STAKES ARE HIGH FOR MARIJUANA BUSINESSES NAVIGATING NEW ADVERTISING AND MARKETING REGULATIONS IN MASSACHUSETTS

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FINANCE AND INSURANCE COMMITTEE

RISK MANAGEMENT SUBCOMMITTEE

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The recently finalized state regulations promulgated to govern the nascent recreational marijuana industry in Massachusetts to provide parameters within which marijuana businesses may promote and market themselves and their products. At first blush they may seem straightforward. However, there are some significant ambiguities and subjective standards that could create unlooked-for exposure for businesses. Due to some quirks in the Massachusetts consumer protection laws, strict compliance with the regulations will be important to limiting significant exposure to consumer protection claims.

THE REGULATIONS LEAVE SIGNIFICANT ROOM FOR DISAGREEMENT ON COMPLIANCE

Limitations on Branding and Logos

In the marijuana industry, brand recognition is hugely important. In Massachusetts, marijuana businesses will be permitted to use logos to promote their products, but not medical symbols, images of marijuana or marijuana paraphernalia, nor incorporate "colloquial references" to cannabis and marijuana in the logos. This rule seems straightforward, until one considers how many potentially prohibited references there are: according to a 2017 *Time* magazine article, there are more than 1,200 slang or colloquial terms for marijuana. Katy Steinmetz, "420 Day: Why There Are So Many Different Names for Weed," *Time* (4/20/2017). So how far will this prohibition extend? Well-known slang terms such as "weed," "pot," "Mary Jane," and the always cringe worthy (or hilarious) "reefer" will surely run afoul, but what about more innocuous terms that have nonetheless come to be understood as colloquial references to marijuana, including "bud," "green," "leaf," "herb/herbal"?

This restriction on branding may affect the ability of out-of-state companies to market their existing and well-known brands in Massachusetts. A review of marijuana brands demonstrates that terms such as "high," "baked," "blunt," "chronic," "bam," "jane" and other borderline terms are fairly popular in this space. This regulation also begs the question of how names for particular varieties or strains will be treated, such as "Kush."

To the extent this regulation prohibits the use of "images of marijuana" in company logos, it presents a significant limitation and potential hurdle for established brands entering the Massachusetts market.

The use of a stylized marijuana leaf is extremely common for cannabis company logos. While simply avoiding the use of an image of a marijuana leaf in developing a logo to comply with this regulation should be straightforward, it again potentially exposes existing brands to running afoul of these new regulations; for example, if their websites are viewable by Massachusetts consumers and the already existing logo contains the offending vegetation. For new businesses seeking to establish a brand and logo, it will behoove them to make sure that they start out on the right foot and not invest time and money on a branding effort that could ultimately be determined to violate the CCC regulations.

Limitations on Advertising and Marketing

Marijuana establishments may engage in reasonable marketing, advertising and branding, within certain parameters. Of course, as with any other industry, deceptive, false, misleading or untrue advertisements are prohibited. To comply with the agency regulations, advertisements, marketing and branding must:

- Not jeopardize public health, welfare, or safety
- Not promote the use of marijuana by individuals under 21 years of age
- Include the statement "Please Consume Responsibly" along with at least two of the following warnings on the face of the ad:
  - "This product may cause impairment and may be habit forming."
  - "Marijuana can impair concentration, coordination and judgment. Do not operate a vehicle or machinery under the influence of this drug."
  - "There may be health risks associated with consumption of this product."
  - "For use only by adults 21 years of age or older. Keep out of the reach of children."
  - "Marijuana should not be used by women who are pregnant or breastfeeding."
- Include the warning: "This product has not been analyzed or approved by the Food and Drug Administration (FDA). There is limited information on the side effects of using this product, and there may be associated health risks. Marijuana use during pregnancy and breast-feeding may pose potential harms. It is against the law to drive or operate machinery when under the influence of this product. KEEP THIS PRODUCT AWAY FROM CHILDREN. There may be health risks associated with consumption of this product. Marijuana can impair concentration, coordination, and judgment. The impairment effects of edible marijuana may be delayed by two hours or more. In case of accidental ingestion, contact poison control hotline 1-800-222-1222 or 911. This product may be illegal outside of MA."

Many of the regulations are directed toward preventing advertising to minors. For example, marijuana businesses are permitted to sponsor events, such as sporting or charitable events, but may do so only if 85 percent of the expected audience is reasonably expected to be 21 years of age or older as determined by reliable, current audience composition data. The burden is on the business to ensure compliance with this restriction. Similarly, advertisements on billboards, media, internet and mobile apps are only permitted to the extent that at least 85 percent of the audience is reasonably expected to be 21 years of age older as determined by audience composition data. Ads may not depict anyone younger than 21 years old, and may not use mascots, sponsors or endorsements that are "deemed to appeal" to a person younger than 21. Websites must require verification that a visitor is 21 or older. How a determination of what might be "deemed to appeal" to minors can be made on a principled basis remains to be seen.

Additional restrictions on labeling also are intended to protect minors. Packages must not be "attractive to minors." This undefined term is so vague that it is sure to cause in-house counsel to lose sleep. Marijuana businesses are already prohibited from using cartoon characters and mascots that would appeal to minors. The regulations do not permit packaging to resemble existing products that do not contain marijuana. So, for example, the "honey bear" jar that contains cannabis-infused honey is a big no-no in Massachusetts, as are products such as "Ganja Joy" and "Hasheath" (which were the subject of a trademark infringement lawsuit a few years ago). Also *verboten* are "words that refer to [products] that are commonly associated with minors or marketed to minors." It is difficult to discern what the boundaries of this prohibition could be. Taken as a whole, do these regulations mean that product labels must be drab, boring and generic?

Some regulations are, in contrast, clear and highly specific. On the health effects, in addition to the required warnings described above, marijuana businesses are prohibited from advertising that their products are safe or that they have therapeutic effects unless the CCC has determined that there is substantial evidence or clinical data to support the claims. Businesses should be cautious about making such claims in any event, as they could be construed as warranties. Even what might have been considered "mere puffery" surrounding the merits of a particular product under common law principles could be construed as a violation of this regulation.

Additional regulations for labeling and packaging requirements, such as describing the information that must be included on labels, is specified in detail down to the size of the text and wording of the warnings required. For the precise requirements on packaging and labels, readers are referred to the regulations. *See* 935 CMR 500.105(5)-(6). Packages also must display easily recognizable marks issued by the CCC to warn that products contain marijuana and are not safe for kids.

A marijuana business may display samples in secure locked cases and allow consumers to inspect a sample, but may not allow consumers to actually "sample" the sample—*i.e.*, consume or use it on-site. The business may post prices in the store and respond to telephone inquiries about pricing, in addition to creating a catalogue of prices that can be posted on its website. Giveaways are not allowed: the use of gifts, coupons and free or "donated" marijuana is not allowed, nor are promotional items such as t-shirts, cups and "novelty" items. In fact, the regulations prohibit any advertising, marketing or branding of marijuana products on clothing, cups, accessories, electronics or sporting equipment. This would appear to prohibit the sale of, for example, souvenir t-shirts to marijuana tourists in town for a "bud and breakfast" getaway.

UNDER MASSACHUSETTS LAW, A CONSUMER PROTECTION VIOLATION CAN BE ESTABLISHED VIA BREACH OF A SAFETY REGULATION OR BREACH OF WARRANTY

Massachusetts' consumer protection statute, known as Chapter 93A, has teeth. Any act or practice found to be unfair or deceptive can constitute a violation, entitling a successful claimant to actual damages (or $25), which can be doubled or trebled for willful violations, along with reasonable attorneys' fees. In addition, liability has been found even in cases where the existence of an actual injury is highly questionable.

Under regulations promulgated by the Massachusetts Attorney General, any act or practice is, as a matter of law, a violation of Chapter 93A if it does not comply with existing "statutes, rules, regulations or other laws, meant for the protection of the public's health, safety or welfare promulgated by the Commonwealth or any political subdivision thereof" if intended to protect consumers. 940 CMR 3.16(3).

That same regulation also makes it a violation of Chapter 93A, § 2 if the act or practice violates the Federal Trade Commission Act or other federal consumer protection statutes "within the purview of M.G.L. c. 93A, § 2. 940 CMR 3.16(4)."

This regulation has been employed to establish that something as common as the violation of a building code can constitute a violation of state consumer protection laws, albeit "only if the conduct leading to the violation is both unfair or deceptive and occurs in trade or commerce." *Klairmont v. Gainsboro Rest., Inc.,* 465 Mass. 165, 174 (2013). That caveat has not prevented the plaintiffs' bar from (1) asserting that any violation of a state regulation, regardless of whether it is technical, trivial or unknowing, constitutes a violation of Chapter 93A, and (2) demanding double or treble damages and attorneys' fees under that statute.

Similarly, Massachusetts case law has held that a breach of warranty generally constitutes a Chapter 93A violation. *Maillet v. ATF-Davidson Co.*, 407 Mass. 185, 193 (1990) (citing Attorney General Regulation, 940 Code Mass. Regs. § 3.08 (2)).

Potential exposure under Chapter 93A is heightened by the fact that the statute provides for a class action remedy that permits courts applying it greater leeway to certify a class and to craft class relief than federal rules permit. And because defendants will necessarily be Massachusetts entities or licensees, removal to federal court will rarely be available, even under the Class Action Fairness Act, due to the local controversy exception to removal.

Note: CAFA's "local controversy" exception prevents removal of a class action to federal court if (1) more than two thirds of the proposed class members are citizens of the forum state; (2) the "principal injuries" alleged occurred primarily in the forum state; there has not been a similar class action against the defendant in the previous three years; and at least one defendant is a citizen of the forum state from which "significant relief is sought" and whose alleged conduct is a "significant basis" of the claims. 28 U.S.C. 1332(d)(4)(a).

The regulations do allow for preapproval of packaging and labeling by the CCC, which could provide a limited "safe harbor" to businesses that request and obtain it. However, the regulation specifies that the preapproval process is not a substitute for compliance with labeling requirements. It may at least, if employed, provide a defense to claims of willful or knowing violations.

With all of these potential sources of exposure, marijuana establishments should maintain a close watch on all advertising, marketing, branding and promotional activities, which will be critical to managing risk exposure. The only safe bet is that consumer advocates and members of the plaintiffs' class action bar will be watching like hawks for any potential violation of these regulations.

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