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Into the Weeds Discussions on the Hazy Path of Legalized Cannabis' Influence on NY Labor Law

NY Disclosure Law

NY Civil Practice Law and Rule §3101 requires certain disclosure during litigation of all materials necessary in the prosecution or defense of an action. The rule had permitted parties to obtain discovery about the existence and contents of any insurance agreement that may be liable to satisfy part or all a judgment. That rule, which was like Federal Rule of Civil Procedure 26(a)(1)(A)(iv), was typically construed as requiring production of policies that would be triggered by a judgment in the ligation. See Spotlight Co., Inc. v. Imperial Equities Co., 438 N.Y.S.2d 162 (App Term, 1st Dept 1981); see also Bolton v. Weil, Gotshal & Manges LLP, 2005 NY Slip Op 52329(U), 14 Misc. 3d 1220(A), 836 N.Y.S.2d 483 (Sup. Ct. NY County 2005) (discussing limits of insurance disclosure requirements).

The requirements for insurance disclosures were amended on December 31, 2021, under the Comprehensive Insurance Disclosure Act which was implemented to amend CPLR §3101(f) and require additional disclosures of insurance materials to "ensure that parties in a litigation are correctly informed about the limits of potential insurance coverage." The change, however, was short lived and amended less than two months later February 25, 2022, to scale back the breadth of the insurance disclosures.

A. The Comprehensive Insurance Disclosure Act

The December 2021 amendment required defendants, third party defendants, crossclaim defendants, and counterclaim defendants to produce to all parties specific insurance information within 60 days of answering the complaint. For matters pending prior to the amendment, defendants would have had 60 days (or by March 1, 2022) to produce the information. The December insurance disclosure requirement included disclosure of complete copies of all "primary, excess, and umbrella policies" that "may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the entry of final judgment." This disclosure requirement applied to insurance carriers, including captive insurance entities, risk retention groups, reciprocal insurance exchanges, and syndicates, and specifically included Lloyd's Underwriters. The disclosure included providing all "declarations, insuring agreements, conditions, exclusions, endorsements, and similar provisions." Applications for insurance were, under the December version, considered part of the insurance agreement and specifically subject to disclosure. The December version of the rule also required disclosure of the available insurance limits, including disclosure of "any lawsuits that … reduced or eroded or may reduce or erode" available limits, disclosure of the other lawsuit's caption, the date that the other lawsuit was filed, and the contact information for all attorneys in that other lawsuit. Further, the amount of "any payment of attorney's fees that have eroded or reduced the face value of the policy" needed to be disclosed in addition to the contact information for the attorney who received those payments. The

December disclosure requirements also required the contact information, including the telephone number and email address for the person adjusting the claim. The December amendment further required parties to continuously update insurance disclosure information within 30 days of receiving any update that prior information was inaccurate, and this requirement would have been present during the entire pendency of the litigation.

Overall, the December 2021 amendment greatly expanded defendants' insurance disclosure requirements, and placed upon defense counsel and carriers a burden of constant monitoring of limits and updating of disclosures. These disclosure requirements appeared so burdensome that the Governor, when signing the Act into law, requested the Legislature tailor the scope of the information disclosed.

B. The Amended Comprehensive Insurance Disclosure Act

The Act was amended in February, with the new version trimming down on the disclosure requirements in significant ways. Notably, the new disclosure requirement applies to actions filed after December 31, 2021. New parties now have 90 days after filing an answer to produce information, up from the prior 60-day timeframe. Instead of providing constant updates to disclosures, updates are now provided at litigation milestones, including at the filing of the note of issue, when entering formal settlement negotiations, at mediation, and at trial. While the Rule still requires disclosure of all primary, excess, and umbrella policies that may be liable to satisfy part or all a judgment, the February amendment no longer considers insurance applications as part of the insuring agreement, and therefore they no longer need to be disclosed. Additionally, parties can agree in writing to disclose just the declarations page instead of the entire policy, though the plaintiff accepting the declarations page may later request the full policy. The current disclosure requirements still mandate that the total limits available under each policy be provided, which is specified as the actual funds available after erosion and offsets. However, the current version of the Rule no longer requires disclosure of other lawsuits that have or may in the future erose limits, nor is there a requirement to disclose payments of attorneys' fees or the contact information for attorneys who received those payments. Further, the February amendment limits disclosure of adjuster information to just the name and email address for the adjuster, removing the telephone number disclosure requirement. Significantly, the Rule now specifies that disclosure of policy limits does not constitute an admission that the claim is covered by the disclosed policy.

Importantly, even though the current version of the Rule scaled back some of the disclosure requirements, the Rules nevertheless still require under CPLR §3122-b that disclosures be produced with a certification by counsel and the insured that the insurance disclosure provided is accurate and complete, and reasonable efforts have been undertaken to ensure the information disclosed remains accurate.

C. Implementation

Defense counsel needs to be aware of the new disclosure requirements and the need to provide information within 90 days of filing an answer, when the note of issue is filed, when entering formal settlement negotiations, at mediation, and at trial. Insurance carriers need to likewise be aware of this requirement and provide counsel with the relevant policy information. If a carrier or defense counsel is interested in not producing a full copy of the policy, there is room to negotiate with parties in the litigation to limit disclosures to the declarations page only. Still, carriers should discuss with defense counsel sub-limits, eroding policies, or other endorsements that impact available limits.

New York Labor Law New Defense Cases

A. Recent Labor Law Cases of Note

Three recent cases in New York have yielded results favorable to defendants in an otherwise difficult jurisdiction.

1. Bonczar v. Am. Multi-Cinema, Inc., 2022 NY Slip Op 02835

Plaintiff was injured when he fell from a ladder while retrofitting a fire alarm system at defendant's movie theater. After climbing up and down to the third or fourth step of the ladder several times without issue, he began to descend when the ladder allegedly shifted and wobbled. Plaintiff did not know why the ladder wobbled or shifted, and acknowledged he might not have checked the positioning of the ladder or the locking mechanism despite having been aware of the need to do so.

The trial court granted plaintiff's motion for partial summary judgment on liability under Labor Law § 240(1). The Fourth Department reversed the trial court, holding that plaintiff failed to show that he was entitled to judgment as a matter of law (Bonczar v. Am. Multi-Cinema, Inc., 2018 NY Slip Op 00712, 158 A.D.3d 1114, 70 N.Y.S.3d 305 (App. Div. 4th Dept.). The Fourth Department found factual issues as to whether a statutory violation had occurred and if plaintiff's own acts and omissions, particularly as to the ladder's positioning and plaintiff's failure to check the ladder's locking mechanisms, were the sole proximate cause of his injury.

On remand, the § 240(1) claim was tried by a jury. The trial court reserved judgment on plaintiff's motion for a directed verdict and the jury returned a verdict for defendant, finding no violation of the statute and that plaintiff's failure to position the ladder properly was the sole proximate cause of his injuries. The trial court denied plaintiff's motion to set aside the verdict as against the weight of the evidence and the Fourth Department unanimously affirmed that judgment in defendant's favor.

2. Cutaia v. Bd. of Managers of the 160/170 Varick St. Condo., 2022 NY Slip Op 02834

Plaintiff was tasked with moving sinks from one area of a bathroom to another. His work required him to cut and reroute pipes in the ceiling that were located near electrical wiring. He used an A-frame ladder to reach the pipes, except he could only lean it against the wall in the closed and unlocked position due to spatial limitations. He was attempting to connect two pipes while standing on the ladder when he was knocked off the ladder because his hand touched a live wire, resulting in him receiving an electrical shock and falling.

Plaintiff did not remember his fall, including whether he lost consciousness, whether the ladder fell to the ground, or whether he was thrown from the ladder after being electrocuted. Plaintiff's expert opined that had the ladder been supported or secured to the floor or wall by anchoring, it would have remained stable when plaintiff was shocked. Plaintiff's expert further opined that given the nature of plaintiff's work, which involved cutting pipes and the use of hand tools at an elevated height, plaintiff should have been furnished with a more stable device, such as a Baker scaffold or man lift. The defense did not submit any expert proof.

The trial court denied plaintiff's motion for partial summary judgment on liability under Labor Law § 240(1). The First Department reversed the trial court and granted the motion, finding that the "safety device" provided to plaintiff was an unsecured and unsupported A-frame ladder that was inadequate to perform the assigned task. The two-Justice dissent would have precluded recovery to plaintiff, based on Nazario v. 222 Broadway, LLC, 2016 NY Slip Op 07823, 28 N.Y.3d 1054, 43 N.Y.S.3d 251, 65 N.E.3d 1286 because of the absence of any evidence that the ladder was defective or that other particular safety devices would have prevented the accident.

3. Healy v. EST Downtown, LLC, 2022 NY Slip Op 02836

Plaintiff is a maintenance and repair technician employed by the building's property manager. The building's maintenance staffs, including plaintiff, was separate from its janitorial staff. Plaintiff's regular duties included making the building's rental properties ready for incoming tenants by repairing fixtures and painting. Additionally, he was tasked with responding to work orders generated by his employer in response to defendant's requests for repairs.

On the day of his accident, plaintiff responded to a "[p]Est [c]ontrol" work order filed by one of the building's commercial tenants. Specifically, the work order complained that birds were depositing excrement from a nest that was lodged in one of the building's gutters located above the tenant's entryway. Plaintiff was allegedly injured when, while attempting to remove the bird's nest, he fell from an unsecured eight-foot ladder that moved when a bird suddenly flew out of the nest. The trial court and the Fourth Department both granted plaintiff's motion for summary judgment on the § 240(1) claim and denied defendant's summary judgment motion seeking dismissal of that claim.

B. Grieving Families Act: Bill S74A

The New York Senate and Assembly recently passed Bill S74A, also known as the Grieving Families Act, and it is expected that Governor Hochul will likely sign the bill into law. If passed, the law would significantly expand the damages available in wrongful death actions, both for presently pending cases as well as any newly filed complaints.

The Bill would amend EPTL section 5-4.1 to extend the statute of limitations to commence a wrongful death action from two years to three years and six months, a significant increase that will permit many more wrongful death cases to go forward.

This Bill would also greatly expand recovery in that it would allow plaintiffs to recover for emotional damages if a tortfeasor is found liable for causing a death. The current law only allows recovery of economic damages, such as economic hardship caused by a loss of parental guidance. The old law did not permit recovery of damages for grief, sympathy, and loss of companionship or consortium (see, e.g., Liff v. Schildkrout, 49 N.Y.2d 622, 427 N.Y.S.2d 746, 404 N.E.2d 1288 (1980), Bumpurs v. N.Y.C. Hous. Auth., 139 A.D.2d 438, 527 N.Y.S.2d 217 (App. Div. 1st Dept. 1988).

Under the current law, only the distributees of the estate (including parents and spouses) are permitted to recover, though the Bill would permit recovery by close family members. Section 5 of the bill provides that the law shall take effect immediately and shall apply to all pending actions and actions commenced on or after such date. Therefore, the Bill would not apply only to new actions but also to pending actions.

If these significant alterations to the wrongful death statute are signed into law as expected, defendants and insurers statewide should anticipate a significant increase in recoverable damages in wrongful death cases for all currently pending lawsuits.

E-Discovery Updates

Claims' role in eDiscovery isn't necessarily to run it, but rather to provide outside counsel with the proper support, expertise, and pre-negotiated rates to ensure eDiscovery gets done on time and on budget. Too often, eDiscovery management is left to outside counsel, even when they don't have the internal resources to manage large, complex construction defect ("CD") eDiscovery. However, when insurance carriers partner with eDiscovery vendors who have CD expertise, they can enact best practices and workflows that bolster outside counsel's firepower, while keeping eDiscovery and managed document review costs to a minimum.

Our panel of industry experts will share their war stories, eDiscovery success secrets, and recommendations for how claims managers can run an effective eDiscovery process with limited waste, payout, and unnecessary cost.

This presentation is relevant to claims professionals because it's a topic that is very rarely covered, if at all. When we attended the 2022 CLM Annual Conference, we discovered that while many claims professionals don't have eDiscovery on their radar, they are thirsty for this knowledge, nonetheless. One of the primary themes of this presentation is how an outside counsel and an eDiscovery vendor can join to deliver solutions to what is typically a very complex and costly component of litigation (or other legal matters where large checks are being written). Attendees of this session will leave equipped with an awareness of their current situation, an invitation to form or interrogate the reality of their current vendor list, and a goal of determining which benefits (or drawbacks!) those vendors are bringing to their eDiscovery process.

Legalized Cannabis

A. Impact of Legalization in Civil Litigation

On March 31, 2021, New York State legalized adult-use cannabis (also known as marijuana, or recreational marijuana) by passing the Marijuana Regulation & Taxation Act ("MRTA"). In addition to legalizing the recreational use of marijuana in New York, the Act amends both the New York medical marijuana law and the New York Labor Law. These amendments significantly impact an employer's rights and obligations for employee's use of marijuana.

While it is legal for adults 21 years or older to consume cannabis, and there is no requirement for most private employers to have a drug-free workplace policy of any kind, employers can still enforce policies that prohibit impairment on the job. New York State prohibits on the job use of, or impairment from, alcohol and controlled substances. An employee may be required to undergo medical testing if a supervisor has a reasonable suspicion that he or she is unable to perform job duties due to a disability which may be caused using alcohol or controlled substances. Additionally, employers are not required to commit any act that would cause them to violate federal law or lose federal funding, because both medical and recreational marijuana are still illegal under federal law. [1]

[1] https://cannabis.ny.gov/adult-use

By amending Section 201-D of the New York Labor Law, it generally makes it unlawful for an employer to take the following actions because of an individual's use of cannabis pursuant to the MRTA, outside of work hours, off the employer's premises, and without use of the employer's equipment or other property:

- Refuse to hire, employ, or license someone.
- Terminate the employment of an employee; or
- Otherwise discriminate against an individual in any of the following:
  - Compensation.
  - Promotion; or
  - Terms, conditions, or privileges of employment.

Exceptions to New York Labor Law § 201-D were put in place through the MRTA by adding a subsection 4-a, which allows employers to take adverse actions against an employee/applicant where:

- An employer is/was required to take such action by state or federal statute, regulation, or ordinance, or other state or federal governmental mandate (for example, mandatory drug testing is required for drivers of commercial motor vehicles in accordance with 49 CFR Part 382; *see also, e.g*., NY Vehicle and Traffic Law § 507-a, which requires mandatory drug testing for for-hire vehicle motor carriers in accordance with 49 CFR 382.).
- The employer would be in violation of federal law.
- The employer would lose a federal contract or federal funding.
- The employee, while working, manifests specific articulable symptoms of cannabis impairment that decrease or lessen the employee's performance of their tasks or duties; or
- The employee, while working, manifests specific articulable symptoms of cannabis impairment that interfere with the employer's obligation to provide a safe and healthy workplace as required by state and federal workplace safety laws, meaning the employee manifests specific articulable symptoms of impairment that:
  - Decrease or lessen the performance of their duties or tasks, or
  - Interfere with an employer's obligation to provide a safe and healthy workplace, free from recognized hazards, as required by state and federal occupational safety and health laws.

Employees who are in the Medical Cannabis Program are considered automatically to be disabled and, as such, are protected from discrimination on that basis. In New York, a certified patient "shall be deemed to be having a 'disability' under the state's human rights law."[2]

In whole, where there is a duty to accommodate an employee's marijuana use, employers must usually consider the specific needs of the job as well as any applicable regulations before acting. Moreover, while workplace safety considerations are vital and vary depending on the type of workplace, employers must ensure that they do not violate the rights of their employees in the process.

While many states and the District of Columbia have legalized marijuana, many marijuana legalization statutes and initiatives do not explicitly address the use of marijuana at the workplace. Additionally, it is still designated as a Schedule I substance under the federal Controlled Substance Act

[2] N.Y. Pub. Health Law §§ 3360 to 3369-d (McKinney), § 3369; N.Y. Comp. Codes R. & Regs. tit. 10, § 1004, § 1004.18

("CSA") which criminalizes the possession, manufacture, distribution, and sale of the drug.[3] Workplace protections vary by state, and some cities have their own rules. The conflict between federal and state law has led to confusion and challenges to many in the industry.

In cases before state and federal courts where state law permits medical or recreational use of cannabis, the illegal status under federal law has made for inconsistent outcomes. In Ross v. Raging Wire Telecoms., Inc., 174 P.3d 200 (Cal. 2008), plaintiff was offered a job by defendant, which required plaintiff to take a drug test. Plaintiff tested positive for marijuana because plaintiff used marijuana to alleviate his medical condition, as recommended by a physician. Nonetheless, defendant refused to hire him and provide plaintiff with accommodations. The California Supreme Court ruled in favor of the defendant, "finding that, in enacting its state medical marijuana law, the voters did not intend to affect an employer's ability to take adverse employment actions based on the use of medical marijuana." Additionally, the Ross court found that employers do not have to accommodate their employees' off-site medical marijuana use. In Colorado, the "lawful activities statute" prohibits employers from interfering with employees' lawful off-duty conduct. However, in Coats v. Dish Network, LLC, 350 P.3d 849 (2015), the Colorado Supreme Court found "lawful activity" to be defined by both state and federal law. Therefore, the Coats court held that off-duty cannabis use is not protected in Colorado because it is illegal under federal law.

On the other spectrum, newer laws tend to afford more job protections. New Jersey, like New York, protects employment for registered medical marijuana patients and recreational users. In New Jersey, medical marijuana was first legalized in 2009 as the Compassionate Use Medical Marijuana Act, which sought to "protect from arrest, prosecution, property forfeiture, and criminal and other penalties, those patients who use cannabis to alleviate suffering from qualifying medical conditions, as well as their health-care practitioners, designated caregivers, institutional caregivers, and those who are authorized to produce cannabis for medical purposes." N.J.S.A. §24:6I-2. However, the law specifically provided: "[n]othing in this act shall be construed to require … an employer to accommodate the medical use of marijuana in any workplace." N.J.S.A. §24:6I-14 (2018). The exception in the statute was brought forth in Wild v. Carriage Funeral Holdings, 458 N.J. Super. 416 (App. Div. 2019), aff'd, 241 N.J. 285 (2020).

In Wild, the plaintiff, a cancer patient and lawful user of medical marijuana, was involved in a motor vehicle accident while at work. He told a hospital physician that he possessed a license to use medical marijuana; however, the physician decided not to order a drug test because "it was clear" that the plaintiff was not under the influence of marijuana at that time. The plaintiff subsequently was required to submit to drug testing by his employer before returning to work. The employer claimed it terminated the plaintiff's employment due to his failure to disclose his lawful use of marijuana, not the positive drug test result.

The plaintiff filed a suit alleging disability discrimination and failure to accommodate under the New Jersey Law Against Discrimination ("LAD"). Plaintiff sued in New Jersey state court, and the trial court dismissed his complaint, reasoning that nothing in the medical marijuana law imposed an obligation on the employer to accommodate his use of medical marijuana for his cancer treatment. In March 2020, the New Jersey Supreme Court affirmed the Appellate Division decision, holding that an employee fired after testing positive for marijuana, which had been prescribed to him as part of his cancer treatment, could sue his employer for disability discrimination under the LAD.

[3] Controlled Substances Act, 21 U.S.C. § 812 *et seq.*

As a result of the Wild case, in July 2019, the law was amended and now specifies that it is unlawful for an employer "to take any adverse employment action against an employee who is a registered qualifying patient based solely on the employee's status as a registrant with the commission." N.J.S.A. §24:6I-6.1(a).

As case law shows, the rights of employers with regards to state-legal cannabis and workplace protections varies greatly by state. Undoubtedly, courts will continue to address these issues. However, until the law surrounding legalized marijuana is well-settled, employers must be aware of their state's marijuana statutes as well as any other statutes that may be applicable to both the employees and employers.

B. Impact of Legalization on Insurance

Insurance providers have been increasingly entering the state-legal marijuana marketplace. As with any business within a growing industry, legal marijuana-related businesses need protection for their operations through insurance products. However, because of the conflict between federal and state laws on the legality of marijuana, there is an inevitable legal risk inherent in providing insurance to marijuana-related businesses that does not exist with respect to policyholders in other business segments. Insurers must be aware that the courts have struggled to apply a consistent legal framework between state and federal laws, which has created uncertainty in businesses transactions involving the marijuana industry. Without clear legal analysis on the matter, it is extremely difficult for insurance companies to calculate risk, and for insureds to rely on coverage. Those risks will remain unless and until federal law changes.

Should an insurer decide to write insurance for marijuana-related businesses in jurisdictions where marijuana has been legalized, the question arises whether a court will enforce an insurance policy issued to a marijuana-related business that is operating legally in the state where it is doing business, notwithstanding the illegality of the conduct under federal law. Again, case law remains unsettled on this issue. The case law provided below is instructive as to how courts view insurance policies.

In Tracy v. USAA Casualty Insurance Co. No. 11-00487 LEK-KSC, 2012 U.S. Dist. LEXIS 35913 (D. Haw. Mar. 16, 2012) , the U.S. District Court of Hawaii granted defendant insurance company's motion for summary judgment when an insured challenged the denial of her claim for the theft of marijuana plants from her home being grown in accordance with Hawaii's medical cannabis program. The court in Tracy relied on the fact that state law expressly excluded insurance coverage for medical marijuana, as well as the fact that it was not foreseeable to the insurer that such a policy would cover marijuana plants as they were unaware of the grow operation in the plaintiff's home.

Likewise, in Hemphill v. Liberty Mutual Insurance Co., 2013 U.S. Dist. LEXIS 200109 (D.N.M. Mar. 28, 2013), a policyholder sought to recover expenses incurred in legally purchasing medical marijuana, which was prescribed by her physician to help with chronic pain that she suffered because of a car accident. The federal district court in New Mexico adopted the reasoning of the court in Tracy to find that requiring the insurer to pay those expenses would constitute the enforcement of an illegal contract. Accordingly, the court granted summary judgment in favor of the insurer.

In contrast, when a loss results from an activity that is federally illegal but permitted under state law, a court may be inclined to uphold a contract when the parties have knowingly entered into an agreement that relates to state-legal cannabis. In Green Earth Wellness Center, LLC v. Atain Specialty Insurance Co., 163 F. Supp. 3d 821 (D. Colo. 2016), the District Court in Colorado ruled in favor of coverage

for a claim where a fire destroyed the insured cannabis company's harvested marijuana product. Plaintiff in this matter made two claims under the policy, a theft claims and a property damage claim relating to harm that its marijuana plants sustained because of a wildfire. The insurer sought summary judgment in its favor on both claims arguing that the policies exclusion for "contraband" applied to bar coverage. The court found 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," and that extrinsic evidence strongly suggested that the parties mutually intended to include coverage for harvested plants constituting Green Earth's inventory. Moreover, the court declined to follow Tracy and declare the policy unenforceable as against public policy citing the "several additional years evidencing a continued erosion of any clear and consistent federal public policy in this area."

Due to the complex regulations and case law governing lawful marijuana, insurers writing risks in the developing legal marijuana industry must be of the uncertainty and significant challenges posed by the industry. Though there is much uncertainty, the case law provided creates a legal framework for insurers to consider when calculating their risk.