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LEGALITY OF INSURING MARIJUANA: WHERE THERE'S SMOKE, THERE'S FIRE

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Crop insurance is big business in America. The federal government provided, through the Federal Crop Insurance Program (FCIC), 1.2 million crop insurance policies in 2015, covering 120 different crop varieties over 297 million acres, with a value of roughly \$102 billion.^[i] Private insurers, who are regulated by each individual state, provided another \$37 billion in coverage.^[ii] This amounts to almost a \$140 billion dollar industry per year. Agriculture, as a whole, amounts to roughly 5% of the gross domestic product (GDP) and employs around 10% of the workforce in the United States.^[iii] As such a large and vital market in the economy, there is a large public interest in protecting the agriculture market through the use of insurance.^[iv] When natural disasters occur and destroy large swaths of crop, or market fluctuations decrease the price of a crop that was valuable when planted, but is no longer valuable at harvest, crop insurance allows farmers to “pay their bankers, fertilizer suppliers, equipment providers and landlords; purchase their production inputs for the next season; and give them the confidence to make long term investments that will increase their production efficiency.”^[v]

The legality of insurance availability to marijuana cultivators is as uncertain as the laws surrounding the production, sale, and possession of marijuana. Currently, marijuana is legal for recreational use in eight states and the District of Columbia,^[vi] with an additional twenty-one states allowing marijuana use for medicinal purposes.^[vii] The main issue surrounding the legality of marijuana in general, and thus insurance specifically, is that marijuana is currently classified as a Schedule I controlled substance by the federal government.^[viii] While marijuana is still illegal under federal law, the Obama administration passed legislation that “prohibits [the] DOJ from spending money on actions that prevent the Medical Marijuana States’ giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”^[ix] However, while the Obama administration did not block states from decriminalizing marijuana possession and use, some insurance companies are reluctant to cover marijuana cultivators due to potential prosecution they may face for criminal actions, such as money laundering, in connection with insuring marijuana crops.^[x]





Courts are also split as to the legality of insuring marijuana. In *Tracy v. USAA Cas. Ins. Co.*, the plaintiff, Barbara Tracy, attempted to collect the cost of twelve marijuana plants from her insurance company after medical marijuana plants were stolen from her property.^[xi] The court found that while Tracy did have a legal interest in the marijuana, as it was permitted by state law, she did not have an *insurable* interest in the marijuana plants as it was contrary to federal law and policy.^[xii] Conversely, the Colorado district court reached a different result from *Tracy*.^[xiii] In *Green Earth Wellness Center, LLC v. Atain Specialty Ins. Co.*, Green Earth applied for reimbursement from damaged marijuana crops with their insurance company, Atain, which was summarily denied.^[xiv] Atain argued that the insurance policy was void for public policy, but the Colorado district court did not agree.^[xv] The court held that if the federal government publically pronounced it would likely decline enforcing their marijuana laws as long as the marijuana possession was consistent with state law, then the public policy argument fails.^[xvi] The district court stated, given the “continued erosion of any clear and consistent federal public policy in this area,” then state law prevails.^[xvii] However, Green Earth still failed to recover its loss, as the insurance policy did not cover “growing crops.”^[xviii]

While Gottlieb and Munson predict that future courts will likely follow *Green Earth*,^[xix] the question still remains open. But because marijuana legalization hinges upon inactivity from the federal government, this could change at any time. As long as the status quo exists, marijuana should continue to be recognized as an insurable crop on public policy grounds. Additionally, for any legal marijuana cultivators out there, please learn from *Green Earth*, make sure your insurance policy actually covers growing crops.

[i] *About Crop Insurance: Just the Facts*, Crop Insurance America, <http://www.cropinsuranceinamerica.org/about-crop-insurance/just-the-facts/> (last visited Feb. 10, 2017).

[ii] *Id.*

[iii] *Id.*

[iv] *Id.*

[v] *Id.*

[vi] *State Marijuana Laws in 2016 Map*, Governing, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> (last visited Feb. 10, 2017).

[vii] Christopher L. Troy, Deepa T. Sutherland, & Hernan N. Cipriotti, *Clearing Up The Smoke: Insurance And Marijuana*, Law360, (Feb. 3, 2017 11:55 AM), <https://www-law360-com.ezproxy.law.uky.edu/articles/887947/clearing-up-the-smoke-insurance-and-marijuana>.

[viii] *Id.*

[ix] *See* United States v. McIntosh, 833 F.3d 1163, 1175 (9th Cir. 2016) (holding that “at a minimum, § 542 prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws” and “prohibits the Department of Justice from preventing the implementation of the Medical Marijuana States’ laws or sets of rules and only those rules that authorize medical marijuana use.”)

[x] Troy et al., *supra* note vii.

[xi] Tracy v. USAA Cas. Ins. Co., No. 11-00487 LEK-KSC, 2012 WL 928186 (D. Haw. Mar. 16, 2012).

[xii] *Id.*

[xiii] Lawrence Gottlieb & Matt Munson, *Insurance Issues Raised By the Legalization of Recreational Marijuana*, 46 The Brief 34, 35 (Fall 2016).

[xiv] Green Earth Wellness Center, LLC v. Atain Specialty Ins. Co., 163 ESupp.3d 821 (D. Colo. 2016).

[xv] *Id.*

[xvi] *Id.*

[xvii] *Id.*

[xviii] *Id.*

[xix] Gottlieb & Munson, *supra* note xiii.

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