MARIJUANA LAW:
PRODUCT LIABILITY CLAIMS

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PRODUCT LIABILITY

- The Defendant was (either) the grower, producer or retailer of the product
- The product was defective
- The defect existed when it left the Defendant's possession
- The product was used in a manner that was reasonably foreseeable



UNDERSTAND THE RISKS THAT AN MME FACES

- "All Marijuana Is Not Created Equal," Richard Fitzpatrick, Cannabis Standard Institute
- We cannot guarantee THC or Cannabinoid level for each individual product, or purity of strain
- Cannabis Pharmacy – disclaimer regarding reliance
- American Herbal Pharmacopeia – disclaimer regarding reliance
- Bankruptcy Protection Is Not Currently Available

Defect Types

- Design Defect: (7PL.4)
  - A product is defective in its design if, as a result of its design, the product is unreasonably dangerous.
    - Today's designer THC; edibles perhaps
- Manufacturing Defect: (7PL.5)
  - A product has a manufacturing defect if the product differs from the manufacturer's intended result or if the product differs from apparently identical products from the same manufacturer.
    - Contaminates such that can be found in any crop or food product

Defect Types Cont'd

- Warning Defective: (7PL.6)
  - A product, though faultlessly made, is defective for its failure to be accompanied by suitable and adequate warnings concerning its safe and proper use, if the absence of such warnings renders the product is unreasonably dangerous.
    - Failure to enumerate the risks of overdosing AND diversion
    - Cannabis Pharmacy excerpt (Pg. 13 in materials)

- Unreasonably Dangerous: (7PL.7)
  - A product is unreasonably dangerous if it failed to perform in the manner reasonably to be expected AND
  - was more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community.
    - Today's genetic engineering increases THC 100 fold
    - Clear extractions, edibles with a dose of THC per bite, or two doses per package or traditional serving – a cookie with four doses-products that could be seen as unreasonably dangerous

Warnings and Foreseeability Are The Battleground

Misuse of a Product: (7PL.8)

- Misuse of a product means a use which the **Defendant could not reasonably foresee**.
- The mere fact that the defendant may not intend the product to be used in a certain way does not mean the using of it in that manner is a misuse of the product.
- If the defendant should reasonably foresee that the product may be used in a way other intended by him, such other use is not a misuse.
  - Extractions and butane, surreptitious dosing, providing to people under 21.

Warranties and Dosing Information

- Word of mouth 'anecdotal evidence' does NOT get into a courtroom

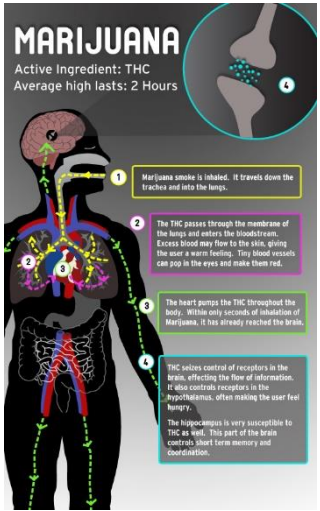
- If the seller warranted the product involved to have a certain quality or attribute regardless of the manner in which it is used, the warranty applies regardless of any improper use. J.I. 7Pl Cont.

- If you guarantee, or promise without a specific exception, that a certain brand or strain helps pain, you can be sued if Pl. can convince a P.I. attorney that it doesn't—even if the user does not follow dosing instructions

- Some of the most credible scientific info. says using too much makes pain worse-*Journal of Pain-5-2012;*

The first 'hard science' study of 'Charlotte's Web' is only just now underway

Children Are Foreseeable Users



- How far will the average 4 year-old go to get a forbidden cookie?
- Between 10-1-2009 and 12-31-11 588 children under the age of 12 were hospitalized in Denver, CO after marijuana ingestion, JAMMA Pediatrics, 7-2013
- How CO: 4 year old child was hospitalized, in a coma for two weeks after eating her mother's Cannabis cookie.
- Q: Is there an intervening act that dispensary/producer/grower can use as a defense?

CO CLASS ACTION

- Coombs V. Beyond Broadway, LLC, et al Class Action-Facts
- Marijuana became legal for anyone over the age of 21 in 2014
- County Fair had a 'Pot Pavilion' where vendors had booths
- Signs on display stating that there was no THC in any of the samples
- County regulations and state law make it illegal to serve marijuana in that setting
- Employees handed out free samples of chocolate bar with THC
- Each chocolate square had three recommended doses of marijuana

Claims

- Strict Liability-edibles are unreasonably dangerous
- Breach of warranty-implied warranty of merchantability/fitness for a particular use
  - Would not pass without exception in the trade (assumes food is the trade)
  - Not fit for the use and purpose for which it was designed (human consumption)
  - Advertising; medical recommendations
- Negligence per se-violation of regulations

CO Class Action, Cont.

- Failure to Label
  - 1 CCR 212-1, M11013 (d) (PP 11-12 of case in materials)
- Negligent Misrepresentation
- Negligence

Defenses:

Foreseeable Misuse

Intervening Criminal Act

Intervening tortious (negligent act)

CO Potential Class Action That Failed

- Defendant LivWell used pesticide Eagle 20 EW, which is legally used on grapes and tobacco, but is not one of the state-approved pesticides for Marijuana crops.
- State inspectors had quarantined a huge portion of crops earlier in the year when the violation was discovered, but later released them when testing demonstrated that the products were safe for consumption
- This is an example of a case where a violation of the regulations was already proven, but . . .
- Plaintiffs failed to demonstrate damage
- October, 2015

Kirk v. Gaia's Garden/Nutritional Elements, Inc.

Husband consumed only part of a tootsie-roll sized piece of candy

Label said that serving size was 10 mgs, but this small piece of candy had 10 servings; 100mgs

Husband became irrational, paranoid and threatening

Wife called the police and as she was reporting the circumstances, husband shot and killed her in front of their three children

In this case, the Defendants were in compliance with the regulations as they were at the time

The Basis of Most Drug Claims Is Deception

Both CO cases center around product labelling and warnings

Inadequate warnings alleged and warnings far inferior to warnings on other consumables

The research on cannabis remains weak with regard to serving size because the government controls grants

Edibles have a significant delay time before effects are felt

Inexperienced users do not understand servings and tolerance

Companies are catering to those with high tolerance, making overdose very foreseeable

‘Forseeability’ Is Largely Based on Honesty and Employee Training

- Parke-Davis (manufacturer of Neurontin) argued that doctors writing prescriptions and pharmacy filling them were an intervening force-Ct. found that this was only a defense if those acts were unforeseeable
- Coombs- Were employees permitted to use cannabis on the job, make recommendations based on personal experience, was the manager present
- CO Mom-was she given literature, offered a safe, warned about the serious dangers of cannabis in the hands of children, warned about serving size, etc.

The Relationship Between the Supplier and the Prescriber

The supplier and manufacturer of medications have an obligation to study and understand the consequences of their product-In Re DES (a medication prescribed, but not marketed, to prevent miscarriages)

In re Bone Screw Litigation: "The learned intermediary defense" – the supplier of medication can use this as a defense-the doctor understood and recommended Cannabis

Doctors will say that they relied on your advertising/promotion BUT will courts apply this to MME when patient can choose any strain?

Lesson-businesses and consumers turn against each other in litigation

In Re: Cholormycetin

The doctors argued that over-whelming promotion of off label uses over-rode the warnings that over-prescribing had serious health consequences; the Court determined that the issue of whether or not over-promoting a use that will lead the doctor to disregard the warnings was an issue to be determined by the jury, leaving this as a potential defense

Chicago vs. Purdue, et al-#4

- In Re: OxyContin
- Marketed as rarely addictive
- Claimed benefits that lacked scientific support
- Alleged that the drug companies misled doctors (trying to avoid the learned intermediary defense)
- 1999-2010 prescriptions for opioids quadrupled
- ER visits for opioid overdose increased by 65% from 1999-2010

In Re: Ortho. Bone Screw Litigation
Product Liability

- 1. Plaintiffs alleged a conspiracy to market bone screw manufacturers to market the product for uses not approved by the FDA
  - -violation of FDA is not a separate cause of action
  - -violation of FDA is a breach of the negligence standard for 'duty' (states law is split on that determination BUT unanimous that compliance with regulations is NOT a defense
  - Plaintiffs had to prove causation and damages to establish a tort

- 2. Fraudulent Misrepresentation-Balance Warnings of Promotion
  - -representation material to the purchase/prescription
  - Made falsely with knowledge or recklessness as to truth or falsity
  - Intent to mislead another into reliance
  - Justifiable reliance
  - Causation of an injury

Promotion and Public Health Are Often In Conflict With Consumable Products-Especially Medicine Solutions:

- Detailed package inserts
- Warnings outside of packages
- Literature for sale in your dispensary
- Detailed In-take forms for those with valid medical issues
- Relationships with physicians interested in the evolving body of knowledge surrounding Cannabis

Train Your Employees To Rely on Credible Literature and Encourage Patients To Do The Same

- In 2013, 2,000 studies were completed regarding the effects of cannabis-only 6% researched the positive effects
- Seek out medical professionals who have access to peer-reviewed studies
- Dr. Brian Lawenda – Nevada
- Rebecca Zlomke, R.N. – Texas
- Use an MME employee training company-Regulated Employee Resources-Nevada

Employee Training, Cont.

- At least one employee whose job is to stay current on reliable literature and assist those with conditions other than pain
- Employees should maturely inquire about the customers' goals (and document it!)
- If employees do not need Cannabis as medicine, don't let them work under the influence
- Your insurance may not cover injuries to employees who test positive

Help Your Clients Understand That Their Customers Are Potential Plaintiffs

Is ‘Stoned’ a Side Effect? Cannabis Pharmacy

Yes, for our purposes, YES!

Plaintiff attorneys see one injury and look for a class

Coombs, resort lawsuits re: phone charges, Big Tobacco, etc.

Customers see a large profit and they are more likely to sue-don’t draw attention to your profits
“Why do so many people stop short in front of trash trucks?” Martina L. Jaccarino, 2000.

Document, Document, Document

1. Create a patient profile and color-code for conditions other than pain-forms created by a knowledgeable doctor/attorney team
2. Checklists created by an attorney have the customer acknowledge all you are doing RIGHT:
    a. info. re: drug safe offered
    b. literature offered
    c. general warnings for an intoxicating substance given (sample opioid agreements included in materials)
3. Package insert-created by a knowledgeable attorney/medical professional team (sample insert from an antibiotic in materials)