

Cannabis Litigation: What You Need to Know

Tuesday, October 19th, 2021

Presented by [Jihee Ahn](#), [John McDonald](#), and [Jesse Mondry](#)

Jesse Mondry 0:05

Hi, good morning, and welcome to the Harris Bricken Canvas litigation webinar. We appreciate all of you taking your time out of your day to attend here, we know we've got a lot of folks down at the mjbizcon. And if you're down there, please take a look and stuff. I think we've got an event down there, we've got a few different attorneys down there, Natalie Bougenies, down there, from our DC office and our Portland office and Simon Malinowski from our New York office for community conference. And I'm not sure if we got anyone else down. But we always have a good presence there. And I know that's a big industry event. So if you're taking time out of that conference to attend here, appreciate it. Before we get started, I just want to sort of introduce, introduce our panel and give you an outline of topics that we're going to discuss today. Questions are welcomed, and you can send those in the chat box, and there'll be forwarded to us and we'll try to answer them sort of as we go along or do that at the end. And we're also going to save some time for questions at the end. So again, see my name is Jesse Mondry I'm a litigator here at Harris Bricken out of our Portland office, and primarily commercial litigation. The majority of my practice is, is in the cannabis sector varies from time to time, but right now it's about 60 to 70%. Usually, it's around half or something like that. Let me let me turn to our panel and let you know who we've got here. Today, we've got Jihee Ahn. Jihee is an experienced, complex commercial litigator, she's actually going to be chairing our dispute resolution litigation practice going forward. She primarily represents clients in business, intellectual property, real estate matters for both domestic and international clients. Prior to joining Harris, Bricken, Jihee was at bigger hostettler in Los Angeles. And to my left, maybe your right, we've got John McDonald, who is an experienced litigator as well, he's out of our Seattle office. John came to us from New York at the law firm of Melbourne, Eagle Myers. He's done a lot of insurance coverage litigation. And he also spent a couple of years doing customs brokerage work. So we might touch on a little bit of international aspects today and some international litigation and how to get things to borders, and that sort of thing. So the topics that we had sort of outlined here today are several one we wanted to kind of talk about, you know, litigation, like the big picture, sort of what's happening, what are the trends? What are we seeing out there, and then really to talk about some areas we, we think you're going to be finding coming up or coming to the fore in the next couple of years, we're going to start out with discussion of some closely held company disputes, and talking about the kind of claims and defenses that we see there, typically cannabis and and how to avoid, I think litigation is always a big topic for us, because our clients, we tend to find that the work the right kind of work ahead of time, you can avoid a lot of the issues that we see later. So we'll talk about that and spend a few minutes on securities litigation. And then we're going to talk about insurance coverage and insurance coverage disputes. A brief update on federal legislative action and how and when that might affect cannabis litigation. We'll discuss the always popular ethics of mediation and arbitration and alternative dispute resolution methods. about international issues. We'll Of course, talk some about health. And then I think we'll open it up for questions. So with that, I think let's turn things over to Jihee who's going to talk to us about closing company disputes LLCs partnerships in the light.

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Jihee Ahn 3:36

Thanks, Jesse. Yeah, so um, you know, when we were thinking about kind of how to structure this webinar and what's talked about, I think the overarching theme is that what we're currently seeing is the cannabis industry is just really continuing to catch her. And the relevant litigation that it's dealing with is maturing, as well. So, you know, to give some perspective, when I first joined Harris, Bricken, about three years ago, we were predominantly dealing with regulatory and compliance issues for our clients. So it was more about how to set up, you know, a solid compliance plan so that violations could be avoided, or, you know, if a violation did occur, how to navigate that agency type litigation and just going through the administrative process. That type of admin litigation has really diminished and I think now we're just spending the majority of our time litigating the same issues for our clients in the cannabis industry, as in any other commercial industry that we service. And, typically, you know, I think by far, the type of dispute that we're seeing the most is, of course, you know, breach of contract disputes, but also partnerships whether it's between a closely held LLC or a partnership between two people, I would say I spend a lot of my time on those kinds of matters. Those types of claims are really boiling down to breach of fiduciary duty actions, which again, boil down to when numbers of partners are just disputing about, you know, company operations or breach of duties and things like that. We did receive, you know, kind of a roundtable of questions before the webinar started. And one of them was, you know, what's your general advice on LLC operating agreements for new cannabis businesses with multiple and novel partners. And now, I think, would agree, our biggest piece of advice is to spend the time to prepare really ironclad corporate documents, you know, obviously, including your operating agreement, but even things like ployment agreements or independent contractor agreements, to the extent that you can make sure everything has really good balances, the better it's going to be for you down the road. Specifically, you know, the more the provisions provide who holds the specific duties or responsibilities or what specific conduct will be considered a breach or you know, what breach will result in specific remedies, all of those things are going to be helpful down the road. And in this context, and in this industry, it's really crucial to work with transactional attorneys that have knowledge of this industry, of the regulations and the common pitfalls that they've already seen over the past few years. And kind of going back to breach of contract liens. This actually is very translatable, it's that context as well, because, you know, even three years later, we're still getting so many requests to file lawsuits on behalf of like, you know, a supplier who wasn't paid or a buyer who didn't receive product. But there's literally nothing in writing. And, you know, oral contracts are enforceable, but claims involving written contracts are just so much easier to prove, you know, and resolution is often a lot faster. So you know, whether you're setting up a company with partners, or you're engaging in business with suppliers, do yourself a favor and get all of your documents in order, because it's just so much easier to put in that work on the front end. So you're not trying to piece things together down the line when the dispute does come up.

So that is kind of overarching, you know, still, the bulk of what we're dealing with, I would say that maybe a newer trend we're seeing in this area of litigation is more receptiveness to the use of receivers, receivers, or neutral third parties that will take over a business's operation while it's involved in legal proceedings. And the sole purpose is to preserve and protect the business during that period. So, you know, if you take care and find an a receiver that's well versed in the cannabis industry, they can

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typically handle everything from sales to personnel, to accounting, and you know, all aspects of your business. And in the beginning, I really found that clients were very hesitant to even consider receivers and in most circumstances, especially because, you know, you're giving up a lot of control over your business and things like that. But I think now people are more understanding that there are upsides to a certain extent and that, you know, for example, if you're concerned that funds are being commingled or stolen or anything like that putting in a receiver can really safeguarding as those concerns, or, you know, if you suspect that your partner is just unmotivated in the business or you know, might be even thinking the ship intentionally, we definitely have heard claims like that. A receiver can step in and make sure that the business is being run optimally so that there's something that you're fighting for in the end. So I would say that's kind of the overarching trend that I'm seeing with with partnership disputes and breach of contract matters. And I think those will continue on in perpetuity.

Jesse Mondry 9:46

Because you know, one of the questions I often give my clients I guess it's what can you make, use or use temporary restraining orders or owner injunctions at the outset of these kinds of disputes, if you have money experience with that. You talk a little bit about that. And any differences you've seen between say, you know, being out in California versus Washington or Oregon.

Jihee Ahn 10:13

I think I missed the first part of your question. Sorry.

Jesse Mondry 10:18

Yeah, I apologize. I think I was on mute there. So Jimmy, one of the questions I get from my clients, and I wondered if you could talk about is in these kinds of closely held partnership disputes. You know, along with filing the complaint, whether it makes sense to ever seek injunctive relief of any kind, whether that's an ex parte TRL or something of that nature, and if you've seen that sort of thing, and if you can speak, you know, the extent of any differences you've seen in our can go about doing that and say, California versus new Washington, or?

Jihee Ahn 10:51

Yeah, I mean, I think that's really fair to say, a lot of times people, you know, have tried really long and hard to do business together and to maintain that relationship. And usually, when you're at a point of coming to a lawyer, it's because you feel that things have gotten really bad that you know, the relationship is untenable. And, you know, in certain circumstances, maybe you think your partner's stealing from the business or, you know, is sabotaging the business, or at least you're interested in the business. So I definitely do get a lot of requests for a tr rose. The thing with trs is the standard is very high to obtain them. And they require a lot of workup, right. And so we are really careful to kind of walk

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through the pros and cons of pursuing preliminary relief, just because it's really costly. And, yeah, they're hard to get from the court, there's a really high standard that you have to show that, you know, you're going to suffer irreparable harm. And that the you know, the status quo is it needs to be maintained to preserve the interest of everyone. So I would say, I mean, in my experience, whether you're doing it, Oregon, Washington, California, maybe the standard is worded a little bit differently, but the basic showing is pretty much the same. And to that, you know, to help us really evaluate whether a TRL makes sense or you know, any other preliminary really makes sense. I think it's important to know that things need to be documented as much as possible. Just because you need to show all that evidence, the court.

Jesse Mondry 12:47

Yes, thank you for that, you know, one of the things I see is that when we've gone out to get a TRL or or had the client who's something's after them and gotten a tr o is that that's not usually the end of the process. Like, that's really the beginning of the process. And I think, you know, folks out there need to understand that but if you go get, you know, what's called a tr o or a temporary restraining order, that word temporary is really important, you know, here in Oregon, are rules that require essentially within a certain number of days after you get this injunctive relief course off old what's called a show cause hearing, right, and they're going to show cause hearing is where the court is essentially going to say, all right, well, we put this emergency injunctive relief in place. But now we're really going to come in and we're going to take and we're going to hear evidence, and then this conclude the testimony of witnesses is conclude that the submission of documents is really sort of, you know, an imagery based hearing similar to you know, similar to a trial where the merits really can come into play. And I think, you know, I see a lot of people know, maybe neglecting that step and not realizing that this is not getting a tiara is not going to sort of solve all your problems going long term, you really got to have a good basis for it. Does California have similar timelines in terms of that you are aware of in terms of the time you might get a TRL when a court is going to try to hold up a hearing to see if that might extend that or change that TRL and will marry and caption?

Jihee Ahn 14:10

Yeah, I would say you know, tiaras you typically go in on an ex parte basis. And then you know, it's a little hard to estimate just because every court is, you know, still trying to recover from COVID delays and things like that. Before COVID I would say they were pretty good at scheduling those those OSC hearings, maybe you know, two weeks out, but I think more this year and last year it's been It couldn't be can be further into the future. So maybe up to four to six weeks. But really, you know, the whole point of a tr o is to just like like you said Jesse just had that really temporary order until a fuller showing is made and so I think ports are generally easy. And California to set that OSC within, you know, one to three weeks, I would say you're muted, just.

Jesse Mondry 15:20

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All right, I think I like muted here. All right. Well, with that, thanks very much Jihee for that. And I apologize. I think as I had some computer problems this morning, I'm still sort of recovering from those. So um, you know, with that we're getting a couple of questions in here. And I think we'll probably push some of those to the ends, I appreciate those. Let's turn over to a kind of a bit about securities litigation. So you know, securities litigation, I guess the first question is, what do we mean by that, and what we're really talking about are typically disputes between investors and your hand or shareholders and the principles of a cannabis company. And usually these are going to relate to representations or missions made in the, in the raising of capital? And yes, you're the offering, right. And this is pretty common most, most of the businesses out there that we see, especially ones that are looking to grow, you know, you've got to go out, you've got to raise finance. And so, you know, we're going to talk about this in a minute. But a big question as well, you know, what is the security Am I offering security, you know, it's an important thing to realize here is that, we tend to think of it as well, that's just, you know, maybe shares in a company, right, I'm not offering shares or an ownership interest in my company as I'm trying to raise money. So I'm not offering security and I'm not subject to securities laws. And that can't be farther from the truth and farther from the risks that you might be placing yourself into, as you're trying to raise capital out here. But but kind of before we kind of get into that a little bit, I just want to kind of talk about a case that you see common in the cannabis industry. And this one's got a bit of an international flavor, right. And this one involves cannabis in Malaysia, that class action securities fraud. And the story is probably familiar to everybody who has been in the industry for a while. The plaintiffs here are alleging this company decided to take advantage of a hot market trend, which is the hemp CBD infused you know, drink space, and here they were CBD infused energy drinks, which is a you know, an interesting juxtaposition, right and get your CBD to relax you and your caffeine get going. But that's, you know, that's beside the point, I suppose. What happened here is that the plaintiffs were promoting their entrance into this sort of this new field by partnering with a manufacturer in Malaysia, and the press releases and their announcements about this partnership with Malaysia and caused their stock to increase by six to seven times this, and this sounds like a pretty good, interesting opportunity, right? For a lot of investors, like, Look, we've got, we've got this hot new market, we've got a manufacturer in Malaysia, we're gonna be able to do these things at a cost. It's much lower producing here, with the 2018 Farm Bill, we're gonna be able to import these things, and we're gonna be doing great. But there's sort of one big problem here and is that manufacturing CBD based beverages was, and he is illegal in Malaysia. Right now this this, you know, this wasn't something something that an ordinary investor or, you know, most folks looking to buy shares are going to know, and they're not going to really do much investigation, this is one of the things that you're going to want to do when you hear these sort of investment opportunities out there. Of course, this fact wasn't disclosed to investors, and it was later revealed upon publications by Market Watch, of course, this this, then the cause causes the stock drop, they get delisted, you know, and their trading gets suspended. And then we get class action lawsuits alleging violations of Section 10. b in the exchange Dec. Five, so no, this is this is kind of this is a kind of a classic securities, you know, fraud offering, right. Another one that I think can be industry daily recent reported on the New York is that the SEC, has accused two folks out there who are co founders of a hemp business of a \$15 million fraud scheme. Apparently, what these what these persons were doing, least allegedly, according to the SEC, and if they're getting involved, that's never good. And the big reason is, is that unlike private litigants, the SEC has sort of unlimited time, and then the limited resources to pursue this and the same, the same there is true for any state regulatory interest, you know, regulatory agency, really, but, you know, they were accused of giving false or misleading

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projections. And, you know, that's a that's a tricky area. Are your projections false, or are they optimistic? Right? You know, we were out there trying to pitch people on how to our business, we often were going to take a pretty rosy, Rosy view of things. What's the difference between sort of false or misleading projections and what sort of an optimistic or rosy view that we're going to do that those are, those are things you want to think about? What's the other part they got in trouble for was making false and misleading statements about their ability and capacities to produce hemp and CBD products and, you know, this is another I think I think we've seen kind of a lot, this really boils down even back to the partnership disputes where you've got, you know, maybe somebody's having a look, here's what we're gonna do, we're gonna build a processing facility, we're gonna produce all this HAMP, we're gonna have all this CBD oil, we're gonna build, you know, sell this on the market, and we'll do these things. And, and, but really, the, the principles of the companies are really a long way off from actually putting on products on the ground. And so you know, if that's the case, there's no, there's nothing wrong with the sort of being advanced in these sort of trends and trying to be market forward and trying to raise revenue for these things. But you really want to be careful about the representations that you're making to prospective investors. What I couldn't stress enough is that if you're raising capital, contemplating capital, you need to hire a securities lawyer. And here's why, right? What is the security, this is going to be defined differently in federal law, different state laws, but sort of generally speaking, security is any type of financial interest in any business venture, or any amount over any period of time. And that applies even if the business is not a formally registered company. So you don't need to be on a stock exchange, to engage in a securities off. And the security can be an offer of sale or equity ownership percentage, but a security can also be a loan or a debt. Security can also be an option award for future ownership or even a profit sharing arrangement. Right? So the debt state law and federal law defines securities pretty broadly. And so this is one of the reasons you're going to want to talk to a securities lawyer, and I'm not one of them. That you know, about, when you're out there raising capital into ours, what we're doing constitutes security, we're the disclosures making required to me, what are the disclosures? We're not required to make other rules about the amount of investment that capital we can collect from any one person, right? These are pretty big questions. And the reason that you really want to talk to a securities lawyer is because the liability side of securities law, and you know, its broad, right, you know, generally speaking, any person who debt directly or indirectly controls a settle seller can be a seller of securities can be liable for fraud. In Oregon, right, that includes every partner, a limited liability company manager, it can include a member who is a manager, an officer or director, and even any person occupying such as similar status performing similar functions. So you can sort of evade securities law or even liability by saying, Well, look, I never had an official title, you know, if you're involved in the raising of capital, right, or the, you know, the issuance of debt, or profit sharing arrangements, and you're doing these kinds of activities, you can be subject to not just liability for the company, but personally personal liability. Right. And that's the big fear for whatever reason, one of the reasons we form companies, right is so that, well, if things go down, you know, the company is liable for these debts and these issues, I'm not going to be personal Bible, securities law really wipes a lot of that away, and you really want to be careful with that. You know, sort of Who else can be liable, any person who participates or materially aids in the sale can be jointly and severally liable. And that's the case in many states. here in Oregon Supreme Court case law has extended that liability to attorneys. Right? So the Supreme Court in Oregon has held that an attorney participated in materially aided in the sale of the fraudulent securities office by by you know, even though the attorney may not have sort of directly known or, you know, there's a number of ways out this sort of, they're not out of the equation for

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potential liability, simply because all they did was provide legal advice right. Now, Oregon's a bit of an outlier, an outlier, I think, in that respect, but you know, you're gonna want to, you know, if you're, if you're a business out there doing it, you want a securities lawyer, because you want to make sure that you're not going to be personally liable. Now, you see, if you're an attorney who's not comfortable or hasn't done a lot of securities offerings, you might want to think about whether this is something you really want to engage in without doing a thorough examination of the law, and it's a liability that you face out there.

You know, in terms of litigation, you know, we're starting to see more and more I think securities litigation, particularly in the in the hemp CBD field. And this isn't surprising, right? I think it's g talked about sort of what have we seen in the marijuana side in terms of maturation of the industry and the kinds of litigation we used to do a few years ago right now, changing over sort of partnership disputes and limited liability, company disputes and maybe disputes about what happens when we want to sell the business, right, you know, and how those sales are going along. And we're seeing starting to see the same thing with securities, which is that folks who've been putting money into this industry, and, you know, you go back two years ago and look in the news articles, right? This was going to be you know, 30 billion. In \$20 billion industry, the profits were going to be unbelievable. This was the time. This is a time also now, though, where, you know, the bottom has fallen out of that a lot of that a lot of the hemp market, unfortunately. And it's been really tough, tough out there for a lot of folks. And this is the time where investors really start to look at, you know, is this the time to try to go back and recover my investment? You know, how long do I want to stay in this? And so I think that we're gonna see sort of more of these disputes about the smaller level, and the sort of limited liability company partnership, this view level. And I think we're also going to see it sort of at the larger class action level, where we've got folks raising money across the country or from people in different states. So that's kind of a, you know, a brief outline on securities litigation, and don't get me specific questions about that. I do see we've got a couple of those, towards the Angier. So let's turn things over to John MacDonald to talk about insurance coverage. disputes.

John McDonald 26:04

Thanks, Jesse. Good morning, everyone, or afternoon, whatever your particular situation may be, depending on where you are. Me, I'm here today to talk a little bit about insurance coverage issues and insurance coverage disputes, specifically within the cannabis space. This is something that we think is going to become more and more important, as operations expand as more states legalize marijuana and eventually, as things start to move the ball forward better aliy. In terms of legalization of marijuana, insurance coverage, obviously operationally is important for a number of reasons, right? There's any number of risks that you might want to insure against. While operating your business, whether it be commercial general liability coverage, to cover bodily injury or property damage arising out of a licensees operations at any particular facility, or crime and theft coverage. business interruption coverage during COVID has been a very large and litigated issue in the insurance coverage world. Another reason obviously, insurance insurance is important, especially in this space is in certain states, Washington, for instance, you're required to have certain insurance in order to operate on your license.

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For instance, here there's a \$1 million policy limit on commercial general liability, you have to have products and completed operations coverage available as well. What Why is coverage counsel important, especially to the sector first, it's new, I think that there are a lot of different businesses in this particular space that for the first time might be dealing with the ability to underwrite insurance coverage for particular risks, the ability to pay a premium to cover in case of a fire or something like that.

With that comes, you know, a learning curve, I think within the industry, and I think coverage lawyers, particularly here at Harris Bricken are well equipped to help with that sort of learning curve. For instance, if you have a claim for coverage, under your policy, there are several different technical elements that you might have to satisfy in order to make sure that that claim could be covered. You pay a premium for an insurance policy just like you do for your car. If you're in a car accident, and you need the insurance available under that policy, the policy has specific terms, policy by policy that you'll have to follow in order to make sure that the insurance company provides you the coverage for any, you know, potentially applicable loss. For instance, one thing that, you know, many businesses don't know when they're first starting to deal with insurances. There are special notice provisions within an insurance policy telling you when, where, why, and how to provide notice to your ensure of a claim that you have, generally you have to do this basically, as soon as you know that you have a claim. Why is that important? Because courts have found that if you don't follow those specific terms in your insurance policy, for instance, providing notice of a claim within a reasonable amount of time, you can be deemed to have lost coverage, even if your policy that you bought and paid a premium for should cover that insurable loss to begin with. If you're not satisfying the conditions of the policy, the insurer can rightfully deny your claim. We think that coverage lawyers and especially here at Harris Bricken are well positioned to help you know expanding businesses in the cannabis space, navigate these different technical difficulties. And, you know, make sure that the coverage that they paid for it is available to them when they need it. Another important role I think the coverage council can play is letting you know what if any claims that you may actually have against your answer, ensure here in Washington, for instance, and in each of the states that Harris Bricken operates primarily in Washington, Oregon, California, these are what are called very policyholder, friendly states. If you're an insured in this state, and you purchased a policy paying a premium to insure a particular loss, courts, sort of as a matter of principle have leaned towards enforcing insurance coverage provisions, there's sort of a rebuttable presumption at the beginning that you should be, you should be able to access this coverage for any particular loss. There are also statutory schemes in play, for instance, the unreasonable denial of claim for coverage or payment of Benefits Scheme. Under Washington statutory law, there if you're unsure is perhaps not acting in good faith, perhaps not willing to discuss settlement of a claim has not started an investigation of a claim that you've brought to it. There are statutory remedies that you can have, in addition to a traditional breach of contract action to seek coverage. Again, one area where coverage lawyers and Harris Bricken can add value is identifying claims that you can bring where you can actually recover your attorneys fees. So under the statutory scheme that I just mentioned here in Washington, and insured, friendly state, if you're a prevailing party on one of these claims, for an unreal, reasonable denial of insurance coverage, we can get to your fees for that paid for by your insurance company, um, litigation, why we're here coverage disputes, how do they work, it's important to seek advice from coverage counsel, both prior to and during a dispute with your insurer for two reasons. First, it may be

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that no litigation is on net, or it may be that no litigation is necessary. One of the biggest roles coverage counsel plays, is if we have a client, for instance, in the cannabis space who was insured a building for fire.

And the you know, there's a small fire adjacent to the building that somehow damages the building or something like that, a client will come to us with the policy with the situation and ask for something called the coverage analysis, we can look at the policy, looking at particular factual situation, and let you know is this you know, more likely than not that you might be able to collect from your insurer, what steps must you take in order to collect and everything like that, on the back end, what I like to call active coverage litigation matters, it may be that you've submitted a claim to your insurance company, you've followed all this steps in your policy, they've investigated your claim, and for one reason or or another, they've decided that no coverage is available that might be based on an exclusion or condition in the policy. Or they may argue that controlling state law applies to that particular claim, and that they could deny it under that law. Obviously, as a policy holder, if you if you have a dispute, with that particular interpretation of your policy, and the insurance company won't move on it, then you can institute what's called formal litigation. Typically, what this mostly takes the form of is what's called the deck action in this in the coverage communities. So it's a declaratory judgment action, where you ask a court to declare your rights under the policy. For instance, you have a coverage dispute about the fire adjacent to the building, you believe that there should be coverage, your insurance company has gone through all the steps, it must to deny the claim, you're still on opposite ends of the spectrum, you can ask a court to declare that your insurance company is wrong. The standard for that is just about the same as a breach of contract, actually, insurance policies are a special form of contracts and courts will interpret them basically the same way as they would if you had any other operational this view. coverage. counsel, especially in this space, I think is really important. And something that you want to talk to, if you are thinking about you're suing your insurance company, because again, with the friction between especially Washington is a great example right with the friction between a fully legal cannabis state and cannabis still being a schedule one drug drug federally illegal. The forum that you choose to see to sue your insurer can become important. For instance, federal district courts, where a lot of this might end up based on diversity jurisdiction are kind of split over this in early coverage litigation. There's a case in Hawaii from 2012, where a federal district court looked at the policy said that there should be coverage under this policy, but unfortunately, it's illegal under federal law. So payment on the claim by the insurance company is illegal and we're not going to order that district court. Same kind of Judge trial court level federal court in Colorado went the other way. Colorado court said that same thing, there's a policy here that there should be coverage under the policy, it's legal under Colorado State law, this insurance company assumed the risk of ensuring there's risk when they accepted the premiums. So covered should it should apply to this particular claim. At the circuit level, there's not a lot of guidance on that yet. But these are the kinds of things that you want to keep in mind, right? When you're considering how to deal with an insurance claim, whether or not to to sue your insurance carrier. Another thing that sort of segue into our next section on sort of federal legalization of this stuff, one thing that is very interesting in the in the coverage context, is in the House and Senate, there has been some movement both on the insurance company side, and you know, on policyholders side to get some clarification for insurance companies what they can and cannot do in terms of cannabis risks underwriting cannabis policies. For instance, in 2019. Senator Menendez, Robert Menendez in New

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Jersey introduced a bill called the clarifying law around insurance of Marijuana Act, which is trying to reduce penalties or completely eliminate them altogether for insurance companies who want to be on the front end of this expansion in their business to write with sort of increased operations for cannabis across the country hasn't passed yet, obviously, a lot of that is still in flux. But this is, you know, that that's just one final reason that I'll sort of leave you with why it's important to talk to coverage counsel about these kinds of things, is it you know, it's essential to know and have someone to help you through these playbooks about how to secure that coverage once you've bought it. And I think that's something that, you know, Harris Bricken is very well equipped to do.

Any amount. Any questions about that, Jesse, that's sort of a broader overview of insurance coverage, especially in the cannabis space, I think that's going to be very important moving forward, and everyone watch your policies, because there is, you know, they do try and get you on little technical gimmicks. So I, you know, just my overview.

Jesse Mondry 37:28

That was a great overview. And I think the last comment there certainly come from inside as somebody who represents insurers, insurance coverage disputes as opposed to insurers, right. You know, I don't think we got any specific questions on that. So we're moving pretty well along here. So let's, let's turn over to GE again, for a little bit of discussion on federal legislation that's pending, or maybe what's going on with that?

Jihee Ahn 37:55

Yeah, um, so, you know, I think in addition to the claim that John was just, you know, he briefly described one other piece of legislation that we've definitely been tracking is the safe Banking Act, which, you know, is slowly moving through Congress, once again, this year, just in the off chance that anyone's unfamiliar, the safe banking app aims to free the Safe Harbor for bank and credit union so that it can't be held liable or subject to, you know, actions for providing financial services to cannabis related businesses. I won't go into detail about what the act entails just because we are a little bit running out of time. But you know, the Act was basically reintroduced in March of this year by a huge bipartisan group of, I think, over 100 members of the House and I think over 30 members of the Senate. And so, you know, we're hopeful that maybe that's something that will be enacted and turned into law in the near future, but we're also a little, you know, hesitant to predict that just because I think it's now been passed by the House three times, most recently in the fall of 2019. And it had showed a lot of promise then but you know, it basically remain pending before the Senate Banking Committee indefinitely so we'll definitely keep track of that. And you know, one of the, the reader questions that we got prior to the webinar starting actually was a fun question to think about, and I'll just kind of open it up for everyone if you have anything to add, but it basically was well federal legalization, bring new litigation issues to the floor. And, um, you know, John kind of touched on this too, but I think legalization could result in you know, a lot of changes There's a whole host of litigation issues or trends. But the one that

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really comes to mind is just an increase in federal litigation. And for me, I think because I practice a lot of intellectual property law, I think that will increase the amount of planes in the IP space as well. trademark infringement claims are already on the rise, they've been on the rise for a while. And it shows that, you know, competitors are taking their place in the market, they're asserting their rights. They're safeguarding, you know, their space. And, you know, even partnership disputes now are increasingly involving discussions of, you know, who is going to walk away with the trademark rights because people at this point have invested a lot of time and money into developing their brand and, and they realize the value in having these intellectual property rights. Um, something that I didn't want to touch on here is also I would predict that patent infringement claims are probably going to break through if if legalization ever happens, you know, every year, there are reports from the USPTO, that they've continued to increase the number of patents containing the words cannabis or marijuana. So we fully anticipate that, you know, the growing number of patents will inevitably result in litigation once the legality is a non issue on a federal level. So you know, with all that in mind, even even today, even now, I'm definitely advising our clients that it's more important than ever to just continue to do your due diligence when you're pursuing your trademarks and patents. And, you know, if you're already an IP owner to really actively monitor your competitors, and make sure that you're protecting your rights in the space. Um, so that's kind of my update on the two issues. I don't know if you guys have anything to add, but we're also a little bit running out of time. So Jesse, I'll just defer you.

Jesse Mondry 42:15

Yeah, sure. Um, yeah, I think that was a good summary. And I probably could talk a little bit about the federal legalization point. But I guess, I think one of the big hiccups for out there and sort of prognosticating on that is exactly what that's going to look like in terms of federal legalization. Are we talking about where the federal government is going to really push as sort of a nationwide federally, you know, legalization? Or are we gonna kind of leave it up to a state by state patchwork type system, you know, if and when that happens down the road? So I'll leave it at that. You know, the next topic we wanted to discuss and we will try to answer a few questions that we've got here is kind of on mediation arbitration, right, which is alternative dispute resolution provisions. And I think, I'm sure a lot of our audience members are pretty familiar with these. But there might be some folks out there and sort of aren't sure of the differences. And I get questions still fairly often about what the difference is. So John, I was wondering if you could just kind of briefly explain to the audience, what is the difference between a mediation and an arbitrary, you know, and a couple of sentences? Listen, you gotta have somebody unmute John looks like.

John McDonald 43:25

I'm unmuted. Thank you. Sure. Great question, Jesse. Great question. So the differences between a mediation and an arbitration, right? Two things first, mediation is what you can really think of is like true alternative dispute resolution. Some people would describe mediation as two sides in a room with a guy, right? There are different, like sort of procedures that you can go through in a mediation to sit down, and consensually try to work through your issue with who in litigation, we would call your opposing party, right, wherever you might have a contractual dispute with or something like that. The mediation

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can be as formal or as informal as the parties desire. Typically, you pay a mediator who has to be they have like, like, like a certification or license kind of, to mediate, and then they'll drive the process themselves. So they'll tell you whether they think a brief in the beginning is helpful, how they'd like the process to go, and then it's, can you settle the case right in front of in front of a mediator? One, one very good thing about mediation is, that's one way where you can really save a lot of costs. I think, if you're able to resolve your dispute, either before or during litigation through mediation. The, the The primary difference, right between mediation and then arbitration is arbitration is what I personally like to call court light. Typically, it's there's an agreement provision in an agreement that says if there's any disputes between this party and the other about something that might happen here, the parties will arbitrate with what's basically a private judge, right? These may be former judges who do this for a living they it's another private forum where there may be, you know, agreed upon rules or not where you, you go to court just in front of these private parties, there's different procedural rules. And it's traditional litigation up to a hearing, which is even like trial. So those are the primary differences, Jesse, between mediation and arbitration.

Jesse Mondry 45:33

Thanks very much, John, we've got you know, we'll try to keep things moving. We got about 20 minutes left.

Jihee Ahn 45:40

I'm just gonna add one thing, because we've got a question about this, though, you know, John did a really great job about why mediation arbitration are definitely options to consider. And I'm finding that, you know, I think the cannabis industry, probably for the better has just become more familiar with these options, which is great. I think the industry is also, you know, more experienced with litigation, and they everyone realizes how expensive and draining and long it can be. And so I think those are all, you know, really great things. And it's good to know what all your options are. But one thing and just going back to the question of you know, what, what do you want to keep in mind, when you're creating those early operating agreements, and early corporate documents and things is, I've actually had kind of a string of cases where clients bring me an operating agreement, and it says that, you know, if there's any dispute born out of the company, or company operations, or what are the meeting, the members need to MIDI, sometimes once, sometimes twice, sometimes three times, before a lawsuit can be filed, or something to that effect. And, um, you know, in special instances where there's minimal bad blood, everyone's still willing to, like, give a really good shot at resolution is can be great. But in others, like I mentioned, you know, when you're, when you're calling for a lawyer, it's usually because things are pretty bad. And having a provision where, you know, you're required to mediate multiple times before you can really do something, um, can actually just be a huge delay in reaching resolution. So I think the thing to keep in mind is you do have to have some foresight to what process might actually work for you, your company, your partners, um, and and just think about, you know, in the very worst case, is this person is my partner going to be someone who's actually going to go to the mediation and engage in in the process in good faith? So, um, I would say, sometimes clients just take it a little too far. And I really kind of dislike those really onerous provisions. And I just caution my clients not to include so many

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kind of obligations, but before they can move forward with filing a lawsuit or, you know, filing an arbitration. And that's all I wanted to say,

Jesse Mondry 48:20

Oh, no, that's great. Jihee, I was actually going to ask you a question about that before we moved on. I guess the other thing I you know, for folks who aren't that experienced with it, the one of the big differences to know I think about arbitration versus litigation is, you know, one, if you've got a contract that's got an arbitration provision, you can try to waive that you want to be the plaintiff and go file a lawsuit, but the other side can try to enforce that, and largely 99% of the time be successful, forcing you into arbitration. They can't be waived. You know, if you guys both do agree the arbitrator you're thinking, well, should we have an arbitration provision? Or do we want to go to court, the really big thing to know is that, you know, by and large, arbitration is a lot faster of a process, and you generally a lot less expensive, because you simply dispose of a lot of formalities that you're going to have with a state court litigation in terms of the rules, the timing of discovery, and so forth. You know, arbitration provision sometimes might reference specific rules like jams or something like that, we're going to use the jams rules, which will, you know, have a number of sort of streamline rules for discovery and how we're going to do this and timelines. But recently, you know, I've got a case pending right now we're in arbitration, but all the arbitration said in the operating agreement was that we're going to agree to arbitrate. Okay, that's great. So you know, we went out, we hire an arbitrator. And then the question is, well, what rules? What do you guys want to do? And we essentially got to kind of got to negotiate and sort of make our own rules, how many document requests want to do, what timeline Do you want to do? What setups Do you want to do? And we got to sort of kind of set our own schedule that we think made sense for this for this kind of case. And I think, in a lot of ways, that's one of the big advantages of arbitration is that flexibility that you can have and so I think that's, you know, really, really You know, I've certainly had other cases where I wish that we could be in state court as opposed to arbitration. And sometimes that's often you're dealing maybe with parties on the other side, that might be difficult and you lost some of the formality of the proceedings and things like that. But when you're going into a transaction, it's difficult to sort of know that, by and large, I think arbitration is the preferred way to resolve disputes in the cannabis in the cannabis industry. Because we got one question just a minute ago that all before we move on to the next topic, which was about the legality defense, and what are we seeing out there with that? And I'll tell you that it's still very much still very much in play the illegality but so just kind of quick background, what is the illegality, defence, the illegality defense, is an affirmative defense where the via the contracts buy marijuana from john, and I deliver the marijuana to john and he doesn't pay me. And then I see john in federal court. And I see we had a contract the federal court john says, Look, this is an illegal contract. It has to do with marijuana, that's a that's an illegal substance, you can't enforce a contract, a federal court is going to agree and and kick the case out of court. So you're going to that's why you file with state courts. If you go to arbitration. Here's what we're seeing that has not changed really at the federal level at all. In the illegality defense, but sort of the cracks that have appeared in that defensive. JOHN mentioned a couple of them in the insurance area, we've got sort of other defenses are where the federal court can make a ruling, right, that does not necessarily implicate or sanction, federal court approval of marijuana, right. So, you know, this might be for example, our landlord suing a tenant, right? That one hasn't been litigated. But what like it would have wouldn't

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include is that I loaned money to a marijuana business and the debt wasn't repaid. But you can plead around this some fashion so that the court isn't sort of having to condone or sanction, its participation, so to speak, in marijuana activity, then you can then the illegality defense won't apply. But it's still very much in play. And really, you don't see, you see very little, if anything in the way of federal court litigation that you know, involves marijuana, certainly not directly. And, you know, that's obviously hemp is a different ballgame now, right with the 2018 Farm Bill, but we'll leave it at that. And, briefly, we've got a few minutes left. So John, did you want to touch on international issues for just maybe a couple of minutes? And I think that would be really interesting. With the cross border activity out there and stuff. So I'll let you take.

John McDonald 52:39

Sure. Yeah. Thanks again, Jesse. And I'll be quick because I know, we were short on time. So cross border issues, this is something that comes up mostly, I think, along the way in the supply chain, or right, we have attorneys here at Harris Bricken, who have a lot of experience at the border, dealing with cannabis products, cannabis items. And they're attempted importation. We bring this up in the litigation context, because there are certain rules at play at the border with respect to importing cannabis items and exporting cannabis items. To tell you the truth. One thing that a lot of people don't know is cash is subject to all these rules. So it's not just your marijuana, cannabis items or products that the government can potentially what we call C's, it's also cash used in connection with any activities that might be found to be illegal at the border. Again, very, super interesting space here legally for us. With these issues, again, sitting in Washington very, very interesting because at the line in Blaine, right up on the northern border, it's it's legal one step across the line, it's legal of the step up the other way across the line. But on the line, it's illegal, right. So importing, exporting. From these three states, there's a lot of technical stuff that you have to watch out for. On the front end, you can seek what's called a customs ruling. If you want to bring something in without the threat or sort of risk of it being taken by the government at the border, you can ask if you can bring it in. If you do bring something to the border, you seek to import it, there's a couple of things that can happen if you get into a space that the government might think is somewhat illegal, you could be dealing with the Department of Justice and the seizure action where For instance, if you bring cannabis product or cash to the border, they can take it and you have due process rights in court, where the Department of Justice has to ask a court to forfeit it to the government. There's also a lot of litigation in what's called the court of international trade very, sort of involved process there, but it also has to do with different disputes at the border. what you can and cannot bring in one of the most interesting things, to me, at least in this space is, you know, the business operationally cannabis is becoming, you know technologically a little bit more advanced, right. So things like an extraction machine, this has been a very exciting I guess issue legally, some extraction machines have dual uses, you can pull hemp from it, or you can pull THC from it, some of them have only a single use, if you bring something like that to the border, the government will look very close at what your intended purpose for that machine is. And that may ultimately determine the decision that the government makes about whether something comes in or comes out. Most important thing that I can say about this is it's always better to do your homework on the front end, it's easier to deal with these international issues on the line when everything might be legal on both sides of the line, to get it

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in sort of the quickest and most efficient way possible. A lot of really exciting stuff here, Jesse, I think, you know, that's, again, a broad overview, but happy to take any questions on that as well.

Jesse Mondry 56:12

Yeah, thanks, John. One question, I guess, you know, you mentioned custom rulings that you can customs ruling is something that person can seek in advance moving something across the border. And I guess, you know, obviously, no one's moving marijuana across the border. But let's we'll sort of look at that over to the side. And we've got, let's say, we've got hemp and equipment, Can Can people see how it can both importers and exporters see customs ruling in advance? Or is it sort of a one way street? Is that you know, suppose you want to remove him from Canada to America? Or vice versa? You know, does that how does that kind of work?

John McDonald 56:48

Great question, you can absolutely see that like prior authorization to bring this in through what's called a customs ruling. Like for instance, say that you have a dual use machine that you're concerned if you bring it to the border for use in your supply chain and try to import it for use at your facility, you can go to United States Customs and Border Protection in the first instance, before you risk bringing it to the border. And ask, you know, but again, you'd want to hire a lawyer, obviously, to go to customs. And they put together with you know, what's called a basically a request for importation. And then it goes to a customs Commissioner who's usually an attorney trained in this kind of stuff. And they'll tell you yes or no, those decisions are then appealable. And what's called the court of international trade, if you think that the customs ruling is wrong, great question, Jesse, you can save a lot of money, especially when you consider the time value of money. If you if you try and address this kind of thing up front, before bringing it in the alternative, if you bring it in, and you know, you think it's legal, but then there becomes a problem. I've seen these things last 180 days, you could have equipment or cash at the border or at a customs bonded warehouse for a very long time. So yes, I've definitely my advice is to see perspective rulings on these things. And that keeps all of your options open while keeping your money. The most safe right at all times.

Jesse Mondry 58:18

Alright, thanks very much, John. All right. We're pretty close to the end here. But I wanted to touch on him just a little bit. And I'll kind of say that I think everything just sort of preceded the discussion, you know, applies to hemp in terms of, you know, the securities litigation region, contract partners, partnership tissues, what I see with Pampas, you know, the certainly the grower level, the prices really bottomed out and that there's okino, there's a lot of there's a lot of sort of businesses sort of going under farmers and shovels are really invested a lot in that. One thing I wanted to kind of bring up in that maybe we haven't talked about is, is making use of receiverships, whether that's a formal court proceeding or sort of an informal receivership and what I mean by that is, you might sort of enter like a third party management agreement. And so for example, suppose you've got a you got a hemp business,

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that's it's not doing very well, farmers may be in dispute, you're maybe at the point where what you really need to do is you want to sort of sell off the assets, and we've got to pay our creditors see if there's anything left. And one way to do that is to go through a court proceeding called a receivership in which a former receiver appointed and the receiver will have to make the receivers job then is to sell off the assets of this company or you know, and then pay the creditors and the protective order. And that can be a great tool and a cost effective to a lot of ways to sort of avoid disputes because the receivers want to receive claims and essentially act as the sort of third party neutral administrator. One of the downsides to a court appointed receiver is the expense the receiver is paid out of the assets of the estate. And there's a lot of formalities with the formal court receivership. Sort of on its See, those can be really beneficial in some states. In some cases, this is something you want to look at on a case by case basis. But one of the things we've I've used it in similar situations is sort of an informal receivership through what we call the third party manager. Essentially, this is an agreement where we essentially appointed a person to sort of do all the things that are receivers going to do what outside of the outside of the court now we built in protections, we built to notice requirements, we'll be building all the things we wanted to do, but we're available, you know, able to then give the receiver a bit more flexibility and avoid some of the costs that are inherent of having the court appointed receiver in terms of reports to the court and the formal notifications that have to be sent out. And so that's something I think that, you know, we're going to see more of in the hemp industry coming forward in the next few years. And I think, early on, we had a question about Jackson County. And let me scroll up here. I wanted to make sure I answered that question. Question was about, let me see here. I think the question was about Jackson County issuing, requiring or issuing fines for the construction of temporary hoop houses and permanent greenhouses down there. And yeah, you know, as we all go through reading the news, Jackson County, is at the head or the center of right of this sort of operation Table Rock and this explosion in, at least according to the law enforcement side of things explosion through unauthorized marijuana grows. And one of the things Jackson County is starting to do this year is issue citations or try to require permits for greenhouses that have no electricity or plumbing, right. And in the past, those typically have not been required to be permitted. And so one of the issues Well, what are we doing now? Is this can they really do this under law under the law? And that's sort of the question, the answer I have for you is that, you know, it's going to depend, of course, Jackson County believes they have a legal basis for it. But ostensibly under Oregon, code 450 5.3 15. Agricultural buildings should be exempt from the kind of land use codes and what they can do under these yet use zones to require hoop houses in greenhouses. Now. You know, does this prevent this is sort of one of those things this prevent Jackson County from issuing these, these citations? No, it doesn't, but what it means is that someone, someone, somewhere is gonna have to litigate this question. And agabus Jackson County will sort of back down from this, where they're going to kind of go through and fight this. So you know, I think having sort of more eyes down on the clients I represent with trauma, cannabis industry side of things, obviously, we sort of take the vision that you know, Jackson County can't impose these new requirements on on farms and agricultural buildings sort of that are really I think, designed to enact control that they don't have over the happen in this industry. And I guess finally an operation sort of this operation Table Rock and I think the news reports are saying something that like 50% of the hemp farms down there are new Jackson County Southern are rolling illegal marijuana under the guise of Panama.

Jesse Mondry 1:02:58

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You know, we should look at that with a little bit of skepticism for a couple of reasons. One, you know, there's what we haven't seen in the news reports they are talking about well look when they say it's marijuana, not hemp? Is this is this hemp that tested at 1% THC, or are we talking 33%, high grade marijuana flower that you're gonna be trying to sell in a dispensary, or I guess the the illegal market. And the second part is, you know that they're using what's called light scale labs down there, which is a horrible lab technology that you're they're taking around. The almost TC has been assisting the o da with this and taking the position that this is sort of a certified test. And if it if it fails, the light the light lab tests, well, that's it, we've got enough to say this marijuana and season starting across. But I know that least a few instances where subsequent testing by you know, another certified lab has gotten results drastically different than this stuff is cast testing. So this is a pretty significant issue if they're starting to seize people's crops, seize money, seize houses, put people in jail, and at least one other laboratory. This comes to secondly, have to recall, you know, speaking with yesterday, it said that look, the reality of gas chromatography or liquid chromatography testing is that if you're trying to move these labs around these testing devices from quickly you've got to take the time to recalibrate these things. It's really just not designed for you know, sort of like quickly moving around and getting a test so I kind of wanted to throw that out there for I guess our folks down in Jackson County because I think a lot of us in the bar association who work in the cannabis side of things are pretty concerned about that and we should be reaching out to folks, you know, whether it's us or somebody else if you're experiencing these kinds of problems, because it's it's it's pretty drastic what they're doing and I don't know the paper today when they're talking about it in the national guard down there. And what they're not talking about is the olcc moratorium on producer licenses. Right and the effect that the state of Oregon is saying we're not going to issue anyone a license to legally grow One mistake may have on the impact of the sensible growth of the illegal market. Well, you know, I see we're a little bit out of time here today. Over time, I can just check real quick for any more questions. And then any closing thoughts from Jihee or John in terms of cannabis litigation? What are you thinking about? nuclear?

Jihee Ahn 1:05:23

I mean, not really. I just want to add, you know, to the extent that you submitted questions, thank you so much we have a Canna Law Blog, we are on all social media platforms. So typically what we do after these webinars is we do go through all the questions and if we can turn those, you know, into blog posts or things like that, we definitely will so that might be a good resource, especially because a lot of the questions we did address today they are on our blog as well. So I would just recommend that everyone look into you know, those resources and yeah, it was very nice chatting with you just hinge on during the hour.

John McDonald 1:06:08

No, no closing thoughts for me, Jesse, thank you very much. Read your insurance policies, though,

Jesse Mondry 1:06:13

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And like Jihee said, You can, of course on the kind of law blog, Twitter, LinkedIn, and everywhere sort of Canna news is found I guess I'm thanks very much for your time. And hopefully you found this useful today and we'll talk to you all soon.

Transcribed by <https://otter.ai>