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BY MARK MILLS

Producing or selling marijuana remains illegal under federal law, but on the first day of 2018, California joined six other states—Alaska, Colorado, Massachusetts, Nevada, Oregon, and Washington—and the District of Columbia in legalizing the production and sale of marijuana for recreational use. Casualty insurers that are selling policies to producers and sellers of marijuana, however, may not have anticipated that, in some of these states, neighbors of the insured businesses would sue the insureds for damages caused by marijuana fumes and the stigma of having a neighbor whose activities remain illegal under federal law. These plaintiffs are utilizing nuisance and trespass causes of action, and, more surprising, they are also suing under the Racketeer Influenced and Corrupt Organizations Act, more commonly known as the RICO Act.

Let's review some of the issues regarding the duty to defend that can arise under standard commercial general liability (CGL) language when insured marijuana businesses are sued under the RICO Act, nuisance, and trespass causes of action.

THEORIES OF RECOVERY UNDER CGL POLICIES

Under nuisance and trespass causes of action, neighbors of the insured businesses are alleging that marijuana fumes and other bothersome activities occurring in the insureds' businesses invade the neighbors' property interests or otherwise damage them. The RICO Act was enacted in 1970 to combat organized criminal syndicates. Since then, the RICO Act has become a staple of civil litigation. In addition to criminal penalties, the RICO Act also sets out an expansive civil enforcement scheme under which persons injured in their business or property by RICO Act violations may recover up to three times their damages, plus their attorneys' fees.

RICO Act violations are violations of enumerated federal criminal laws that damage the plaintiff's business or property, and they include federal drug law violations. Because marijuana remains illegal under federal law, neighbors of insured marijuana businesses allege the policyholders damage their businesses and properties by producing marijuana, therefore violating the RICO Act.

CGL policies cover policyholders' liability for occurrences that cause bodily injury or property damage. Occurrences are defined as accidents. CGL policies also exclude intentional conduct. Therefore, one wouldn't think nuisance and trespass should be covered occurrences because these causes of action are thought of as intentional torts. RICO Act liability should not be an occurrence because it requires criminal conduct, which presumably is not accidental. In theory, CGL carriers should have no duty to defend insured marijuana business sued for nuisance, trespass, or violating the RICO Act.

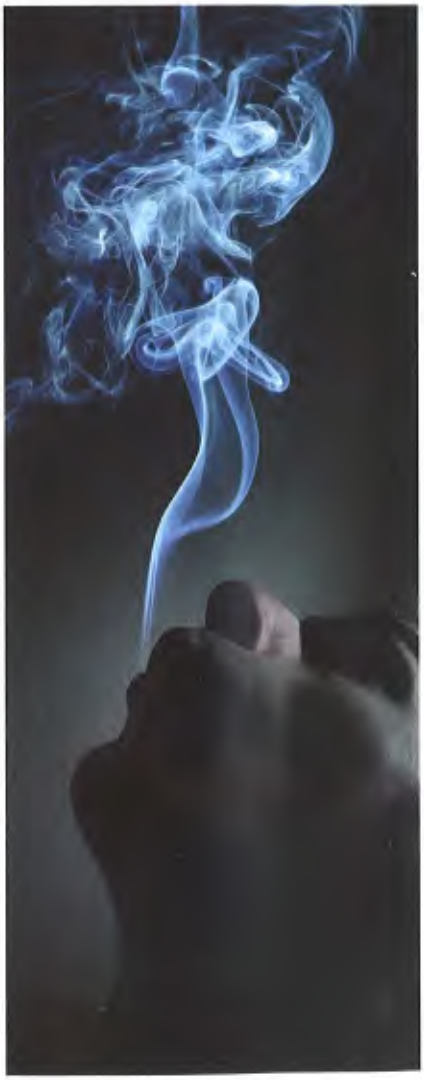
Courts hold, however, that liability for an occurrence may be alleged for purposes of the duty to defend if the complaint does not explicitly say the insured intended to cause the specific injury complained about. Courts employ the same reasoning in holding that the intentional conduct exclusion may not preclude the duty to defend. By reasoning that a complaint alleging the insured's liability under the RICO Act, nuisance, or trespass does not allege that the insured intended to cause the claimed damage, courts can easily hold that a duty to defend exists.

Further, while nuisance and trespass violations may be intentional torts, liability under these torts can still be premised upon negligent conduct. Hence, it may be difficult for an insurer to deny the duty to defend by arguing that the complaint does not allege the insured is liable for accidental conduct.

The CGL policy also covers an insured's liability for causing a third party to suffer bodily injury. While neighbors of insured marijuana producers allege marijuana fumes annoy them, they typically do not allege that marijuana fumes sicken or physically injure them. Plus, the RICO Act also does not allow recovery of damages that would qualify as covered bodily injury. It seems doubtful that the duty to defend would be triggered under bodily injury provisions.

CGL language also covers the insured's liability for occurrences that cause property damage. Unlike bodily injury, the duty to defend could be triggered under property damage provisions. CGL policies define property damage as physical injury to tangible property, or loss of use of tangible property that is not physically injured. Depending on what type of damage the neighboring property owner alleges, both prongs of the property damage definition may be implicated.

PLAINTIFFS ARE UTILIZING NUISANCE AND TRESPASS CAUSES OF ACTION, AND, MORE SURPRISING, THEY ARE ALSO SUING UNDER THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT.



COURT INTERPRETATIONS

Plaintiffs suing marijuana producers typically complain of marijuana's pungent odor. It seems incongruous that liability for unpleasant odors could constitute liability for physically injuring tangible property. But at least one court has decided that the duty to defend was triggered by allegations of unpleasant odors that permeated a structure because these allegations could constitute liability for physical injury to tangible property.

In *Safe Streets Alliance v. Hickenlooper*, one of the few published decisions addressing marijuana businesses' liability under the RICO Act and nuisance laws, the 10th Circuit Court of Appeals illustrates what commercial liability insurers should be mindful of regarding potential property damage coverage issues in these actions.

In the case, Colorado property owners sued adjacent marijuana growers under nuisance and RICO Act theories. Remember, successful RICO Act claimants may recover for damages to their businesses or properties caused by violations of the federal criminal laws listed within the RICO Act. In *Safe Streets Alliance*, neighbors of the marijuana growers alleged damage from noxious marijuana odors, decreased property values, and stigma damage resulting from the marijuana growers' criminal activities. The 10th Circuit reversed summary judgment against the property owners and held that they could proceed against the marijuana businesses under both nuisance and RICO Act claims.

Plaintiffs suing marijuana producers in other states use *Safe Streets Alliance* as a template in drafting RICO Act,

nuisance, and trespass suits against marijuana businesses. Although *Safe Streets Alliance* is not an insurance coverage case, the 10th Circuit's holding that marijuana fumes and stigma support the RICO Act's property damage element makes it easier to argue that RICO Act allegations may trigger the duty to defend under property damage coverage.

The insured's liability for decreased property values, like those alleged in *Safe Streets Alliance*, should not trigger the duty to defend. Most courts consider stigma damage, or decreased property value, to be economic damage, which does not qualify as covered physical injury to tangible property. Neighboring landlords, however, also may allege that fumes or the stigma of purportedly criminal businesses nearby means that they cannot charge as much for rent. Lost rental income may fall within the loss-of-use prong of the CGL property damage definition.

CGL policies also cover the insured's liability for damages because of offenses listed within the definition of personal and advertising injury. With one possible exception, the personal and advertising injury offenses likely are not relevant in a case that alleges nuisance, trespass, or RICO Act liability against a marijuana business.

Under this potentially relevant personal and advertising injury offense, covered liability is defined as invading the right of private occupancy for property that the claimant occupies. For coverage, however, the property owner must be the "invader" of the right of private occupancy. This language is intended to cover insured landlords or property owners against liability for wrongful evictions and similar actions.

While neighbors of marijuana businesses allege that fumes from the insured marijuana business interfere with their use and enjoyment of their properties, these neighbors typically are not tenants of the insured marijuana businesses. For coverage to be triggered, the insured marijuana business would have to be the landlord or property owner that the tenant sues because fumes from the insured business interfere with the tenant's use and enjoyment of the leased property. Coverage under this provision seems unlikely because marijuana producers—at present, anyway—are more likely to pay, rather than collect, rent.

ONLINE COMMENTATORS OPPOSED TO LEGALIZED RECREATIONAL MARIJUANA MENTION THE RICO ACT AS A WEAPON TO USE AGAINST MARIJUANA BUSINESSES THAT ARE NOW LEGAL UNDER SOME STATE LAWS.

POLLUTION EXCLUSIONS

Alleged liability for fumes raises the issue of whether the pollution exclusion may preclude the duty to defend. CGL policies exclude liability arising out of pollutants, and it defines pollutants as fumes that cause irritation. We are unaware of any court addressing if marijuana smoke is a pollutant, although one court held that cigarette smoke was a pollutant. Courts more typically apply pollution exclusions when the insured operates a smelter, stockyard, or similarly malodorous business. Thus, an insurer may have a difficult time successfully arguing that marijuana fumes are a pollutant, barring favorable authority (i.e. binding precedent holding cigarette smoke is a pollutant).

Whether the pollution exclusion applies to liability for producing marijuana may depend on how broadly the courts in the relevant state interpret the exclusion. Under the exclusion's current version ("absolute" or "total" exclusion), a split of authority exists. Courts relying on the exclusion's drafting history limit it to environmental remediation actions. Courts guided by the exclusion's language apply it to facts meeting the exclusion's provisions, even if the insured's alleged liability does not result from a government-ordered cleanup of environmental damage.

For the pollution exclusion to prevent liability coverage for producing or selling marijuana, the relevant state's courts must apply it to liability outside traditional environmental cleanup actions. The Supreme Courts of Colorado and Washington have held that the absolute or total pollution exclusion applies beyond traditional environmental liability. The courts of final disposition in California, the District of Columbia, and Massachusetts limit the pollution exclusion to traditional environment remediation claims. The issue appears unresolved in Alaska, Oregon, and Nevada.

Media reports indicate that the inconsistency between federal and state law on producing recreational marijuana is unlikely to resolve soon. Online commentators opposed to legalized recreational marijuana mention the RICO Act as a weapon to use against marijuana businesses that are now legal under some state laws. So while lawsuits may not be widespread now, the existing tension between federal and state law and encouragement in utilizing the RICO Act as a weapon against legalizing commercial marijuana production point to these suits increasing in the future.

Depending on the precise allegations, and perhaps also on insurers' ability to rely on facts outside of the complaint, the duty to defend may still be denied under standard CGL language. However, if carriers want to avoid defending insured marijuana businesses against the RICO Act and related claims, then they should amend standard CGL provisions with specific exclusions or coverage limitations. ■

Mark Mills is a director at the law firm of Betts Patterson Mines. He can be reached at mmills@bpmlaw.com.