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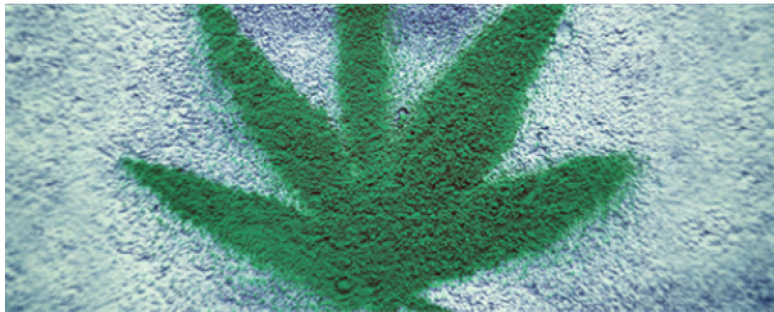
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Weed Killer

Problems with proving damages related to the destruction of cannabis crops

By [S. Karen Bamberger](#)

Cannabis is now legal for medicinal or recreational use (or both) in 33 states and the District of Columbia. As of Oct. 17, 2018, it also became legal throughout Canada. More states are expected to legalize cannabis in some form this year. That means litigation concerning cannabis can be expected to grow, well, like a weed.

There are obvious product liability claims related to the sale of cannabis products—for example, products that are tainted or mislabeled. Criminal cases are expected to define and refine issues surrounding impairment and the levels at which use of cannabis-related products can be prosecuted. No doubt, there are cases that will involve trademark issues. But what about cases in which cannabis growers bring claims against others for damaging or killing their crops?

There recently was such a case in Washington State. The client was an industrial painting company that applied spray paint to an outdoor water tank. Several indoor grow operations were located approximately 800 feet away, and one company alleged that volatile organic compounds (VOCs) emitted when the spray paint was applied caused “mass plant death” to its crop of marijuana plants. But how to prove such claims?

Even though so many states have now legalized or will be legalizing cannabis, the federal government still has not. This hazy hybrid status for cannabis leads to proof problems. In a typical case involving death of a crop due to environmental factors (think of spray drift cases, in which a pesticide is applied on one field and wind causes the chemicals to drift to another field where the product has deleterious effects on a different crop), there is scientific literature that can support not only the weather and its effects on particular chemicals, but also, and more importantly, the effect of a certain chemical upon a particular crop. Not so for marijuana.

For example, there are no federally funded studies that have been published regarding the effects of any particular chemical on a cannabis plant. If there is no laboratory in the plaintiff's state that can process cannabis (and many laboratories are only certified to perform certain limited tests on the plants), a plaintiff will be unable to send samples across state lines because to do so would be to commit a federal offense.

Similarly, where many other crops have been studied by federal agencies to establish certain acceptable levels of exposure to specific products, there are no published levels regarding acceptable levels of any particular chemical in a cannabis plant. In the previously mentioned case, the plaintiff's own experts admitted that there was no published data establishing what level of VOCs would be toxic to a cannabis plant and no peer-reviewed publications that established this causal connection, either.

So, when a plaintiff claims that VOCs were the source of the loss, what type of proof can that plaintiff rely upon to prove causation? If your jurisdiction applies the Frye standard, take advantage of these voids in the scientific knowledge base. Under Frye, evidence derived from a scientific theory or principle is admissible only if the theory or principle has achieved general acceptance in the scientific community, and there are generally accepted methods of applying the theory or principle in a manner

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capable of producing reliable results. In our case, given the plaintiff's experts' admissions—and the reality of the dearth of scientific research studying the effects of VOCs on cannabis plants—we were successful in obtaining summary judgment due to plaintiff's inability to establish causation.

If your jurisdiction follows Daubert, you know that your judge will consider the following factors:

- Is the underlying theory testable?
- Was the theory peer reviewed?
- Does application of the theory lead to a high known or potential rate of error?
- Are there standards controlling the technique's operation, and were they followed?
- Is the theory or technique generally accepted within the relevant scientific community?

Under the Daubert analysis, the plaintiff in the case example would have had similar insurmountable proof problems. The underlying theory, according to plaintiff's own experts, was not really testable. They conceded that there was no way to practically test for the presence of VOCs in the air or in the plants, and they could cite no peer review of their theory. As will be explained, they failed to follow even rudimentary scientific principles in collecting data.

Of course, do not forget Rule of Evidence 703, whether you are in federal or state court. This rule requires that facts or data that experts base their opinions on be of the type reasonably relied upon by experts in the particular field. In the case example we discussed, the defense experts provided testimony that no forensic agronomist would rely on the facts or data used by the plaintiff's experts, because those experts really had no such evidence.

In a typical case involving the destruction of a crop, a forensic agronomist would collect samples and perform thorough testing of each potential source of contamination. For example, water would be tested and records would be maintained regarding when, where, and how the water was collected; there would be a protocol for how the water was tested and what it was tested for, and the test results would be recorded and a sample of the water would be retained so that additional testing could be performed again if necessary. In the case example provided, the defense hit the jackpot, because plaintiff's experts failed to maintain any records of any of the testing they performed. There were zero test results, and no samples were retained of the planting material, the containers, the water, or the plants themselves. The plaintiff's experts also admitted that they had not performed any testing of the air inside the grow rooms to try to determine VOC content.

Cannabis may be legal in many states, but that does not mean there is the necessary science to establish causation for a crop failure. A plaintiff seeking to recover damages for a crop loss can be caught "high" and dry if it cannot meet the rigors of scientific proof.

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