



Oregon Division of Financial Regulation Bulletin DFR 2017-04

TO: All Property and Casualty Insurers and Other Interested Persons

DATE: June 29, 2017

RE: Clarifying Coverage for Marijuana Items and Activities

Summary

Property and casualty insurance policies commonly include public policy clauses or exclusions for illegal substances or illegal activities. Because the production, processing, sale, and use of medical and recreational marijuana are legal in Oregon, but are prohibited by federal law, general exclusionary language may not be sufficient to clearly define what is covered in a policy. To provide certainty to insurers and insureds, property and casualty insurance policies should explicitly state whether marijuana items¹ and marijuana activities² are covered or excluded, and whether marijuana activities are considered illegal activities under the policy.

Background

Although the federal Controlled Substances Act prohibits the possession and production of marijuana,³ Oregon law permits the possession of marijuana items and engaging in marijuana activities, within limits defined by statute.⁴ Because these items and activities are permitted by Oregon law, insurers may provide coverage for marijuana items and activities within state boundaries.

Conflicts between state and federal law may be a source of confusion in some property and casualty insurance policies that contain general public policy clauses or exclusions for illegal substances. For example, a homeowner's insurance policy generally

¹ In this Bulletin, "marijuana items" has the meaning defined in ORS 475B.015: "marijuana, cannabinoid products, cannabinoid concentrates and cannabinoid extracts."

² In this Bulletin, "marijuana activities" includes all activities that are permitted under ORS Chapter 475B. This includes the production, sale, use, distribution, warehousing, processing, transportation, and delivery of medical and recreational marijuana items, to the extent allowed ORS Chapter 475B.

³ See *e.g.*, 21 U.S.C. § 841(a)

⁴ ORS Chapter 475B.

excluding “illegal substances or activities” would not make clear to the insured whether marijuana stored in the home for personal use consistent with ORS Chapter 475B would be covered.

In general, an insurance policy may not contain a provision that is uncertain, ambiguous, or likely to mislead a person to whom the policy is offered, delivered, or issued.⁵ Oregon courts have ruled that the insurer has the burden of proving that a loss is excluded from coverage and that an ambiguity is generally construed strictly against the insurer.⁶ Not attempting, in good faith, to promptly and equitably settle claims in which liability has become reasonably clear is prohibited.⁷

Guidance

Insurers issuing property and casualty policies that could potentially cover loss, damage, or liability associated with marijuana items and marijuana activities should explicitly state in the policy whether, and to what extent, these interests are covered or excluded.⁸

If the terms of the policy would otherwise cover marijuana items or marijuana activities, general language excluding “illegal activity,” “contraband,” or “coverage inconsistent with public policy” is not sufficient to describe the coverage provided. Similarly, language that refers to “illegal” or “criminal acts under federal law” provides insufficient guidance to policyholders as to their rights under an insurance policy.⁹

Failing to explicitly identify marijuana items or activities excluded from a policy, in some cases, may lead to an unfair claims settlement practice. Although an insurer may exclude certain types of insurable interests in a property or casualty policy, the insurer must clearly describe to the insured what is covered. Insurers also must provide sufficient information about the extent of coverage to insureds prior to purchase.¹⁰ In some cases, failing to pay a claim for a marijuana-related loss based on vague exclusionary language may be an unfair claims settlement practice.

For example, if a marijuana dispensary obtains commercial property insurance and discloses the nature of its business and the content it needs covered during the application process, it would be unlawful for the insurer to later deny coverage based on vague exclusionary language stating that “illegal substances or activities” are excluded from coverage.

⁵ ORS 742.005(2).

⁶ *Stanford v. American Guaranty Life Ins. Co.*, 280 Or 525, 527 (1977).

⁷ ORS 746.230(1)(f).

⁸ The guidance in this bulletin does not apply to medical services to be provided for compensable injuries under the Workers' Compensation Law.

⁹ The guidance in this bulletin applies to policies with terms that would otherwise cover marijuana items or activities if they were permitted under both state and federal law. In other words, policy language that relies solely on the legal status of marijuana under federal law to identify an exclusion is insufficient.

¹⁰ See ORS 746.075; ORS 746.240.

In contrast, if a policy stated, for example, that “activities, losses, or claims involving or resulting from possession, production, processing, sale, or use of drugs or substances classified as Schedule 1 under the Controlled Substances Act, such as marijuana, are excluded from coverage,” that language would likely provide adequate notice to the insured of the scope of coverage and is less likely to be ambiguous.¹¹

In order to provide certainty to insurers and insureds, property and casualty insurance policies that would otherwise cover marijuana items or activities should explicitly state whether those risks are covered or excluded. Insurers also must provide sufficient information about the extent of coverage to insureds prior to purchase.

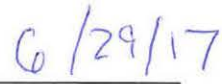
Implementation Dates

In order to allow insurers sufficient time to review, consider, and implement the guidance in this bulletin, compliance deadlines will be phased in over the next 12 months. In order to exclude loss, damage, or liability associated with marijuana items and marijuana activities:

- Policies issued or renewed 90 days after the issuance of this bulletin must contain language in the policy or be accompanied by a notice to the insured explicitly stating the extent to which marijuana items and activities are excluded.
- Policies issued or renewed 12 months after the issuance of this bulletin must contain language in the policy explicitly stating the extent to which marijuana items and activities are excluded.



TK Keen
Deputy Administrator
Division of Financial Regulation



Date

¹¹ This language is provided as an example. Insurers are free to use any exclusionary language that provides policy holders with adequate notice of the scope of coverage, consistent with the guidance provided in this bulletin.



Report to Agency on Public Comment Period

Date: May 1, 2017

To: Department of Consumer and Business Services

From: Alex Cheng, Senior Policy Analyst

Subject: Oregon Division of Financial Regulation Proposed Bulletin on Coverage of Marijuana Items and Activities 2017-4

Comment Period Start: December 6, 2016
Comment Period End: February 13, 2017

Background

Property and casualty insurance policies commonly include public policy clauses or exclusions for “illegal substances” or “illegal activities.” Because the production, processing, sale, and use of medical and recreational marijuana are legal in Oregon but are prohibited by federal law, general exclusionary language may not be sufficient to clearly define what is covered in a policy.

Conflicts between state and federal law may be a source of confusion in some property and casualty insurance policies that contain general public policy clauses or exclusions for illegal substances. The Division of Financial Regulation (DFR) developed Bulletin DFR 2017-4 to promote clarity between insurers and insureds when it comes to policies that may cover losses, damage, or liability associated with marijuana items and marijuana activities.

Summary of Written Comments

DFR received three comment letters from insurance industry representatives: One from the American Association of Insurance Services (AAIS); one from Lana Butterfield, a lobbyist for Professional Insurance Agents of Oregon and Idaho; and a joint letter from the American Insurance Association (AIA), Property Casualty Insurers Association of America (PCI) and the National Association of Mutual Insurance Companies (NAMIC).

AAIS disputed the need for the proposed bulletin and asserted that general public policy clauses, such as exclusions for “illegal activity,” is sufficient to notify consumers of the extent of their coverage. The comment letter stated that because the majority of policy holders understand that marijuana items and marijuana activities are illegal under federal law, that they would presume those risks to be excluded. AAIS recommended that instead of requiring policy forms to list the specific risks excluded from the policy, that DFR draft a disclaimer explaining the limits of the

policy's coverage and require insurers provide that disclaimer to policy holders. AAIS requested further clarification on the scope of the bulletin and a delayed compliance date.

Ms. Butterfield questioned whether the bulletin would place additional burdens on insurance agents. The comment letter also requested that different guidelines be provided for property policies that may have different types of forms.

The joint comment letter from AIA, PCI, and NAMIC requested that DFR wait until conflicts between state and federal law with regards to marijuana are resolved before issuing the bulletin. The comment letter expressed concern that requiring "certain illegal activity" be specifically enumerated in an insurance policy is legally tenuous, impractical, and likely to lead to consumer confusion. The proposed bulletin provides an example of exclusionary language specific enough to notify consumers that marijuana may be excluded from coverage. The comment letter recommended alternative language for the example and that the final bulletin emphasizes that insurers need not adopt the example language word for word. Finally, the comment letter recommended an implementation period to allow insurers time to adopt new language in their forms.

Discussion

After fully considering all comments received, DFR staff finds that a bulletin addressing exclusionary language for marijuana items and activities is necessary and appropriate at this time. The division has received numerous inquiries and complaints from policy holders and agents about this issue, and courts across the country have handed down conflicting rulings.¹ Additional specificity in exclusionary language would help avoid confusion for policy holders and unnecessary litigation risk for insurers.

Waiting until conflicts in state and federal law are resolved to issue a final bulletin would not be practical. The conflict in state and federal law is the source of the confusion, and there is no certainty as to when the conflict would be resolved. Clarity in exclusionary language with regards to marijuana is needed at this time.

DFR staff finds that implementing the guidance in the proposed bulletin would not be overly burdensome to insurers. The guidance does not prohibit the use of public policy clauses in general, nor does it prohibit insurers from excluding illegal activity when the legal status of those activities is relatively clear. Marijuana items and activities are a unique case, because of the conflict in state and federal law. Prior to the issuance of the proposed bulletin, DFR had already received form filings that proactively clarified the coverage status of marijuana items and activities. DFR staff finds that adoption of this best practice is in the public interest.

DFR staff finds that requiring insurers to use a division-drafted disclaimer would be overly prescriptive. Property and casualty policies provide a wide range of coverages and exclusion, and the division is not requiring that insurers provide any particular type of coverage. The final bulletin provides an example of exclusionary language for marijuana that would provide

¹ See e.g., *The Green Earth Wellness Center, LLC v. Attain Specialty Insurance Co.*, 163 F.Supp.3d 821, 832 (D. Co. 2016); *Tracy v. USAA Casualty Ins. Co.*, 2012 WL 928166 (D. HI., 2012).

adequate specificity to policy holders, but also makes clear that insurers are free to use language tailored to the coverage provided in individual policies.

The proposed bulletin stated that the guidance would apply to property and casualty policies that could potentially cover marijuana items and activities. The final bulletin clarifies that the guidance applies to policies with terms that would otherwise cover those risks if they were permitted under both state and federal law. In other words, a policy may not rely solely on the legal status of marijuana under federal law to identify an exclusion. In contrast, many insurance policies would not cover marijuana items or activities regardless of its legal status. For example, a property insurance policy which covers only specifically enumerated items need not address its applicability to marijuana.

The final bulletin does not change the duties and responsibilities of agents. Agents are required to disclose exclusions to the same extent as they were prior to the issuance of the final bulletin.

DFR staff acknowledges that insurers will require time to amend policy forms. The final bulletin provides a graduated implementation period, which phases in compliance over the next 12 months. Policies issued or renewed 90 days after the issuance of the final bulletin must contain language in the policy or be accompanied by a notice to the insured explicitly stating the extent to which marijuana items and activities are excluded. Policies issued or renewed 12 months after the issuance of the final bulletin must contain language in the policy explicitly stating the extent to which marijuana items and activities are excluded.

Summary

After fully considering the comments received, DFR staff proposes to modify the bulletin consistent with the following:

- On page 2 of the proposed bulletin, clarify that the guidance does not apply to medical services to be provided for compensable injuries under the Workers' Compensation Law;
- On page 2 of the proposed bulletin, clarify that the guidance only applies to policies with terms that would otherwise cover marijuana items or activities and that policy language which relies solely on the legal status of marijuana under federal law to identify an exclusion is insufficient;
- On page 2 of the proposed bulletin, adopt, in part, language recommended by AIA, PCI, and NAMIC for the example of adequate exclusionary language for marijuana items and activities;
- On page 3 of the proposed bulletin, provide additional emphasis that the example exclusionary language is not mandatory; and
- On page 3 of the proposed bulletin, adopt a graduated implementation period of the next 12 months.



Alex Cheng
Senior Policy Advisor

This Summary and Recommendation are reviewed and adopted.

Signed this 29th day of June, 2017.

Department of Consumer and Business Services

A handwritten signature in blue ink, appearing to read 'TK Keen', written over a horizontal line.

TK Keen, Deputy Administrator
Oregon Division of Financial Regulation