1 million. The attorneys can collect a fee from the fund, making the litigation rational. And the court often awards an incentive fee to the class representative who filed the lawsuit, making the case economically rational for them as well.[144]

For defendants, this is not good news. They cannot assume that small damage claims will go unpursued. And they don't. Class actions are filed about nutritional supplements, food, fees charged by car dealerships, inappropriate payments by insurance companies, defective cell phones, overcharges on cell phone bills, and much more.

The marijuana industry should expect to face similar claims. And it should recognize the model for bringing these claims already exists. For example, consumer fraud claims are regularly filed against food companies who sell things that are misleadingly labeled as "organic" when they aren't, or that are promised as fresh "when they were frozen."[145] If something is labeled "pesticide-free" and proves not to be, claims will be filed.[146] Even more closely related, if a bottle of Vitamin B is promised to contain "500 mg of Vitamin B12," but it's found only to have 100 mg of B12," a lawsuit is almost certain.[147] And if a medicine is marketed as effective and safe (such as Vioxx), and proves not to be, a class action to recover the purchase price will be filed.[148]

As discussed in more detail below, these cases are ready-made models for suing marijuana producers and sellers.

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[144] *Id.*

[145] Bryan Cave LLP, *Three Recent Cases Highlight Risks of Using Claims Of "Fresh" In Advertising*, LEXOLOGY (Dec. 22, 2015), https://www.lexology.com/library/detail.aspx?g=ce25bbf5-887b-4972-b62c-63cd7ef3e570.

[146] Shruti Date Singh, *Weedkiller found in some "natural" Bigelow tea lawsuit says*, DENVER POST (Dec. 21, 2017, 9:52AM), https://www.denverpost.com/2017/12/21/bigelow-tea-weed-killer-lawsuit/.

[147] Jonathan Stempel, *Lawsuit accusing Whole Foods of overcharging is revived: U.S. Appeals Court*, REUTERS (June 2, 2017, 10:26AM), https://www.reuters.com/article/us-wholefoods-lawsuit/lawsuit-accusing-whole-foods-of-overcharging-is-revived-u-s-appeals-court-idUSKBN18T2AL.

[148] Alex Berenson, *Merck Agrees to Settle Vioxx Suits for $4.85 Billion*, THE NEW YORK TIMES (Nov. 9, 2007), http://www.nytimes.com/2007/11/09/business/09merck.html.

A. Cannabis and Consumer Fraud Examples

What might misrepresentation in regard to cannabis look like? Currently, such claims are not common. But if legal markets expand, and especially if federal regulation occurs, such claims are foreseeable against cannabis companies. The following section will examine potential claims by posing hypotheticals. Note that Section VI will discuss defenses cannabis companies could take in response to the following hypotheticals.

1. Hypothetical 1 - The "Organic Chronic"

D is an entity possessing a dispensary license and grow license. D advertises all of their cannabis as "Organic Chronic – grown with little to no pesticides!" They sell their product to P, an avid cannabis user. P strictly likes to purchase organic marijuana, and typically inspects her product after purchase. After trying some of D's flower, P notices something off about the taste. P decides to take her purchased cannabis to a third-party organization for analysis. Depending on what the analysis might yield, if the sample reveals high amounts of pesticide, it may amount to misrepresentation. And the only economically viable way to file that claim will be as a class action.

This could be an issue should cannabis products in the future be advertised as "organic." It should be noted that in the current state of legal markets, most states require cannabis dispensaries to disclose which pesticides or fungicides have been used on each cannabis product, which will be discussed later. Some states also have regulations preventing companies from using the "organic" label on their product. Thus, cannabis companies should be weary when claiming to have organically-grown product. Until federal regulation occurs, which would allow the USDA to potentially approve certification of cannabis products, claims that products are organic may be risky for growers. A potentially safer route may be to advertise that the company uses safe, proper

methods when growing their product – but not necessarily claim they are "organic." This would be ideal even if a grower uses organically-approved pesticides or practices.

2. Hypothetical 2 - Why is this getting me high?

P is a medical marijuana user who needs a combination of CBD and THC to mitigate her symptoms from PTSD. P goes to a medical marijuana dispensary seeking a CBD-dominant vaporizer "cartridge." The cartridge she purchases has a ratio of 2:1 CBD-THC. P consumes the cartridge once she arrives home. Soon, P starts to feel very relaxed and happy, as if she's floating. Surely, P is high from THC.

Though a pleasurable experience, P did not purchase this particular cartridge to become high. The ratio, 2:1 CBD-THC, is simply supposed to indicate that the product contains double the amount of CBD than THC. These cannabis products tend to provide significant therapeutic effects, while reducing the mind-altering, psychoactive effect. However, independent testing on the particular cartridge P purchased reveals little to no CBD at all, and only THC. In this situation, P potentially has grounds to bring suit against producer of the cartridge by misrepresenting their product incorrectly as having 2:1 CBD-THC.[149]

These types of claims would be unique, important consumer-fraud claims in the cannabis industry. Balancing CBD and THC ratios is crucial; companies wouldn't want to create products that are labeled as being CBD-dominant, but may have accidentally been made with the psychoactive, THC-rich parts of the plant. This will be problematic, especially if the product would be used for children. Children might benefit most from 2:1 or 1:0 CBD to THC products since they have little to no mind-altering effects and the most therapeutic effects. Thus, a company claiming these measurements must make sure they are accurate statements.

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[149] There is significant overlap in tort claims. Here, there may also be a product liability claim, as discussed in the previous section. But, if the user worries that showing the "high" caused physical harm will be too difficult, the consumer fraud route would 1) avoid the need for physical injury, and 2) allow the consumer to aggregate claims with other purchasers.

To prevent such a situation, cannabis processors must examine their manufacturing process closely. If trying to make a 1:0 CBD to THC product, for example, they need to be careful when using machinery that has recently processed cannabis containing THC. Failure to clean machinery in between uses might mean traces of THC end up in a final product meant to contain only CBD.

3. Hypothetical 3 - Why isn't this getting me high?

The same exact situation in Hypothetical 2 could occur for individuals seeking out products for more recreational purposes rather than medicinal effect. For example, P is an experienced recreational user of cannabis concentrates. He purchases a concentrate from D, an entity that is licensed to both dispense and produce marijuana concentrates. D's packaging indicates that the concentrate contains a high amount of THC and low level of CBD - which is exactly what P was seeking. After P purchases concentrate and arrives home, he takes a big "dab" of the product. Minutes go by, and P does not feel any effect. He decides to take another dab, and another, making sure he's properly inhaling. Yet to no avail; P, an experienced user, is not getting any effect from his cannabis. Perhaps P's personal tolerance for cannabis has been increased, however, to be sure he decides to take the concentrate to a third-party for analysis. Results indicate that the concentrate actually came from a CBD-dominant strain and contained very little THC. Further investigation finds that an employee of the processor may have unintentionally used the wrong strain for processing. Though intending to use "Blue Dream," a high-THC strain, the employee mistakenly placed "Charlotte's Web," a high-CBD strain, into their closed-loop machines before the extraction process. Ultimately, the final product was CBD-dominant instead of THC-dominant as advertised. In this scenario, a potential misrepresentation argument could be made, similar to Hypothetical 2.

As mentioned above, cannabis processors must examine their manufacturing process closely. Just as makers of supplements and food products must take steps to randomly inspect and test products, the cannabis industry also must regularly test its

products. And it must deploy the best technology available to ensure consistent doses. In fact, states with commercial cannabis have enacted regulations requiring testing to be done on batches of products. They also allow for variances in total CBD and THC contents. In Colorado, for example, "a potency variance of no more than plus or minus 15% is allowed."[150] And as long as a company can prove they are adhering to state standards related to testing and variances, a claim against their product may be weakened.

The cannabis industry should also carefully consider whether warnings or disclaimers would be wise. For example, if the industry warned that given the current state of the art, there will be some variance in the total CBD and THC content in products, it may partially shield itself from dangers it cannot design out due to existing technology and knowledge.

4. Hypothetical 4 - The Cannabis Cure-All

Products that contain less THC and/or CBD than promised in a medical application could conceivably give rise to a consumer fraud claim. For example, similar to hypothetical 2, imagine a military veteran uses medical marijuana control spasms in his legs, which were partially paralyzed in combat. Some literature suggests that the combination of THC and CBD produces medicinal effects to combat PTSD and spasms.[151] If, due to spider mites, lack of quality control, or fraud, the product did not contain as much THC and/or CBD as promised, and the veteran began to experience painful spasms as a result, a claim would lie. It should be noted that here, a products liability claim might also work, because the physical injury requirement would be met. At that point, everyone in the distribution chain would be potentially liable for the physical injury as well as the related damages. For example, the veteran might miss work or even lose his job as a result of the debilitating spasms.

The tobacco industry can be examined for these types of

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[150] 1 COLO. CODE REGS. 212-2 § R712(F)(5) (2015). "Potency Variance. A potency variance of no more than plus or minus 15% is allowed."

[151] Ab Hanna, *How Does Cannabis Help PTSD Patients?*, HIGH TIMES (Nov. 23, 2017), https://hightimes.com/health/cannabis-help-ptsd-patients/.

situations. Big tobacco was notorious for once advertising false health benefits of tobacco.[152] When the claims were proven otherwise, the industry was met with lawsuits and strict regulation, such as the incorporation of surgeon general warnings on all tobacco packaging.[153] The distinguishing factor between cannabis and tobacco, however, is that cannabis indeed does have vast medical benefits.

In late 2017, the Food and Drug Administration ("FDA") issued warning letters to numerous CBD companies over some of their medical claims targeting specific ailments.[154] This poses a significant issue to these companies, since the warning letters could be potentially used by a plaintiff to demonstrate that a company made claims that their product is intended to cure or treat a specific ailment, when it did not. If a CBD product advertises or claims that it is intended to treat cancer, for example, and a cancer patient using the product does not attain relief, that exposes the company to a misrepresentation claim. And plaintiff could, in turn, present to the jury the warning statement sent to company by the FDA.

Thus, this Article puts forth that companies should be extremely cautious in the advertising and marketing of their product as to not attract the attention of the FDA, at least until the agency approves or acknowledges some medical benefit of cannabis.

Even vague references, such as that marijuana *may* treat cancer, will be viewed as a medical claim in the lens of the FDA.[155] Any product which suggests it might have a role in treating or diagnosing disease, or that it is intended to affect the structure or any function of the body of humans or animals, is considered a drug to the FDA and thus subject to federal regulation.[156] Thus, a company should be very cautious before advertising and claiming their

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[152] Stuart Elliot, *When Doctors and Even Santa Endorsed Tobacco*, THE NEW YORK TIMES (Oct. 6, 2008), http://www.nytimes.com/2008/10/07/business/media/07adco.html.

[153] *Id.*

[154] *Id.*

[155] *FDA warns companies marketing unproven products, derived from marijuana, that claim to treat or cure cancer*, FOOD AND DRUG ADMINISTRATION (Nov. 1, 2017), https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm583295.htm.

[156] 21 U.S.C. § 321(g)(1).

products have medical benefits, especially for specific ailments, as to not attract attention from the FDA (and eventually, misrepresented plaintiffs).

But despite the wonders of cannabis, companies still need to be careful when making medical claims, especially claims that cannabis could cure specific ailments. Until the federal government acknowledges the potential medical benefits of cannabis, these products could be met with federal intervention and - of course - potential misrepresentation claims down the line.[157]

A simple solution here will be the use of disclaimers. Cannabis companies should disclaim as much as they can before final sale. Processors, for example, can include disclaimers on their packaging stating that the product is not federally approved. They can mention that both the FDA and the Drug Enforcement Administration ("DEA") have concluded there is no medical benefit to the product. If they choose to, they can also disclaim that the product does not cure any specific ailment or disease. That would insulate the processor from a claim that the product did not cure a specific disease when it was advertised as doing so. More preventative solutions such as these will be discussed in Section VI.

V. PERSONAL INJURY CLAIMS

Personal injury claims account for roughly 25% of cases in federal courts and likely more in state courts.[158] And many of those lawsuits involve alcohol or drugs. As the legalization of marijuana spreads, it is inevitable that more people will drive while high. And when this results in an accident, there will be very real exposure for the marijuana industry.

To the uninitiated, car accidents might bring to mind small, quick settlements for a few thousand dollars. But beyond the "In a

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[157] Mona Zhang, *FDA Targets Country's Largest Cannabidiol Producer in Warning Over Cancer Claims*, FORBES (Nov. 1, 2017, 10:38PM), https://www.forbes.com/sites/monazhang/2017/11/01/the-fda-targets-countrys-largest-cbd-producer-in-warning-over-cancer-claims/#26116f323fb7.

[158] Administrative Off. of the U.S. Courts, Annual Report of the Director: U.S. District Courts - Judicial Business (2015).

wreck, get a check" type claims, automobile and trucking accident claims can be massive. For example, if a truck driver causes an accident while driving too fast on icy roads, the sheer size and weight of the rig makes death and serious injury likely. It is not uncommon for such an accident to kill several passengers in a car and to permanently injure others. What is the value of such a claim? Or to put it from a defendant's perspective, what is the exposure? In the most serious cases, it could approach $100 million for a single accident. For example, one of the authors of this Article recently worked on a case that involved the death of an adult child, the permanent injury of the child's sister, and physical and emotional damage to the mother. The permanently disabled sister was paralyzed and had severe brain trauma. Her life care plan - which is just her expected future medical costs - was $38 million. Her pain and suffering could, with some juries, exceed that amount. And one cannot begin to value the mother's claim for the loss of her son. The adult child's lost wage claim alone was valued at $2 million. The several months he spent in the hospital before his death, all in quite a bit of pain from burns, was worth many millions more.

These numbers are admittedly extreme, but they are possible. And auto accidents that give rise to multi-million-dollar claims are common. Similar claims arise when people are harmed on the job in industrial settings or doing construction.

If marijuana is implicated in any of these settings as "contributing to the cause" of the accident, the liability could flow to not only the user, but the seller and maybe the manufacturer. This could expose that seller and/or manufacturer to ruinous damages if they are not properly insured.

A. Cannabis and Accident Claims

Let's carry the trucking accident example into a marijuana-based claim. Assume that the trucker who crossed the midline and ran head-on into a car was tested by the police after the accident. Let's also assume he tests very high for THC.[159] The driver and his

[159] Though the presence of THC is simple to detect in one's body, it's tricky to determine whether an individual would be high at a present moment, since

company are likely to be held liable. But it may not end there.

In the context of alcohol, most states recognize claims against bars or liquor stores who serve customers that are visibly too drunk, or underage, who then cause injury to third party.[160] Called "dram shop" laws, these statutes hold liquor stores and bars liable for injuries caused to third-parties by patrons those establishments served.[161] This is based on the idea that the entity which profited from the sale of alcohol should be held liable, at least partially, for damages.[162] Selling to a clearly-intoxicated customer is considered negligent under these statutes.[163] It should be noted that the intoxicated person cannot sue the seller if she becomes injured.[164]

By extension, dispensaries who sell to visibly high people are almost certainly vulnerable to similar claims. Similarly, if laws evolve to allow "pot bars" where people go to get high, those establishments will almost certainly be liable just as bars are.

This is not to say these claims would be easy. Proving causation is always challenging, and with marijuana, it may prove even more difficult for plaintiffs. THC remains in the tissue even after a person's "high" has dissipated, so showing that the sale of marijuana "caused or contributed to cause" the accident won't always be possible.

Putting aside causation, which will be at issue but is often established through experts, the marijuana industry may face additional risk beyond dram shop claims. So long as marijuana remains federally illegal, a third party may argue that anyone who sells marijuana, even to someone who was not high, is liable. They'd argue that it would be no different than if a gas station sold someone methamphetamines and the person got in an accident while under the drug's effects. Returning to the trucking accident example, a third party injured by a high truck driver might sue the

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traces of THC can remain in the body up to 30 days. But a number of state agencies are undergoing research and testing products that may be able to detect recent impairment.

[160] 45 AM. JUR. 2D *Intoxicating Liquors* § 448 (2018).

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.*

dispensary and even the manufacturer of the marijuana (as well as anyone in between). The argument that it constitutes "negligence per se" to sell illegal drugs might allow the plaintiff to establish liability against those defendants.

A unique, unorthodox argument to establish this would be to invoke the Controlled Substances Act ("CSA"). Perhaps plaintiff would argue company was being negligent per se, by selling a product that is federally illegal. Restatement (Third) of Torts § 14: Liability for Physical and Emotional Harm explains negligence per se as an "actor [being] negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect."

In other words, one could be construed as acting negligent per by violating a statute intended to protect a certain class of people from specific types of harms or injuries. The victim must be part of the protected class designated by the statute, and the violator's actions must cause the injury statute is designed to protect. And of course, there exists the CSA, which would preempt state regulations permitting the use and sale of cannabis.

On its face, this seems plausible. Marijuana laws are certainly meant to protect the public from the alleged dangers of use, and those would seem to include driving under the influence.[165] If a court took this approach, concluding that the sale

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[165] A few cases have referenced the CSA as a potential source for the right to sue as a third party. They have not succeeded. One such case is discussed here for completeness. However, it should be noted that relying on federal law to establish something as per se negligence would be different than seeking to file an action under that law, as it if creates a private right of action.

In *Safe Streets Alliance v. Hickenlooper*, ranch-owners in Pueblo County, Colorado, claimed to be aggrieved when defendants a licensed grow facility on neighboring property. Plaintiff also brought an "equity" action against Colorado and Pueblo County stating that the CSA entirely preempts Amendment 64. The action also requested statewide injunctive relief blocking enforcement of Amendment 64.

Plaintiff claimed to be able to enforce CSA's preemptive effects ''in equity'' so long as "they have been injured—in any way—by official conduct that also violates a federal statute." Further, plaintiffs argued that "free-floating causes of action in equity exist unless 'Congress has restricted the courts' pre-existing equitable authority to enjoin violations of federal law."

of marijuana was per se negligence, all that would remain is proving that the marijuana in the trucker's system came from the dispensary and manufacturer. Although this may sound difficult at first blush, it often isn't. If the truck driver testifies as to where he purchased the marijuana he used, the source is identified. This is certainly easier than tracking sources of asbestos, when the exposure occurred decades earlier, and attorneys do that all the time.

Because the accident victim did not buy marijuana or consume it, there is no argument for comparative fault or assumption of the risk (or any other doctrine to blame the injured party). As a result, the illegality of marijuana would become a sword for the plaintiff, not a shield.

If a cannabis company is ever implicated in such a suit, it would be best to counter the plaintiff's argument and attempt to demonstrate that the CSA was not intended to protect the plaintiff's class, nor that it creates a federally substantive private right to invoke such a claim. At the time of this writing, there is 10th Circuit precedent for this argument.[166]

If this option does not prove successful, defendant must then prove to the jury that they did all they could to prevent such misuse of their product sold to the driver. For example, cannabis processors can include disclaimers onto their products stating that possession of the product is a federally illegal offense, and that it is a mind-altering substance. Dispensaries could provide adequate warning statements to consumers about the dangers of misusing the product. They can also incorporate signage throughout their

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However, the Court disagreed. The Court held that for one to be able enforce the CSA "in equity," the Act must "create new federal substantive rights or incorporates by reference a private citizen's existing substantive rights, elevating them for federal protection." Here, plaintiffs failed to prove that the CSA met this threshold inquiry to claim that the CSA preempts state regulations." Further, plaintiffs did not "assert that the CSA refers to a private citizen's real property rights, let alone protects those rights."

It should be noted, *Safe Streets* was not a negligence per se claim against a company, rather, an agency and state. Yet, for one to bring an equity claim against a company, they still would have to meet the threshold utilized in the *Safe Streets* decision. Plaintiff must prove the CSA created a new federally substantive private right to invoke such a claim.

[166] *Id.*

dispensary, especially on entrances and exits, to not consume marijuana while driving. Companies can also make safe, responsible use a focus of their mission or objectives, and in turn, encourage consumers to also consume cannabis properly. These solutions, and many more, will be discussed in Section VI of the paper.

VI. CANNABIS INDUSTRY PRACTICES AND DEFENSES

This Article puts forth that, while potentially ruinous tort claims will face the industry, there are solutions that commercial cannabis companies can take. Such actions will ultimately reduce the chance claims will be brought against the entity for defects, misrepresentation, or injury. Or, if claims are brought, these actions will at least insulate entities from liability if they can prove they acted in such a manner, and without negligence. Many of these preventative actions have been discussed throughout the Article. The following section will include a breakdown of those examples, and more, throughout the entire chain of commercial cannabis.

A. Specific Company Practices by Entity-Type

Growers should properly inspect what kind of chemicals are inside the fertilizers, pesticides, and insecticides they intend to apply. They should also be cognizant of when they are spraying their plants. Application too close to harvest might potentially leave residual amounts of pesticide on product. Taking the flower to a testing organization might be a good final action to ensure the harvest is safe for use. Though costly, a company could use representative samples from harvests to find out what exactly is in their cannabis and ensure the final harvest would be safe for further distribution. Testing also provides other advantages, such as CBD and THC amounts. These practices will help a cannabis grower prove to a jury that they did all they could to prevent tainted product from reaching the marketplace. Last, growers should be hesitant when claiming their products might be "organic." Until federal regulation occurs, which would allow the USDA to potentially approve certification of cannabis products,

claims that products are organic may be risky for growers.

On the processor level, cannabis processors should ensure the flowers they use meet safety thresholds established by the state. They should also take special precaution to make sure they are using the right strains for processing - whether THC or CBD-dominant. Cleaning machinery in between uses might also be beneficial - especially if a processor uses the same machine to manufacture hemp and marijuana, for example. Hemp products that are supposed to contain CBD might attain undesirable traces of THC within the final product if the machine is not cleaned properly between uses. The company should also examine their extraction process, particularly the purging phase, to ensure the concentrate is effectively getting rid of residual chemicals that may be harmful to consumers. Finally, when packaging their final products, processors should use accurate, detailed labels that indicate the amount of THC or CBD content within the edible or concentrate. Child-resistant packaging would be beneficial to utilize, along with warning statements that clearly let the user know that the product contains THC. Processors can also consider warning statements on their packages, such as "this product has a psychoactive effect" and "do not use while operating machinery." Processors should also disclaim as much as they can onto their products. At the very least, it would be beneficial for them to state that the product is not federally approved, the FDA and DEA does not recognize any medical benefit, and that possession of the product is a federal crime.

At the retail level, dispensaries can have the discretion to choose to sell products they deem safe, responsible, and proper so as to not get entangled in a potential suit facing a grower or processor of a product. More importantly, the dispensary should implement standard operating procedures that ensure safe practices. For example, the procedure could mandate that budtenders remind customers how to use the specific cannabis product purchased during every transaction, whether it's an edible, raw flower, or a concentrate. They can also ask the consumer if they know how to properly use the product. If ever faced with a claim, the dispensary can present their written, standard operating procedure to the jury. This in turn can be used to demonstrate that the dispensary and its budtenders gave

adequate warning statements to consumers before finalizing purchases.

A preventative measure that all forms of cannabis companies can take would be compliance audits. To explain, cannabis companies could consider being periodically audited by legal counsel to ensure compliance with all state regulations. In fact, cannabis entities shouldn't just adhere to, but exceed state standards (and, if ever, federal standards) set forth in regulations for commercial marijuana. If ever faced with a lawsuit claiming their product failed to adequately warn, for example, a company might be safe if they can prove to a jury there was adherence to all packaging and labeling requirements of the state and that even more warning statements were added to their product.

Last, all forms of cannabis entities can work together to create preventative solutions. For example, processors can contractually require dispensaries to warn or instruct consumers about their products before purchase. Or, they can include requirements that each party carry insurance to prevent claims. The contract can also dictate procedures in the event of a lawsuit, such as indemnification.

These are examples of actions down the line which entities could undertake to prevent potential defects, misrepresentation claims, or injury to third parties. Effectively, these practices provide insulation should these entities receive actual claims.

1. Arbitration

It is also possible that the marijuana industry will begin using arbitration clauses. Arbitration clauses are often used to prohibit class actions. In 2011, the United States Supreme Court concluded that arbitration clauses, even if they prohibited class actions and might reduce the likelihood that a party will be able to pursue their individual claim, are generally enforceable pursuant to the Federal Arbitration Act.[167] Although scholars, including an author of this Article, question whether the precedent is sound, the

[167] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1743 (2011).

precedent has proved durable.[168] Indeed, the Court cemented the decision in *Italian Colors*, concluding that even when there is evidence that enforcing an arbitration clause will deprive parties of any meaningful path to resolving their claims, the policy in favor of enforcing arbitration clauses trumps.[169] The result is that a growing number of businesses are turning to arbitration clauses, complete with class action waivers, to insulate themselves from a variety of consumer claims. It is likely that as the marijuana industry grows and becomes more sophisticated, it will consider arbitration clauses, both at the consumer level and in the business-to-business contracts.

2. Insurance

An obvious form of insulation to all claims discussed would be for cannabis companies to purchase insurance that would cover potential business losses and settlements. In 2016, the Colorado Federal District Court effectively allowed for contracts related to cannabis transactions, including insurance contacts, to be enforceable.[170] In *Green Earth Wellness Center, LLC v. Atain Specialty Insurance Compan*y, a cannabis company operating a dispensary and medical grow was denied an insurance claim by their provider, who argued that policy excluded coverage for "[c]ontraband, or property in the course of illegal transportation or trade."[171] The insurance company further alleged that "public policy requires that coverage be denied, even if the [insurance] policy would otherwise provide it."[172]

Defendant submitted several cases in which courts have tried to reconcile federal and state law for marijuana. Defendant focused on *Tracy v. USAA Cas. Ins. Co.*,[173] which similarly involved the question of whether an insurer is liable for breach for

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[168] John Campbell, *Mis-Concepcion: Why Cognitive Science Proves the Emperors Have No Robes*, 79 BROOK. L. REV. 107, 128 (2013).

[169] Am. Exp. Co. v. Italian Colors Rest., 570 U.S. 228, 238, 133 S. Ct. 2304, 2312, 186 L. Ed. 2d 417 (2013).

[170] *Green Earth*, 163 F. Supp. 3d at 821.

[171] *Id.* at 832.

[172] *Id.*

[173] Tracy v. USAA Cas. Ins. Co., 2012 WL 928186 (D. Hi. Mar. 16, 2012).

failing to pay an insurance claim for loss or damage to cannabis plants.[174] In that case, the Court concluded that the CSA actually did prevail over state law, and that enforcing the terms of the insurance Policy "would be contrary to federal law and public policy."[175] Defendant also invoked CSA to argue that the insurance policy was an illegal contract.[176]

But the Court responded that, since defendant entered into the policy of "its own will, knowingly and intelligently," it is obligated to comply with its terms or pay damages for having breached it.[177] The Court began their reasoning stating that this type of contract dispute "will be governed by the law of the state in which the suit is brought."[178] Accordingly, the Court could disregard defendant's argument about property's illegality under federal law and apply Colorado state law. And defendant failed to prove plaintiff violated Colorado's marijuana laws.[179] As a result of this case, federal law and public policy ultimately does not make it illegal for insurance companies to pay for damages or settlements related to cannabis products. And cannabis entities can surely utilize this measure to provide for insulation.

B. Adherence to Regulations

One benefit of state legalization is that states can grant authority to existing or new agencies to regulate cannabis. These state agencies can impose their own regulations for products and ensure that safe practices are adopted throughout the intrastate industry so long as companies comply. A rule requiring that all cannabis products have child-resistant packaging, for example, will help reduce the possibility of products reaching into the hands of children. Or, states can direct agencies to publish lists of approved pesticides or fungicides that growers must follow, which would prevent tainted product from reaching consumers. Further, agencies can require dispensaries to place informative warning

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[174] *Id.* at 835.
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.* at 827.
[179] *Id.* at 831.

signs on doors for consumers to see before exiting, which may help reduce injuries from potential accidents. In a legal sense, these regulations provide insulation to cannabis entities in potential lawsuits if they can prove compliance. This fact is relevant in *Kirk v. Nutritional Elements, Inc., and Gaia's Garden* - though the labelling of the product may have been small, both companies were adhering to state regulations at that time, thus it will be harder to prove negligence.[180] And companies can further insulate themselves if they can prove to a jury that they went beyond adherence just to state laws.

If federal regulation of cannabis ever occurs, and a national agency is delegated authority to regulate cannabis products, it could be helpful to look to state rules and adopt them into a national, uniform standard. The section below will examine examples of effective rules from states like Washington, Oregon, Colorado, and California.

In Washington, the Liquor and Cannabis Board ("WSLCB") provides for quality assurance testing requirements in regard to raw flower. WSLCB regulations, at the time of this writing, states that "certified labs must test and report…to the WSLCB" cannabinoid content levels of samples. These tests will provide content of THC, CBD, and help detect potency levels.[181]

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[180] *Supra* note 125

[181] W.A.C § 314-55-102: Quality Assurance Testing 1(A) (a) Potency analysis.

(i) Certified labs must test and report the following cannabinoids to the WSLCB when testing for potency:

(A) THCA;

(B) THC;

(C) Total THC;

(D) CBDA;

(E) CBD; and

(F) Total CBD.

(ii) Calculating total THC and total CBD:

(A) Total THC must be calculated as follows, where M is the mass or mass fraction of delta-9 THC or delta-9 THCA: M total delta-9 THC = M delta-9 THC + (0.877 x M delta-9 THCA).

(B) Total CBD must be calculated as follows, where M is the mass or mass fraction of CBD and CBDA: M total CBD = M CBD + (0.877 x M CBDA).

(iii) Regardless of analytical equipment or methodology, certified labs must accurately measure and report the acidic (THCA and CBDA) and neutral (THC and CBD) forms of the cannabinoids.

The rule also establishes thresholds for the allowable trace amounts of residual solvents and heavy metals. It further incorporates a "moisture analysis" alongside a "foreign matter test," which could detect for things like mold growing within the flower.

In Oregon, the Oregon Liquor Control Commission ("OLCC"), at the time of this writing, provides for guidelines cannabis companies can take if samples fail testing.[182] If thresholds aren't met, cannabis must be destroyed as per the guideline.[183] The rule also allows for failed samples to be used for further processing in extraction, only if the process can prove to effectively get rid of the inappropriate residual solvents.[184] Should cannabis companies in Oregon follow this rule, there should be no reason for one to bring a suit against them for "dirty oil," for example.

In Colorado, at the time of this writing, the Marijuana Enforcement Division requires an informative - label to be affixed to every package of cannabis concentrates.[185] The label includes a complete list of all "nonorganic pesticides, fungicides, and herbicides used during the cultivation of the Retail Marijuana used to produce the Retail Marijuana Concentrate," along with a list of

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[182] O.A.R § 333-007-0450: Failed Test Samples.

"(2) If a sample fails a test or a reanalysis under section (1) of this rule the batch:

(a) May be remediated or sterilized in accordance with this rule; or

(b) If it is not or cannot be remediated or sterilized under this rule, must be destroyed in a manner specified by the Authority or the Commission."

[183] *Id.*

[184] *Id.* at (4) Failed microbiological contaminant testing.

"(a) If a sample from a batch of usable marijuana fails microbiological contaminant testing the batch may be used to make a cannabinoid concentrate or extract if the processing method effectively sterilizes the batch, such as a method using a hydrocarbon-based solvent or a CO2 closed loop system."

[185] C.C.R § 212-2: R 1004 – Packaging and Labeling Requirements of a Retail Marijuana Product by a Retail Marijuana Products Manufacturing Facility.

"k. A complete list of all nonorganic pesticides, fungicides, and herbicides used during the cultivation of the Retail Marijuana used to produce the Retail Marijuana Product."

"l. A complete list of solvents and chemicals used in the creation of any Retail Marijuana concentrate that was used to produce the Retail Marijuana Product."

solvents and chemicals used during the extraction process.[186] The rule also mandates a "Required Potency Statement," which labels the potency of THC and CBD levels in milligrams.[187]

Lastly, California has adopted significant regulations with regards to packaging and labeling. State law mandates that companies use a very broad warning statement on its packaging:

> "GOVERNMENT WARNING: THIS PACKAGE CONTAINS CANNABIS, A SCHEDULE I CONTROLLED SUBSTANCE. KEEP OUT OF REACH OF CHILDREN AND ANIMALS. CANNABIS MAY ONLY BE POSSESSED OR CONSUMED BY PERSONS 21 YEARS OF AGE OR OLDER UNLESS THE PERSON IS A QUALIFIED PATIENT. CANNABIS USE WHILE PREGNANT OR BREASTFEEDING MAY BE HARMFUL. CONSUMPTION OF CANNABIS IMPAIRS YOUR ABILITY TO DRIVE AND OPERATE MACHINERY. PLEASE USE EXTREME CAUTION."[188]

These codes, along with previous examples mentioned in the Article, are just a sample of sensible regulations that could be adopted into federal standards. And again, adherence to these regulations by cannabis companies provides significant insulation in potential lawsuits if the entity can prove compliance.

It should be concluded, however, that much of the weight on these laws rests on the shoulders of the state as well. Should the

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[186] *Id.*

[187] *Id.* at 4. Required Potency Statement.

"a. Every Retail Marijuana Products Manufacturing Facility must ensure that a label is affixed to the Container that includes the number of THC servings within the Container, and at least the Retail Marijuana Product's THC and CBD content."

"b. Nothing in this rule permits a Retail Marijuana Establishment to transfer, wholesale, or sell Retail Marijuana Product that has failed potency testing and has not subsequently passed the additional potency testing required by rule R 1507(C)."

[188] Cal. Bus. Prof. Code Chapter 12 § 26120 (c)(1).

agency regulating marijuana not be enforcing their regulations properly, there is no reason why a grower intending to slip past laws might use a non-approved pesticide, for example, and allow tainted product to hit the marketplace. Thus, a great portion of the onus is on the state agency (and, if ever, a federal agency), who needs to take consumer safety seriously when regulating and actually enforcing commercial cannabis.

C. Responsible Use Campaigns

Lastly, this Article posits that, if the industry wants to be ready for such claims discussed herein, companies should perhaps adopt a focus on sensible and responsible use. This method has been adopted by companies in the tobacco and alcohol space. Some companies brand themselves entirely to focus on "responsible use" by way of marketing campaigns and branding techniques. By painting themselves as the brand that promoted "responsible use," companies make statements to their consumers about the potential effects of overusing or misusing their product.

The distinguishing factor between cannabis and those substances, however, is that cannabis indeed has vast medical benefits, and the high produced from cannabis is arguably less-intoxicating than that of alcohol. Yet, when it comes down to it, marijuana containing THC still has a mind-altering effect. And warning statements about proper, safe, responsible use are necessary. Thus, consumer safety might make for a relevant focus of a cannabis company's mission or objectives.

Dispensaries, for example, could make consumer safety a priority. As mentioned earlier, they can incorporate the use of brochures or information leaflets to be given to customers. They can also place signage throughout their store encouraging responsible use or have signs on their doors saying things like "DO NOT SMOKE AND DRIVE" for consumers to read before exiting the premises. They could also promote a culture of safe and responsible use by their employees. In employee manuals and training programs, for example, the company can highlight to budtenders that promoting responsible use is critical.

Undertaking these actions will help in potential lawsuits. If faced with a claim, a company can pull these brochures, signs, and

employee manuals and contracts to demonstrate that they encourage proper use amongst consumers, or at the very least, tried to prevent misuse. And if federal regulation occurs, and cannabis companies soon have access to broader advertising spectrums, perhaps a focus on responsible and safe use would be crucial for the cannabis industry to adopt.

By promoting responsible use, this Article puts forth that cannabis companies might be able to prevent situations down the line which may ultimately lead to costly lawsuits.

VII. CONCLUSION

The marijuana industry is in its infancy, and due to legal uncertainty, it has a large share of small players. It is both cobbled by, and in some ways insulated by, these features. One way it has received insulation to date is by avoiding, in large part, traditional tort claims brought by consumers. At present, consumers struggle to bring the claims. This is due in large part because (1) attorneys are not certain that marijuana-related defendants are solvent, (2) some consumers do not want to advertise their use of an illegal drug, and (3) even when the claims are filed, plaintiffs face an immediate defense that they contributed to their own harm or that their claims are barred entirely as the purchase of the product was illegal. So long as marijuana remains illegal at the federal level, this first-party claim insulation will remain, though it is likely to erode. This erosion will occur as courts become more familiar with the claims and as sympathetic plaintiffs, such as military veterans using marijuana to treat battle-related injuries, pursue claims. However, the industry will not experience similar insulation from third-party claims. Instead, the industry is ripe for claims by innocent people harmed by inadvertent consumption or by pedestrians or motorists hurt or killed by high drivers.

The combination of the less certain first-party claims (of which some will succeed) and third-party claims (of which many will eventually succeed) could be ruinous to actors in the industry if they don't take proper precautions. A single class action could cost actors tens of millions of dollars, as could a single injury claim. The industry is likely to mature and prepare for these claims - as it

is already beginning to do - by reducing its liability exposure, asking consumers to waive some of the claims in contract, insuring against the losses, and actively engaging in creating legislation that protects its interests.