



December 10, 2021  
10:30 AM – 11:45 AM

**Session 203 | Risky Business: Litigation Challenges and Insurance Solutions for the Cannabis Industry**

As of June 2021, the cannabis industry continues to experience rapid growth as 36 states have legalized the use of medical marijuana while 18 states have enacted legislation to regulate cannabis for adult use. Many of these products, however, remain unlawful at the federal level. Against this backdrop of ambiguity, the marketplace continues to rapidly advance and evolve and cannabis businesses are subject to risks of tort and product liability claims, and even professional liability claims unique to the industry. This panel will examine recent litigation that highlights the issues facing the cannabis/CBD/hemp industry, as it grapples with extraordinary growth, evolution, innovation, and uncertainty.

This program will also help attendees to better understand both the liability and the property/casualty insurance coverage available for their clients in the cannabis space, identify potential gaps in coverage, and secure coverage for their clients to allow them to manage the industry's unique risks.

**Moderator:**

Richard Y. Cheng, *Weaver Johnston Nelson, PLLC*

**Speakers:**

Sahar Ayinehsazian, *Senior Associate Attorney, Vicente Sederberg*

Isaac Bock, *Managing Director, AlphaRoot*

Peter Roldan, *Partner, Emergent LLP*

Olivia Truong, *Member, Melchiode Marks King LLC*

## **Materials**

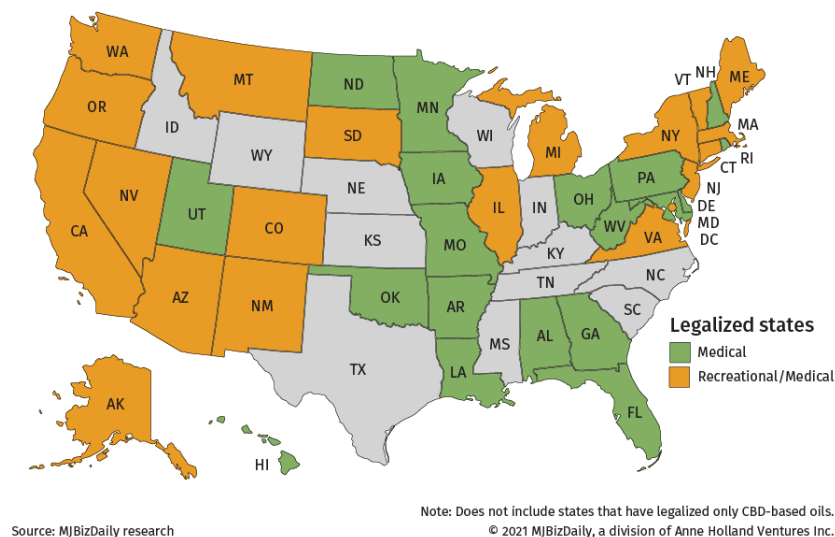
1. *Risky Business: Litigation Challenges and Insurance Solutions for the Cannabis Industry* by Olivia Y. Truong, Melchiode Marks King LLC
2. THC ( $\Delta^9$ -Tetrahydrocannabinol or Delta-9-Tetrahydrocannabinol) Proposition 65 fact sheet, Office of Environmental Health Hazard Assessment
3. Cannabis (Marijuana) Smoke Proposition 65 fact sheet, Office of Environmental Health Hazard Assessment
4. Public D&O Insurance Overview

# 2021 NAPABA CONVENTION together

## **Risky Business: Litigation Challenges and Insurance Solutions for the Cannabis Industry**

By Olivia Y. Truong, Melchiode Marks King LLC

As of September 2021, the medical use of cannabis has been legalized in 38 states and the District of Columbia, while the recreational or adult-use of cannabis is legal in D.C. and 19 states. However, the U.S. Drug Enforcement Administration (DEA) still classifies cannabis as a Schedule 1 drug, making the use and sale of marijuana illegal at the federal level. Against this backdrop of ambiguity, the cannabis industry and marketplace continue to rapidly advance and evolve, and insurance is needed to address the associated risks.



### **I. Brief Overview of Current Legal Landscape of Cannabis**

Cannabis regulations vary from state to state, such that companies operating in multiple jurisdictions must comply with individual state regulations. As more and more states legalize the recreational and medical use of cannabis, federal cannabis reform is becoming essentially urgent.

On July 14, 2021, Senate Majority Leader Chuck Schumer (D-NY) proposed the *Cannabis Administration and Opportunity Act*.<sup>1</sup> As originally drafted, the proposed legislation would de-

<sup>1</sup> A detailed summary of the proposed bill can be found at:  
<https://www.democrats.senate.gov/imo/media/doc/CAOA%20Detailed%20Summary%20-.pdf>

schedule cannabis and remove it from the Controlled Substances Act, give states control over local marijuana policies, permit movement of cannabis products through the channels of interstate commerce, expunge marijuana convictions, remove collateral consequences, and tax the sale of cannabis products to fund equity programs. The deadline for public comment expired on September 1, 2021, and bill drafters will revise the proposed bill based on public comments received. The revised bill will eventually be sent to committee for continued revision and debate.

Also, earlier this year in March 2021, a bipartisan group of U.S. Senators introduced the *Clarifying Law Around Insurance of Marijuana Act* (CLAIM Act), the purpose of which is “to create a safe harbor for insurers engaging in the business of insurance in connection with a cannabis-related legitimate business[.]” On one hand, in view of its illegal status under federal law, it is understandable why insurers are reluctant to insure cannabis businesses. On the other hand, the inability to obtain insurance may limit or discourage individuals or entities from engaging in cannabis businesses. In some states, a cannabis business is required to obtain insurance (e.g., coverage for general liability, property, or worker’s compensation) in order to secure licensing to even operate. The CLAIM Act will:

- Prohibit penalizing or discouraging an insurer from providing coverage to a state-sanctioned and regulated cannabis business, or an associated business (e.g., landlord renting to a legal cannabis business);
- Prohibit the termination or limitation of an insurer’s policies solely because the insurer has engaged in the business of insurance in connection with a cannabis-related business;
- Prevent recommending, incentivizing, or encouraging an insurer not to engage in the business of insurance in connection with a policyholder, or downgrade or cancel the insurance offered to a cannabis or cannabis-related business;
- Prohibit the federal government from taking any adverse or corrective supervisory action on a policy issued to an owner or operator of a cannabis-related business, or real estate or equipment that is leased to a cannabis-related business, solely because the owner or operator is engaged with a cannabis or cannabis-related business; and
- Protect employees of an insurer from any liability solely for engaging in the business of insurance with a cannabis or cannabis-related business.

The proposed CLAIM Act is intended to encourage insurance for members of the cannabis industry, who operate in compliance with state and local laws.

## **II. Product Distinction: Cannabis vs. Hemp vs. CBD**

For insurers that operate in the cannabis space, it is important to understand the distinction between cannabis/marijuana, hemp, and cannabidiol (CBD).

Cannabis, also known as marijuana, is a psychoactive drug that contains tetrahydrocannabinol (THC). It is currently classified as a Schedule 1 drug by the U.S. Drug Enforcement Administration, which is a class of drugs or substance with the following characteristics:

- High potential for abuse;
- No currently-accepted medical treatment use in the U.S.; and
- Lacks accepted safety for use under medical supervision.

Hemp is distinguishable. In December 2018, the Agriculture Improvement Act of 2018 (popularly known as the 2018 Farm Bill) was signed into law. The 2018 Farm Bill reclassified hemp and legalized growing industrial hemp. Hemp is defined as cannabis with less than 0.3% THC. Commercially, hemp seeds are crushed and used in beauty products, such as oils and food. Hemp products can be shipped and sold across the country.

Cannabidiol (CBD) is also distinguishable. CBD is a chemical found in cannabis plants; it is one of 113 identified cannabinoids in cannabis plants. Unlike THC, CBD does not create a “high” and has been found to be helpful in managing pain, reducing inflammation, and lowering anxiety.

## **III. Products Liability Risks**

There are a variety of products available: flower, concentrates, vapor pens, pre-rolls, topicals, tinctures, capsules, edibles, and beverages. However, there is no uniformity in how products are manufactured, tested, packaged, or marketed. Over the past several years, the U.S. Food and Drug Administration (FDA) has issued warning letters and consumer updates, which provide informal guidance on the production and sale of cannabis products. But, the FDA has yet to promulgate any formal rule or regulation governing such products. For example, here is a warning letter sent to a CBD retailer in March 2021:

\* \* \*

This letter is to advise you that the U.S. Food and Drug Administration (FDA) reviewed your website . . . and has determined that you take orders there for various human and animal products, all of which you promote as products containing cannabidiol (CBD). . . . In addition, the FDA has observed that your website offers CBD-containing products for sale in the United States and that these products are intended to mitigate, prevent, treat, diagnose, or cure COVID-19<sup>1</sup> in people. The claims on your website and social media websites establish that all strengths and varieties of your “Balance CBD Drops,”<sup>2</sup> “Relief CBD Drops,”<sup>3</sup> “Relax CBD Drops,”<sup>4</sup> and “Relief CBD Salve”<sup>5</sup> (hereinafter all referred to as “your CBD-containing products for humans”) are unapproved new drugs sold in violation of sections 505(a) and 301(d) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act), 21 U.S.C. 355(a) and 331(d). Furthermore, your CBD-containing products for humans are misbranded drugs under section 502(f)(1) of the FD&C Act, 21 U.S.C. 352(f)(1). In addition, your “Pet CBD Drops”<sup>6</sup> is an unapproved new animal drug that is unsafe under section 512(a) of the FD&C Act, 21 U.S.C. 360b(a), and is adulterated under section 501(a)(5) of the FD&C Act, 21 U.S.C. 351(a)(5).

\* \* \*

Therefore, FDA is taking urgent measures to protect consumers from certain products that, without approval or authorization by FDA, claim to mitigate, prevent, treat, diagnose, or cure COVID-19 in people. As described below, you sell products that are intended to mitigate, prevent, treat, diagnose, or cure COVID-19 in people. We request that you take immediate action to cease the sale of any unapproved and unauthorized products for the mitigation, prevention, treatment, diagnosis, or cure of COVID-19.

As explained further below, introducing or delivering these products for introduction into interstate commerce violates the FD&C Act.

\* \* \*

This letter notifies you of our concerns and provides you an opportunity to address them. Failure to adequately address this matter may result in legal action including, without limitation, seizure and injunction.

Please notify FDA in writing, within 15 working days of receipt of this letter, of the specific steps you have taken to address any violations. Include an explanation of each step being taken to prevent the recurrence of violations, as well as copies of related documentation. If you cannot complete corrective actions within 15 working days, state the reason for the delay and the time within which you will do so. If you believe that your products are not in violation of the FD&C Act, include your reasoning and any supporting information for our consideration.<sup>2</sup>

\* \* \*

With legalization, there comes liability. There are obviously different risks for different players along the supply chain (dispensary, cultivator, delivery, testing labs, distributor). In the cannabis context, type of products liability claims can range from design defects, manufacturing defects (contamination/recalls), or failure to warn (inadequate warning labels or marketing defects, such as non-compliant websites or overselling benefits, as seen in the above warning letter).

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<sup>2</sup> <https://www.fda.gov/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/cannafyl-611957-03012021>.

The first cannabis products liability lawsuit was filed in Colorado in 2015. *Flores v. Livwell, Inc.*, District Court, Denver County, Case No. 2015-CV-33528. The plaintiffs, two marijuana users, filed suit against a cannabis grower and dispensary operator for allegedly using an unapproved fungicide (Eagle 20, a petroleum-based fungicide) on their marijuana plants. The plaintiffs specifically alleged that LivWell, Inc. sold marijuana sprayed with Eagle 20 to medical and recreational customers without adequately warning consumers of the risks associated with the fungicide. Interestingly, neither plaintiff alleges that they were sickened from ingesting marijuana purchased from LivWell, or that they sustained any bodily injury. They only claimed that they overpaid for a product with a manufacturing defect. The case was ultimately dismissed for lack of standing in 2016 because the plaintiffs did not suffer damages.

Although *Flores* was dismissed, it made apparent the fact that marijuana products can be sprayed with pesticides like any other plant, but without any oversight by the U.S. Environmental Protection Agency (EPA). While some legalized states have since adopted EPA regulations for cannabis production, the lack of federal oversight could also lead to lack of enforcement by state agencies.

Failure to warn claims in a variety of contexts have also become prevalently litigated. For example, in *DZE Corp. v. Vickers*, 299 So. 3d 538, 539 (Fla. Dist. Ct. App. 2020), *reh'g denied* (July 27, 2020), *review denied*, No. SC20-1280, 2021 WL 1426782 (Fla. Apr. 15, 2021), the family and estate for deceased motorists brought wrongful death action against a manufacturer of a highly dangerous chemical marketed as “potpourri,” for deaths resulting from car crash in which the oncoming driver had voluntarily consumed potpourri, become intoxicated, and drove at high rate of speed. DZE Corporation manufactured products containing synthetic marijuana known as “spice.” The potpourri was labeled “Not for human consumption,” and it was undisputed that the product was dangerous if consumed. The jury returned a \$37 million verdict against the manufacturer; however, the verdict was reversed on appeal in the manufacturer’s favor, reasoning:

Any conclusion that DZE’s failure to warn was the proximate legal cause of the devastating crash that occurred requires speculation that DZE could foresee [the oncoming driver] would: 1) disregard the warning on the product and consume the potpourri; 2) become voluntarily intoxicated; and 3) drive recklessly in violation of the state’s criminal laws and cause an accident.

*Id.* at 541.

Therefore, in some states, health warning labels are now required for all cannabis products. Sample warnings include:

- “This product is infused with marijuana.”
- “Keep out of the reach of children.”
- “There may be health risks associated with the consumption of this product.”
- “This product was produced without regulatory oversight for health, safety, or efficacy.”
- “The intoxicating effects of this product may be delayed by two or more hours.”
- “There may be additional health risks associated with the consumption of this product for women who are pregnant, breastfeeding, or planning on becoming pregnant.”
- “Do not operate a motor vehicle or heavy machinery while using marijuana.”

Additionally, here are some of the “universal” symbols required and used in recreational marijuana programs across the country:<sup>3</sup>



With increasing marijuana legalization, products liability claims in the cannabis industry are inevitable.

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<sup>3</sup> <https://compoundinterests.net/blog/the-seven-universal-symbols-for-cannabis-products>.



#### **IV. Insurance Coverage Issues Relating to Cannabis**

In September 2019, Insurance Services Office, Inc. (ISO) released five new cannabis-related endorsements to the businessowner policy form (BOP). Two are property exclusions and three are liability coverage part exclusions:

- BP 15 30 – Cannabis Property Exclusion
- BP 15 31 – Cannabis Property Exclusion with Hemp Exception
- BP 15 32 – Cannabis Liability Endorsement
- BP 15 33 – Cannabis Liability Exclusion with Hemp Exception
- BP 15 34 – Cannabis Liability Exclusion with Hemp Exception and Lessors Risk

Although all five endorsements would exclude coverage for either “cannabis property” or “cannabis liabilities,” three include a carve-out that ostensibly affords coverage for losses or claims involving “hemp.” However, not only is “hemp” not defined within the endorsements, but the hemp exception applies only when industrial hemp production is allowed by state law.

##### **A. Broad Definition of Cannabis**

All five endorsements contain the following definition of “cannabis”:

"Cannabis":

1. Means:

Any good or product that consists of or contains any amount of Tetrahydrocannabinol (THC) or any other cannabinoid, regardless of whether any such THC or cannabinoid is natural or synthetic.

2. Paragraph \_\_\_\_\_ above includes, but is not limited to, any of the following containing such THC or cannabinoid:

- a. Any plant of the genus Cannabis L., or any part thereof, such as seeds, stems, flowers, stalks and roots; or
- b. Any compound, byproduct, extract, derivative, mixture or combination, such as:

(1) Resin, oil or wax;

(2) Hash or hemp; or

(3) Infused liquid or edible cannabis;

whether or not derived from any plant or part of any plant set forth in Paragraph \_\_\_\_\_.

The definition of “cannabis” broadly includes “**any good or product** that consists of or contains **any amount of** Tetrahydrocannabinol (THC) or any other cannabinoid.” This is problematic because hemp, which is legal and is essentially cannabis with less than 0.3% THC, would fall within the definition of “cannabis” for purposes of these endorsements. Thus, cannabis (federally illegal) and hemp (federally legal) share equal footing and are excluded from coverage under these endorsements—unless there is an exception to that exclusion.

#### B. Cannabis Property Exclusions

Historically, cannabis is considered “Property Not Covered” as “contraband, or property in the course of illegal transportation or trade”:

#### **2. Property Not Covered**

Covered Property does not include:

- a. Accounts, bills, currency, deeds, food stamps or other evidences of debt, money, notes or securities. Lottery tickets held for sale are not securities;
- b. Animals, unless owned by others and boarded by you, or if owned by you, only as "stock" while inside of buildings;
- c. Automobiles held for sale;
- d. Bridges, roadways, walks, patios or other paved surfaces;
- e. Contraband, or property in the course of illegal transportation or trade;

However, with cannabis being declared legal in a growing number of states, applying the foregoing policy language becomes challenging because cannabis may no longer constitute “contraband.”

In any attempt to simply or clarify this potential coverage issue, the two endorsements that exclude coverage for property-related cannabis losses—BP 15 30 (Cannabis Property Exclusion) and BP 15 31 (Cannabis Property Exclusion with Hemp Exception)—specifically add “cannabis” to the enumerated list of “Property Not Covered.” Thus, direct damage to “cannabis” and business income/extra expense losses (expenses) arising from direct damage to “cannabis” are specifically excluded pursuant to these two “cannabis property” endorsements.

#### C. Cannabis Liability Exclusions

Likewise, the three “cannabis liability” exclusion endorsements—BP 15 32 (Cannabis Liability Endorsement), BP 15 33 (Cannabis Liability Exclusion with Hemp Exception), and BP 15 34 (Cannabis Liability Exclusion with Hemp Exception and Lessors Risk)—are much more

specific than the general coverage form. They broadly exclude from coverage any bodily injury, property damage, or personal and advertising injury arising from multiple cannabis-related activities that can be threatened, alleged, actual, or suspected. These endorsements are broad and totally exclude cannabis-related losses, as well as excluding “property damage” to “cannabis” owned by a third-party.

There are two built-in exceptions in the “absolute” exclusion—BP 15 32 (Cannabis Liability Exclusion):

- “Bodily injury” or “property damage” attributable to and caused by an insured or a person adversely affected by the ingestion or absorption of cannabis for whom the named insured is legally responsible, but only if the cannabis product was not furnished, served or sold to the insured.
- The “personal and advertising injury” exclusion does not apply to false arrest, detention or imprisonment; or the wrongful eviction from, wrongful entry into, or invasion of the right or private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor.

D. Hemp or Lessor’s Risk Exceptions

Two endorsements contain a hemp exception—BP 15 31 (Cannabis Property Exclusion with Hemp Exception) and BP 15 33 (Cannabis Liability Exclusion with Hemp Exception). The last endorsement—BP 15 34 (Cannabis Liability Exclusion with Hemp Exception and Lessor’s Risk)—adds an exception for lessors.

The “Cannabis Property Exclusion with Hemp Exception” (BP 15 31) specifically provides that the definition of “cannabis” does not apply to “goods or products containing or derived from hemp, including, but not limited to:

- a. Seeds;
- b. Food;
- c. Clothing;
- d. Lotions, oils or extracts;
- e. Building materials; or
- f. Paper.”

As mentioned above, if industrial hemp production or cultivation is allowed under state law, then direct loss to and business income/extra expenses losses arising from direct damage to hemp-related property are covered by the BOP.

For “Cannabis Liability Exclusion with Hemp Exception” (BP 15 33), the hemp exception reads as follows:

- B. The exclusion in Paragraph \_\_\_\_ does not apply to:
1. "Bodily injury", "property damage" or "personal and advertising injury" arising out of goods or products containing or derived from hemp, including, but not limited to:
    - a. Seeds;
    - b. Food;
    - c. Clothing;
    - d. Lotions, oils or extracts;
    - e. Building materials; or
    - f. Paper.
  2. "Property damage" to goods or products described in Paragraph \_\_\_\_ above.

Similarly, the foregoing endorsement caveats that the state must allow hemp production or cultivation for the exception to apply.

The “Cannabis Liability Exclusion with Hemp Exception and Lessor’s Risk” (BP 15 34) endorsement adds a lessor’s risk exception that reads follows:

- B. The exclusion in Paragraph \_\_\_\_ does not apply to:
3. "Bodily injury", "property damage" or "personal and advertising injury" arising out of the ownership, maintenance or use of a premises leased to others by you;

This endorsement allows a landlord/lessor to have liability protection for any liability assigned to the landlord/lessor resulting from cannabis-related activities of its tenant/lessee.



# THC

## ( $\Delta^9$ -Tetrahydrocannabinol or Delta-9-Tetrahydrocannabinol)

### Why am I being warned about exposure to THC?



- THC is on the [Proposition 65](#) list because exposure to this chemical during pregnancy may affect the development of the child.
- Some studies have found that when pregnant or lactating female laboratory animals were exposed to THC, it affected the brain, behavior, or learning ability of their offspring, and later in life, made their offspring more susceptible to drug addiction.
- Proposition 65 requires businesses to determine if they must provide a warning about significant exposure to [listed chemicals](#).

### What is THC?

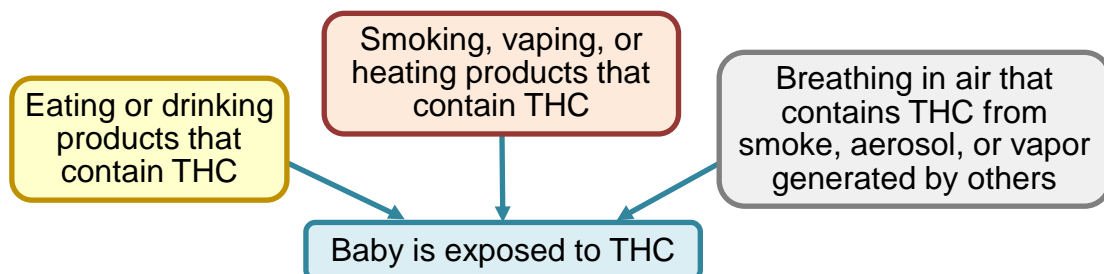
- THC is a chemical in cannabis (marijuana) plants and [cannabis smoke](#). It is the main psychoactive ingredient in cannabis, which means that it affects the mind and behavior.
- THC is present in cannabis concentrates known as THC extractions, informally called dabs, honey oil, budder, or wax.
- THC is also found in a wide range of other products, such as THC-containing vaping liquids, and edible cannabis-containing items, including candy and baked goods.

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### How does exposure to THC occur?

- You can be exposed to THC by smoking, vaping, heating, or consuming cannabis, or products that contain THC.
- You can also be exposed to THC when others around you smoke, vape, or heat some of these products.
- If you are pregnant or breastfeeding, and you use or are exposed to cannabis products that contain THC, your baby can be exposed to THC, too.

### If you are pregnant, you can expose your baby to THC by:



**How can I reduce my baby's exposure to THC?**

- ⊗ If you are pregnant or breastfeeding, do not use cannabis or other products that contain THC, and avoid spending time in places where others are smoking cannabis or using products that release THC into the air.

**For more information:****General Fact Sheets and Resources**

- US Department of Health and Human Services (HHS)  
Food and Drug Administration (FDA)
  - ▶ What You Should Know About Using Cannabis, Including CBD, When Pregnant or Breastfeeding  
<https://www.fda.gov/consumers/consumer-updates/what-you-should-know-about-using-cannabis-including-cbd-when-pregnant-or-breastfeeding>
- Office of the Surgeon General (OSG)
  - ▶ U.S. Surgeon General's Advisory: Marijuana Use and the Developing Brain  
<https://www.hhs.gov/surgeongeneral/reports-and-publications/addiction-and-substance-misuse/advisory-on-marijuana-use-and-developing-brain/index.html>
- Substance Abuse and Mental Health Services Administration (SAMHSA)
  - ▶ Learn about Marijuana Risks. Marijuana and Pregnancy  
<https://www.samhsa.gov/marijuana/marijuana-pregnancy>
- California Department of Public Health (CDPH)
  - ▶ Pregnant and Breastfeeding Women  
<https://www.cdph.ca.gov/Programs/DO/letstalkcannabis/Pages/pregnantbreastfeedingwomen.aspx>
- California Environmental Protection Agency (CalEPA)  
Office of Environmental Health Hazard Assessment (OEHHA)
  - ▶ Cannabis (Marijuana) Smoke  
<https://www.p65warnings.ca.gov/fact-sheets/cannabis-marijuana-smoke>

**Scientific Information about THC**

- California Environmental Protection Agency (CalEPA)  
Office of Environmental Health Hazard Assessment (OEHHA)
  - ▶ Evidence on the Developmental Toxicity of Cannabis (Marijuana) Smoke and  $\Delta^9$ -THC  
<https://www.p65warnings.ca.gov/fact-sheets/cannabis-marijuana-smoke>

**Proposition 65**

- California Environmental Protection Agency (CalEPA)  
Office of Environmental Health Hazard Assessment (OEHHA)
  - ▶ Proposition 65: Background  
<https://www.p65warnings.ca.gov/faq>
  - ▶ Proposition 65: The List of Chemicals  
<https://www.p65warnings.ca.gov/chemicals>
  - ▶ Proposition 65: Fact Sheets  
<https://www.p65warnings.ca.gov/fact-sheets>



## Cannabis (Marijuana) Smoke

### Why am I being warned about exposure to cannabis smoke?



- Cannabis (marijuana) smoke is on the [Proposition 65](#) list because it can cause cancer. Exposure to cannabis smoke may increase the risk of cancer.
- Cannabis smoke is also on the Proposition 65 list because if a pregnant woman smokes cannabis, this can affect the development of the child. For example, this may affect the child's birthweight, memory, and attention.
- Proposition 65 requires businesses to determine if they must provide a warning about significant exposure to [listed chemicals](#).

**Cannabis smoke** is formed when the dried leaves, flowers, stems, seeds, and resins of cannabis plants are burned.

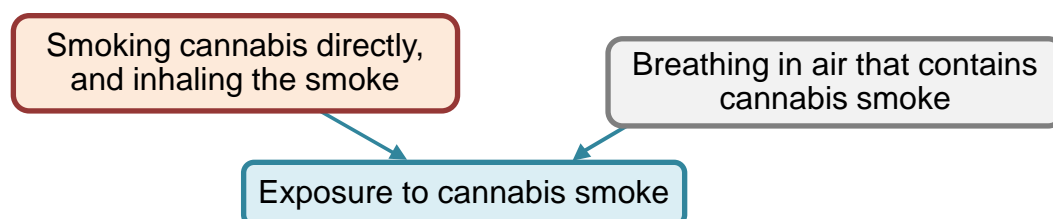


### CANNABIS SMOKE

- Cannabis smoke contains several thousand different chemicals, some of which are on the Proposition 65 list. These include:
  - Chemicals that cause cancer, such as [arsenic](#), [benzene](#), benzo[a]pyrene, [cadmium](#), [hexavalent chromium](#), [formaldehyde](#), [lead](#), and nickel.
  - Chemicals that can affect the baby when the mother is exposed to them during pregnancy, such as 1,3-butadiene, [cadmium](#), [carbon monoxide](#), [delta-9-tetrahydrocannabinol \(THC\)](#), hydrogen cyanide, [lead](#), [mercury](#), methanol, and toluene.
- Many of these chemicals are also in [tobacco smoke](#), which is on the Proposition 65 list as causing cancer, birth defects, and other reproductive harm.

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### How does exposure to cannabis smoke occur?



- If you are pregnant or breastfeeding, and you smoke cannabis, your baby is exposed to many of the harmful chemicals in cannabis smoke.

**How can I reduce my exposure and my family's exposure to cannabis smoke?**

- ❌ If you are pregnant or breastfeeding, do not smoke cannabis.
- ❌ Avoid spending long periods of time in places where cannabis smoke is present, especially if you are pregnant.
- ❌ Avoid smoking cannabis around children, and do not allow children to spend time in places where cannabis smoke is present.

**For more information:****General Fact Sheets and Resources**

- California Department of Public Health (CDPH)
  - ▶ Let's Talk Cannabis  
<https://www.cdph.ca.gov/Programs/DO/letstalkcannabis/Pages/LetsTalkCannabis.aspx>
  - ▶ Pregnant and Breastfeeding Women  
<https://www.cdph.ca.gov/Programs/DO/letstalkcannabis/Pages/pregnantbreastfeedingwomen.aspx>
- US Department of Health and Human Services (HHS)  
Food and Drug Administration (FDA)
  - ▶ What You Should Know About Using Cannabis, Including CBD, When Pregnant or Breastfeeding  
<https://www.fda.gov/consumers/consumer-updates/what-you-should-know-about-using-cannabis-including-cbd-when-pregnant-or-breastfeeding>
- Centers for Disease Control and Prevention (CDC)
  - ▶ Marijuana and Public Health. What are the Health Effects of Marijuana  
<https://www.cdc.gov/marijuana/index.htm>
  - ▶ What You Need To Know About Marijuana Use and Pregnancy  
<https://www.cdc.gov/marijuana/factsheets/pregnancy.htm>
- Substance Abuse and Mental Health Services Administration (SAMHSA)
  - ▶ Marijuana and Pregnancy  
<https://www.samhsa.gov/marijuana/marijuana-pregnancy>
- California Environmental Protection Agency (CalEPA)  
Office of Environmental Health Hazard Assessment (OEHHA)
  - ▶ THC ( $\Delta^9$ -Tetrahydrocannabinol or Delta-9-Tetrahydrocannabinol)  
<https://www.p65warnings.ca.gov/fact-sheets/thc>

**Scientific Information on Cannabis Smoke**

- California Environmental Protection Agency (CalEPA)  
Office of Environmental Health Hazard Assessment (OEHHA)
  - ▶ Evidence on the Carcinogenicity of Marijuana Smoke  
<http://oehha.ca.gov/media/downloads/proposition-65/chemicals/finalmjsmokehid.pdf>
  - ▶ Evidence on the Developmental Toxicity of Cannabis (Marijuana) Smoke and  $\Delta^9$ -THC  
<https://oehha.ca.gov/media/downloads/cnr/cannabisdarthid100419.pdf>



**Proposition 65**

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  - ▶ Proposition 65: Fact Sheets  
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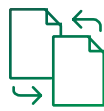
# Public D&O Insurance

## Coverage Overview

D&O risks now extend well beyond traditional claims for which D&O cover was originally designed. Over the last 18 months cannabis Directors and officers have been involved with suits ranging from regulatory issues to material misrepresentations during the fundraising process. Our public D&O insurance programs protect against:



Shareholder  
Complaints



Competitor  
Claims



Derivative  
suits



Securities-related  
claims



Ownership  
disputes



Regulatory  
Investigations

## Policy Features

Increased regulatory scrutiny, public demands for individual accountability, more frequent shareholder litigation, rising defense and settlement costs, and expanding bankruptcy exposure all contribute to a very challenging environment for both public and private company executives. The typical D&O programs we put together include coverage for:

- Coverage for defense costs as well as damages, judgments, settlements, etc.
- Coverage for both individual directors as well as the entity itself
- Coverage for both indemnifiable and non-indemnifiable claims as well as Securities Claims
- \$0 retention for non-indemnifiable (Side A) claims
- Broad investigation and & inquiry coverage
- Worldwide Coverage Territory
- Bankruptcy or Insolvency Coverage
- Coverage arising from M&A disputes
- Automatic coverage for newly acquired subsidiaries
- No insurer consent needed for settlements below retention
- Panel counsel with pre-approved hourly rates

## Enhancements Available

Every company faces unique risks, so we're can structure your policy to fill the gaps in coverage with numerous market-leading enhancements:

Additional Dedicated Individual Limit	✓
Expanded Dropdown Coverage	✓
Broader Fines and Penalties Coverage	✓
Crisis Management Costs	✓
Pre-Claim Inquiry / Document Production Costs	✓
Shadow Director and Outside Director Liability Coverage	✓
Employed Lawyer Professional Liability Extension	✓
Whistleblower Coverage	✓
Extradition Costs	✓
Personal Reputation Costs	✓

## About AlphaRoot

AlphaRoot is a full services tech-enabled insurance brokerage, leveraging technology to provide whiteglove insurance broking services to the Cannabis Industry. Our goal is to educate the cannabis companies about the risks associated with their business and take the stress out of buying insurance. We partner with the leading cannabis insurance carriers to craft tailored risk management programs that allow you to focus on the things that matter, growing your business

## Our Partners



XL Insurance  
Reinsurance



LLOYD'S

RELM

## Contact Us



alpharoot.co



info@alpharoot.com



+1 646 854 1093



New York, NY

SESSION NAME:

**Risky Business: Litigation  
Challenges and Insurance  
Solutions for the Cannabis  
Industry**





## Speakers

- Sahar Ayinehsazian, Senior Associate Attorney, Vicente Sederberg
- Isaac Bock, Managing Director, AlphaRoot
- Peter Roldan, Partner, Emergent LLP
- Olivia Truong, Member, Melchiode Marks King LLC

## Moderator

- Richard Y. Cheng, Member, Weaver Johnson & Nelson, PLLC



# Sahar Ayinehsazian

Vicente Sederberg  
Los Angeles, California



- Practice focuses on cannabis banking, corporate transactions, and regulations
- Established and co-leads Vicente Sederberg's Banking and Financial Services Department
- As a member of the National Cannabis Industry Association's Banking Access Committee, Sahar also works on strategy and educational advocacy to enable state-licensed businesses to obtain accounts at depository institutions

# Isaac Bock

AlphaRoot

New York, NY



- Managing Director at Alpha Root, a tech enabled insurance brokerage that focuses specifically in the cannabis sector
- Helped build specialized programs for companies ranging from small brand only operations through some of the largest MSO's in the industry
- Prior to working at AlphaRoot, Isaac began his career working at Marsh & McLennan, before joining Founder Shield who is the parent company of AlphaRoot

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# Peter Roldan

Emergent LLP

San Francisco, California



- Represents policyholders in insurance coverage and insurance bad faith litigation arising out of claims under commercial and personal lines policies
- 18 years of experience as an insurance coverage litigator, including 9 years on the carrier side
- Practice focuses on coverage issues involving both third-party liability policies (commercial general liability, directors & officers, errors & omissions, and personal umbrella) and first-party property policies (commercial property and homeowners)

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# Olivia Truong

Melchiode Marks King LLC  
New Orleans, LA



- Litigates disputes in Louisiana, Mississippi, and Georgia, in areas of law, including insurance defense and coverage, professional liability (D&O, E&O, EPL), construction defect litigation, transportation and trucking litigation, and first-party property and contractual disputes
- Primarily represents and defends insurers in coverage disputes and bad faith litigation arising out of claims under commercial line policies

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# Richard Y. Cheng

Weaver Johnson & Nelson, PLLC  
Dallas, TX



- Practice focuses entirely on representing healthcare and cannabis businesses and investors with corporate transactions, regulatory assessments, compliance matters and administrative appeals
- Represents a broad base of cannabis related clients, including, private equity groups investing in the cannabis industry, physicians, medical marijuana dispensaries, seed developers, cultivators, processors, wholesalers, retailers, distribution centers and ancillary providers (e.g. testing labs, biomass brokerage firms, etc.) and marketers
- Teaches cannabis law as an adjunct faculty at UNT Dallas School of Law

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# Growing Cannabis Market

- 36 states have legalized the use of medical marijuana. 18 states have legalized cannabis for adult use.
- U.S. legal cannabis market had an estimated value of at least \$15 billion in 2020. Projected to grow to at least \$30 billion by 2022.
  - “Is Cannabis the Next Insurance Opportunity?”, *Property Casualty 360°*, January 6, 2021

# Federal Cannabis Reform

- Cannabis Administration and Opportunity Act
- Clarifying Law Around Insurance of Marijuana Act (CLAIM Act):
  - Prohibit penalizing or discouraging an insurer from providing coverage to a state-sanctioned and regulated cannabis business, or an associated business;
  - Prohibit the termination or limitation of an insurer's policies solely because the insurer has engaged in insuring a cannabis-related business;
  - Prevent recommending, incentivizing, or encouraging an insurer not to engage in the business of insurance in connection with a policyholder, or downgrade or cancel the insurance offered to a cannabis or cannabis-related business;
  - Prohibit the federal government from taking any adverse or corrective supervisory action on a policy issued to an owner or operator of a cannabis-related business, or real estate or equipment that is leased to a cannabis-related business; and
  - Protect employees of an insurer from any liability solely for engaging in the business of insurance with a cannabis or cannabis-related business.



# Industry Sectors

- Cultivation
- Extraction and Testing
- Manufacturing
- Retail
- Ancillary



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# Product Distinction: THC vs. Hemp vs. CBD

- Cannabis/Marijuana
  - Psychoactive drug that contains tetrahydrocannabinol (THC)
  - Classified as a Schedule 1 drug by the U.S. Drug Enforcement Administration
- Hemp
  - Legalized by 2018 Farm Bill
  - Defined as cannabis with less than 0.3% THC
- Cannabidiol (CBD)
  - Chemical found in cannabis plants
  - One of 113 cannabinoids found
  - Found to be helpful in managing pain, reducing inflammation, and lowering anxiety

# Products Liability Risks

- Variety of Products Available



- But, No Uniformity in Manufacturing, Testing, Packaging, Marketing



# With Legalization, There Comes Liability

- FDA Warning Letters

\* \* \*

This letter is to advise you that the U.S. Food and Drug Administration (FDA) reviewed your website . . . and has determined that you take orders there for various human and animal products, all of which you promote as products containing cannabidiol (CBD). . . . **In addition, the FDA has observed that your website offers CBD-containing products for sale in the United States and that these products are intended to mitigate, prevent, treat, diagnose, or cure COVID-19<sup>1</sup> in people.** The claims on your website and social media websites establish that all strengths and varieties of your “Balance CBD Drops,”<sup>2</sup> “Relief CBD Drops,”<sup>3</sup> “Relax CBD Drops,”<sup>4</sup> and “Relief CBD Salve”<sup>5</sup> (hereinafter all referred to as “your CBD-containing products for humans”) are unapproved new drugs sold in violation of sections 505(a) and 301(d) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act), 21 U.S.C. 355(a) and 331(d). Furthermore, your CBD-containing products for humans are misbranded drugs under section 502(f)(1) of the FD&C Act, 21 U.S.C. 352(f)(1). In addition, your “Pet CBD Drops”<sup>6</sup> is an unapproved new animal drug that is unsafe under section 512(a) of the FD&C Act, 21 U.S.C. 360b(a), and is adulterated under section 501(a)(5) of the FD&C Act, 21 U.S.C. 351(a)(5).

\* \* \*



# With Legalization, There Comes Liability

- *Flores v. LivWell, Inc.*, District Court, Denver County, Case No. 2015-CV-33528
  - Two marijuana users sued a cannabis grower/dispensary operator for using an unapproved petroleum-based fungicide (Eagle 20) on their marijuana plants.
  - The plaintiffs alleged that LivWell, Inc. failed to adequately warn consumers of the risks associated with the fungicide.
  - Dismissed due to lack of standing because the plaintiffs did not assert bodily injury or any sickness from ingesting marijuana from LivWell.

# With Legalization, There Comes Liability

- *DZE Corp. v. Vickers*, 299 So. 3d 538, 539 (Fla. Dist. Ct. App. 2020), *reh'g denied* (July 27, 2020), *review denied*, No. SC20-1280, 2021 WL 1426782 (Fla. Apr. 15, 2021)
  - Wrongful death action against manufacturer of a synthetic marijuana known as “spice,” marketed as “potpourri,” and labeled “not for human consumption.”
  - Jury verdict of \$34 million against manufacturer was reversed on appeal
  - “Any conclusion that [manufacturer’s] failure to warn was the proximate cause of the devastating crash . . . requires speculation that [manufacturer] could foresee [the adverse driver] would: 1) disregard the warning on the product and consume the potpourri; 2) become voluntarily intoxicated; and 3) drive recklessly in violation of the state’s criminal laws and cause an accident.”

# Warning Labels

- “Keep out of the reach of children.”
- “There may be health risks associated with the consumption of this product.”
- “This product was produced without regulatory oversight for health, safety, or efficacy.”
- “The intoxicating effects of this product may be delayed by two or more hours.”
- “Do not operate a motor vehicle or heavy machinery while using marijuana.”



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# Five New ISO Cannabis-Related Endorsements

- BP 15 30 – Cannabis Property Exclusion
- BP 15 31 – Cannabis Property Exclusion with Hemp Exception
- BP 15 32 – Cannabis Liability Endorsement
- BP 15 33 – Cannabis Liability Exclusion with Hemp Exception
- BP 15 34 – Cannabis Liability Exclusion with Hemp Exception and Lessors Risk



# Broad Definition of “Cannabis”

"Cannabis":

1. Means:

Any good or product that consists of or contains any amount of Tetrahydrocannabinol (THC) or any other cannabinoid, regardless of whether any such THC or cannabinoid is natural or synthetic.

2. Paragraph \_\_\_\_\_ above includes, but is not limited to, any of the following containing such THC or cannabinoid:

a. Any plant of the genus Cannabis L., or any part thereof, such as seeds, stems, flowers, stalks and roots; or

b. Any compound, byproduct, extract, derivative, mixture or combination, such as:

(1) Resin, oil or wax;

(2) Hash or hemp; or

(3) Infused liquid or edible cannabis;

whether or not derived from any plant or part of any plant set forth in Paragraph \_\_\_\_\_.

# “Cannabis Property” Exclusions

- BP 15 30 – Cannabis Property Exclusion
- BP 15 31 – Cannabis Property Exclusion with Hemp Exception

## 2. Property Not Covered

Covered Property does not include:

- a. Accounts, bills, currency, deeds, food stamps or other evidences of debt, money, notes or securities. Lottery tickets held for sale are not securities;
- b. Animals, unless owned by others and boarded by you, or if owned by you, only as "stock" while inside of buildings;
- c. Automobiles held for sale;
- d. Bridges, roadways, walks, patios or other paved surfaces;
- e. Contraband, or property in the course of illegal transportation or trade;

# “Cannabis Liability” Exclusions

- BP 15 32 – Cannabis Liability Endorsement
- BP 15 33 – Cannabis Liability Exclusion with Hemp Exception
- BP 15 34 – Cannabis Liability Exclusion with Hemp Exception and Lessors Risk

# Hemp and Lessors Risk Exceptions

B. The exclusion in Paragraph \_\_\_\_ does not apply to:

1. "Bodily injury", "property damage" or "personal and advertising injury" arising out of goods or products containing or derived from hemp, including, but not limited to:
  - a. Seeds;
  - b. Food;
  - c. Clothing;
  - d. Lotions, oils or extracts;
  - e. Building materials; or
  - f. Paper.
2. "Property damage" to goods or products described in Paragraph \_\_\_\_ above.

B. The exclusion in Paragraph \_\_\_\_ does not apply to:

3. "Bodily injury", "property damage" or "personal and advertising injury" arising out of the ownership, maintenance or use of a premises leased to others by you;



# Business Income and Extra Expense Coverage

## BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM

- Usually included in commercial property and business owner package policies
- Provides coverage for the loss of business income due to the necessary suspension of the insured's operations as a result of loss of or damage to covered property at the insured premises
- Also covers necessary “extra expenses” incurred during the suspension of operations
- How do you calculate net income for cannabis businesses?
- An accountant or valuation expert is usually needed to establish the amount of the loss

### A. Coverage

#### 1. Business Income

Business Income means the:

- a. Net Income (Net Profit or Loss before income taxes) that would have been earned or incurred; and
- b. Continuing normal operating expenses incurred, including payroll.

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# Proposition 65

- Requires businesses to provide warnings to Californians about significant exposures to chemicals that cause cancer, birth defects or other reproductive harm.
- California publishes a list of chemicals to which Prop. 65 applies
  - List is updated annually and currently has approximately 900 chemicals
- Includes:
  - Cannabis (Marijuana) Smoke
  - THC ( $\Delta^9$ -Tetrahydrocannabinol or Delta-9-Tetrahydrocannabinol)
  - Pesticides (myclobutanil and carbaryl)
- Enforcement by Attorney General, district attorney, city attorney, and ***private right of action***
- Penalties
  - Up to \$2,500 per day per violation
  - ***Attorneys' fees and costs***

# Proposition 65 – Insurance Coverage?

- Generally speaking, there is no coverage for Prop. 65 actions under CGL policies
  - *See Ulta Salon v. Travelers Property Casualty*, 197 Cal.App.4th 424 (2011)
    - No allegations of bodily injury in lawsuit alleging violation of Prop. 65
- Possibility of coverage under D&O/Management policies (private companies)
  - D&O policies provide broad coverage for a company's wrongful acts (Side C)
  - However, there are likely coverage exclusions for civil penalties and attorneys' fees
- Specialty insurance may be available for certain industries
  - Should include coverage for attorneys' fees and civil penalties

# D&O Coverage

- Provides coverage to officers and directors for liability arising out of acts in corporate capacity
  - Side A – coverage for losses if company cannot indemnify
  - Side B – coverage for company's indemnity obligation
  - Side C – coverage for claims against company (privately held)
- Securities Litigation
  - False or misleading statements or omission of information. Recent examples:
    - *Canopy Growth Corp.*: Alleged failure to disclose low demand for oil and gelcap products
    - *HEXO Corp.*: Alleged material misstatements and omissions regarding sales revenues, supply agreement, and acquisition of facilities (*federal suit dismissed in March 2021; NY State suit dismissed June 2021*)
    - *Trulieve Cannabis Corp.*: Alleged misstatements regarding gross profits; undisclosed related party real estate sale
- Shareholder derivative lawsuits
- Third-party lawsuits against company, officers, and directors
- D&O coverage is usually required by investors and prospective board members

# Professional Liability – E&O Coverage

- CGL and D&O policies typically exclude coverage for claims arising out of the performance or failure to perform “professional services”
  - CGL coverage is also limited to claims for bodily injury or property damage
- Courts have construed “professional services” broadly to include any services “arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill.”
  - Lab testing
  - Product development
  - Manufacturing
  - Marketing
  - Consulting
- E&O policies will respond to claims for financial losses arising out of any errors in providing or failing to provide professional services



# Insurance Marketplace

- From a high level, there is still a very limited marketplace when it comes to carrier options for cannabis, hemp and CBD companies and will vary by operations, products (THC vs CBD vs other cannabinoids) and line of coverage needed
  - Ancillary service providers have the most variety when it comes to all lines of coverage
- For casualty (GL, PL) insurance there has been some progress in terms of overall competition within the marketplace
  - Still rather limited for THC related products and vapes, however, more carriers have come online
  - CBD companies have a much wider selection (including some Lloyd's of London syndicates)
  - Delta-8 products have been a huge grey area with many carriers specifically excluding at this point
  - Vapes still having adverse effects from “vape crisis”
- Property coverage – capacity has been increasing however, large operations are still unable to fully insure
  - Business interruption is limited in most cases in particular
- Crop coverage is still very limited and there are very few options for outdoor grows

# Insurance Marketplace

- None property and casualty lines of coverage are even more limited in most cases
  - Crime coverage – Really only 1 market
  - E&O – Depends on operations and what the professional service itself is, but very limited
  - Cyber – Growing, but for THC related exposures, only 1 market
- The coverage that has been one of the largest pain points for our clients is D&O
  - Private company D&O is rather limited with high minimum premiums and in many cases, very limited coverage
  - Public D&O is probably the single “hardest” market we work with
    - Limited marketplace (handful of carriers)
    - Extremely high premiums and retentions

# What do Underwriters Look at?

- Cannabis insurance has plenty of unique variables that factor into its overall cost. That said, premiums, coverage, and limits vary among providers. However, some elements that affect rates include:
  - Size of the company
  - Business operations (fully integrated from seed to sell, plant vs non-plant touching, etc.)
  - States in which the company operates (is it a Multi-state operations)
  - Is there a US presence?
  - Insurance coverage selection
  - Claims history



A photograph of four people (three men and one woman) standing together at a convention. They are all wearing lanyards with badges. The man on the far left is holding a glass of wine. The background is slightly blurred, showing other people and a festive atmosphere with lights. The image has a blue-to-purple gradient overlay.

# Questions?

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