The marijuana minefield
The US legal marijuana marketplace today is growing like weeds. Sorry for the analogy, but in 2017, it was USD 8.5bn, and by 2022, it is projected at USD 23.4bn.¹

To be clear, there are an estimated 25,000 cannabis-related businesses that want (and in some jurisdictions are even required by law) to have insurance. But since marijuana is still illegal on a federal level, insurers have been reluctant to tap into this burgeoning market. Could they already unknowingly be providing coverage? Either way, currently used policy exclusions may not be sufficient to protect them.

Lay of the land
As of December 2018, marijuana is:
- Legal for medical use in 23 states;
- Legal for medical and recreational use in 10 states;
- And, legal for medical and recreational use in all of Canada.

Omnipresent though it may be, marijuana is still classified as a Schedule I drug under the US’ Controlled Substances Act. As a result, in the US, entities that engage in business with cannabis companies are subject to criminal and civil penalties, including fines, asset seizure and imprisonment, under federal money laundering, drug trafficking, and racketeering statutes. These legal, regulatory, and financial risks have led most carriers not to offer coverage to the industry.

To date, most of the carriers that do write policies have been non-admitted. But in 2017, the California Insurance Commissioner began actively encouraging admitted insurers to file rates and forms for the cannabis industry, noting the federal government had not seized any premiums for cannabis businesses in states with legal cannabis laws. Golden Bear became the first admitted insurer to offer coverage in November 2017. And several more carriers have since entered the market, providing lessor’s risk and product-liability coverage and surety bonds.

Potential exposures
Legal issues are not the only thing holding many insurers back from coverage. Numerous property and casualty exposures emerge from marijuana. Among the most significant:

1. Fire/theft/damage to marijuana plants. Grow operations use a tremendous amount of water and electricity, so fire, electrical blowouts and mold damage are risks. They also utilize hazardous materials, like flammable solvents, fumigation chemicals and pesticides, which pose dangers to workers. Greenhouses can occupy more than 1 million square feet, and contain hundreds of millions of dollars of marijuana, so the losses can be substantial.

2. Immediate bodily injuries. Consuming too much marijuana, due to mislabeling or inadequate warnings about proper dosage, can lead to severe nausea or vomiting, increased blood pressure and rapid heartbeat. The number of ER visits related to overconsumption have increased significantly since legalization.² Overdoses can also cause hallucinations and paranoia. In 2017 a Colorado man was sentenced to 30 years in prison for killing his wife during a psychotic episode allegedly caused by consuming a marijuana edible.³

3. Long-term health effects. The average amount of THC, which is the psycho-active component of marijuana, has increased to more than 12% today from 4% in 1995. The long-term effects of the increased potency, and whether new methods of consumption, like edibles and vaping, might deleteriously impact users, have not yet been fully studied.

4. Auto accidents. A study by the Insurance Institute for Highway Safety found that collision claims increased in four states after they legalized recreational marijuana (Colorado, Washington, Nevada and Oregon).⁴ Marijuana is the most prevalent drug (illegal or legal) found among fatally injured drivers.

²https://www.reuters.com/article/us-health-marijuana-kids/marijuana-related-er-visits-by-colorado-teens-on-the-rise-idUSKBN1HO38A
Insurers who don’t wish to cover marijuana exposures may believe that various policy exclusions, like contraband or illegal acts exclusions, are sufficient to preclude coverage. However, two recent cases show this reliance may not be justified.

In Green Earth Wellness Center v. Atain Specialty Insurance, 163 F. Supp. 3d 821 (D. Col. 2016), the insured, who operated a retail medical marijuana facility and grow operation, sought coverage for marijuana plants that were damaged due to smoke and ash from a nearby fire. The insurer argued that the contraband exclusion in the policy barred coverage. The court held that the exclusion was “rendered ambiguous by the difference between the federal government’s de jure and de facto public policies regarding state-regulated medical marijuana.” It found coverage for Green Earth’s harvested plants, noting that Atain knew that Green Earth was operating a medical marijuana business, and that the record suggested the parties shared a mutual intention that the policy would cover inventory and the contraband exclusion wouldn’t apply.

The court in K.V.G. Properties Inc. v. Westfield Insurance Company, No. 17-2421 (6th Cir. Aug. 21, 2018) did find that the dishonest or criminal acts exclusion precluded coverage for damage to the insured’s rental property caused by tenants who grew marijuana. However, the court’s holding focused on the fact that the tenants were not acting in compliance with Michigan’s medical marijuana law. The court stated, “under different circumstances, KVG might have a strong federalism argument in favor of coverage” and that it “would hesitate before reading a Michigan insurance policy to bar coverage for a ‘criminal act’ when Michigan law confers criminal and civil immunity for the conduct at issue.”

The conflict between federal and state law has led some regulators to conclude that clarity is needed in exclusionary language with regard to marijuana. In 2017, the Oregon Division of Financial Regulation issued a bulletin requiring insurers issuing P&C policies that potentially cover loss, damage, or liability linked with marijuana items (and activities) to explicitly state in the policy whether — and to what extent — these interests are covered or excluded. General exclusions, like ‘illegal activity,’ ‘contraband,’ or ‘coverage inconsistent with public policy,’ as well as language referring to illegal or criminal acts under federal law, were deemed “insufficient to describe the coverage.”

This directive has spurred Insurance Services Office (ISO) to develop cannabis-related exclusions/endorsements. In November 2018, it introduced numerous optional endorsements for use with various GL and commercial-liability umbrella and excess policies, including one endorsement that excludes bodily injury, property damage, and personal and advertising injury-related exposures associated with cannabis, which is defined in a broad matter. If these exclusions are adopted, it may be harder for insureds to contend that policies are ambiguous and therefore should be construed in favor of coverage.

In conclusion, insurers cannot ignore legal marijuana, even if they don’t plan to provide coverage. They need to understand the issues presented and take action to ensure their intentions are borne out by their policy wordings. Carriers that wish to enter this area must deal with a constantly changing political and legal landscape that makes underwriting marijuana-related risks especially challenging. It is imperative that insurers stay abreast of medical, legal, and regulatory developments and examine their portfolios carefully to evaluate their potential exposure.

Marijuana by the numbers

- 125,000–160,000 full-time workers employed by cannabis-related businesses. The industry is expected to add another 340,000 full time jobs by 2022. [https://mjbizdaily.com/chart-cannabis-industry-supports-over-125000-full-time-jobs/]
- 25,000–33,000 estimated cannabis businesses in the US. [https://aaisonline.com/taking-the-high-road-with-property-and-casualty-cannabis-insurance]

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