

Although Imperfect, TRIA Remains Vitally Important to the Insurance Industry

Panelists Discuss the Past, Present and Future of the Program

BOSTON — The Terrorism Risk Insurance Act of 2002 (TRIA), borne out of the aftermath of the terrorist attacks on September 11, 2001, was designed to make terrorism risk insurance both available and affordable. Seventeen years after its inception, one question begs to be answered: Is it still achieving its goals? A panel of experts recently discussed the original intent of TRIA, how it has changed and what the future would look like without it at the annual

meeting of the American Property Casualty Insurance Association (APCIA).

The insurance industry was profoundly affected by the 9/11 terrorist attacks, which remain the most costly terrorist incidents in U.S. history. The Insurance Information Institute (I.I.I.) estimates that total insurance losses reached \$47 billion (in 2019 dollars). Although the insurance industry was able to pay nearly all of the claims, it was clear that the

industry could not cover future losses by itself. In response, Congress enacted TRIA, creating a federal government backstop for catastrophic terrorism losses.

TRIA had two specific statutory goals: The first was to immediately stabilize the marketplace and make insurance available following the attacks. The second goal was to ensure the marketplace

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Conflicting Federal and State Laws Leave Carriers With Little Appetite for Insuring the Cannabis Industry

BOSTON — Although public support for the legalization of marijuana has been growing steadily, the ongoing inconsistency between federal and state laws and the classification of marijuana as a Schedule I substance have left most insurance companies with little interest in entering into the market. Panelists at the Boston chapter of the CPCU Society's I-Day discussed public policy and

practical issues that have arisen for the insurance industry as cannabis products have evolved into a growing business sector.

While the marijuana industry faces significant legal uncertainty, it has made headway in recent years. Thirty-three states have legalized the usage of

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fore 9/11, which was a separation of the two. “Then you would expect to see an introduction of the terrorism exclusions at a level that we don’t currently have.” Anything that could be excluded, would be. Property, particularly in central business districts, could become extremely difficult to insure, noted Schupp.

In addition to withdrawing coverage from multiple lines of business, the industry delivers relief to policyholders.

“By having the program, you harness the infrastructure of our industry structure to adjust the claims and offer the relief. I don’t think it’s corporate welfare. It’s more punitive on the industry to provide the coverage that they now have no choice but to provide than it would be otherwise,” said Scott Sinder, partner, Steptoe and Johnson.

It is important to remember that the “free backstop” is not free to the insurance companies, noted Schupp.

“It’s free to policyholders, which is only fair because they’re the ones that are exposed to the post-event surcharges. What the backstop has done has shifted that amount of loss from a traditional insurance, capital based, capital supported pre-funded model to a post-funded model that puts the burden on

policyholders at the back end.”

Landgraf agreed that it is not taxpayers who are exposed. “The commercial policyholder community, which is frankly the entire economy, will ultimately pay back through surcharges any federal backstop payments.”

Schupp reminded attendees that after 9/11, no one could know whether terrorism was going to become a frequency event. Fortunately, it did not. So, all of the money that would have been paid for the value of the backstop is actually in the economy.

“It’s building infrastructure, building investments and brand new jobs. It’s not sitting in insurance companies or in the Treasury piggy bank waiting for a terrorism event. The program has been extremely effective for a low frequency, high severity scenario, which hopefully never comes to pass. All of that money, instead of coming into the insurance industry, is with municipalities, businesses and other organizations doing the good work that they do,” he said.

Moreover, it is not sitting on the federal government balance sheet as it collected premium for some indefinite, hopefully never-to-be-used cause, added Landgraf. ■

Conflicting Federal and State Laws Leave Carriers With Little Appetite for Insuring the Cannabis Industry

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medical marijuana, including all of the New England states. The recreational use of cannabis is allowed in 11 states and the District of Columbia, with Massachusetts, Maine and Vermont among them.

A few years ago the National Association of Mutual Insurance Companies (NAMIC) began hearing from member companies that were getting sued for bad faith claims because they had denied coverage on homeowners claims. In one such case, \$8,000 of marijuana plants had been stolen from an insured’s basement. “There is no insurable interest in something that’s illegal, so the claim was denied,” said Jon Bergner, assistant vice president, public policy and federal affairs, NAMIC.

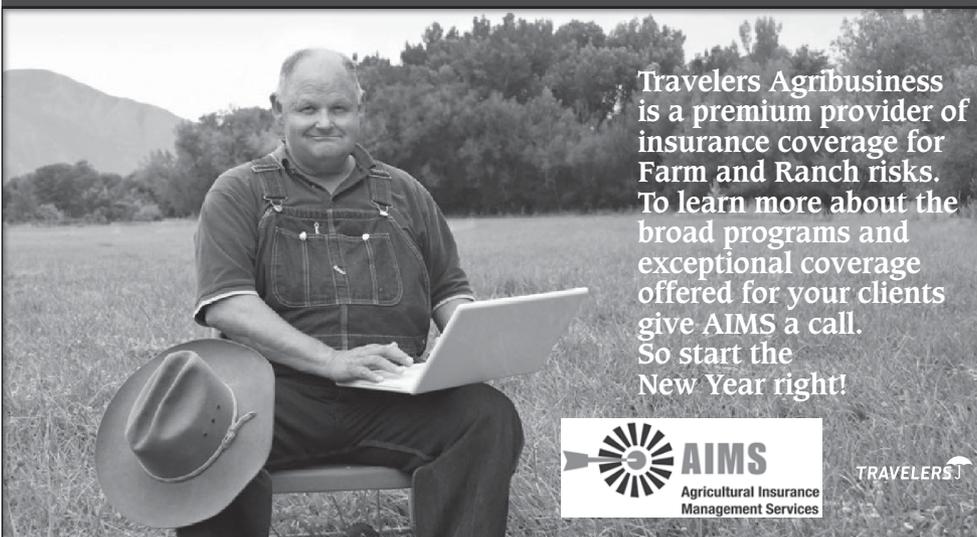
In this instance, the carrier won the case because the Controlled Substance Act (CSA) at the federal level superseded the state and local law. While some states hold that the CSA preempts state law, others say for purposes of this insurance contract, state law supersedes the federal law.

NAMIC has been analyzing how the different lines in the property-casualty (P-C) space could be affected by the cannabis market. “There wasn’t a line that didn’t require some thought as to how it could be potentially impacted,” added Bergner.

The automobile insurance line offers a good example. While an increase in accident frequency and severity has been seen across the U.S., some studies have suggested that states that allow the recreational use of marijuana have seen an increase in accident frequency and severity that is significantly higher statistically than in states that have not legalized recreational marijuana.

In addition, there are general business issues to be dealt with. Does an insured’s

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business have a drug-free workplace policy? Is it going to be allowed to continue that policy? “It is definitely something that companies cannot ignore,” said Bergner.

An Expansive Industry

Even bigger questions surround the idea of a potential insurance market, if the conflict between state and federal law is reconciled. Bergner pointed out that the cannabis industry is quite real and that it has a supply chain that is both robust and modernized — “it is not your uncle growing marijuana in the garage.” Biotech companies are involved in testing, and there are processors, growers, cultivators and a multitude of ancillary businesses, all of which need insurance. All of them complain about being unable to find coverage for what they need, according to Bergner.

“My cannabis clients really want to get insurance, but there is a gap,” said attorney Max Riffin, Burns & Levinson. His clients are looking for products liability insurance, crop insurance and directors and officers liability insurance (D&O). His clients are finding that the exclusions often “swallow the whole” or the insurance costs too much. Although Riffin has had success representing an industrial hemp provider, anything related to cannabidiol (CBD) or tetrahydrocannabinol (THC) — the most common cannabinoids found in cannabis products — has been difficult.

Riffin’s clients include operators, investment funds, credit funds and hedge funds that are involved with mergers and acquisitions to private offerings

where they are raising money either through loans or equity securities. He represents ancillary companies, such as equipment providers, as well. “It’s everyone from cultivators to distributors to people who are delivering cannabis now. It’s an expansive industry,” he said.

At the state level here in Mass., dispensary clients are finding that it is taking 20 to 24 months to get a provisional license. Riffin’s clients are trying to expedite that as well as trying to secure insurance that will help them with respect to shareholder derivative claims.

There is products liability concern about vitamin E acetate after it was exposed as the main culprit in the recent vaping illness outbreak. “In vaping, there is a lot of counterfeiting in the industry, which is another concern,” said Riffin.

An Agent’s Approach

Cannabis is the fastest growing industry in the U.S. Michael DeNault, producer, Foster Insurance/Charles River Insurance, has been working to secure insurance with businesses across the country. Instead of simply providing them with a policy to fill out, he said his agency has taken a different approach — working with them on a preloss basis.

“When we designed our application, we didn’t just ask about how many smoke detectors and clean rooms they have (where they are extracting the oils from the flower). The application is a set of business rules. If applicants don’t check the right boxes, instead of just giving them a definition, we’re advising them on the correct way that the state is

requiring them to do things. These businesses are almost in the same position as we are — it’s the Wild West right now in cannabis,” explained DeNault.

Conflict Between State and Federal Law

Although insurance carriers could be found in violation of the Controlled Substances Act, which establishes federal drug policy regarding the manufacture, importation, possession, use and distribution of certain substances, such as marijuana, Bergner said the more practical danger lies elsewhere. It is being in violation of the Bank Secrecy Act of 1970, which requires financial institutions in the U.S. to assist U.S. government agencies in detecting and preventing money laundering, and the Racketeer Influenced and Corrupt Organizations Act (RICO). Originally aimed at the Mafia, prosecutors have used RICO to attack other forms of organized crime. To violate RICO, a person must engage in a pattern of racketeering activity connected to an enterprise. RICO’s real power is its civil component.

“If you are participating and abetting somebody who is violating federal law, you are opening yourself up to criminal liability under RICO. While you may not be arrested by the Department of Justice (DOJ) for selling insurance to a cannabis dispensary, the civil liability created under RICO could bring you in. Insurance companies have notoriously deep pockets, so they could be a target of the trial bar,” cautioned Bergner.

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started by a homeowners association sued a dispensary — every entity doing business with that dispensary — for reduction of their property values under the RICO statute for civil liability. Although the dispensary ultimately won, the case took years to settle and could have gone the other way, noted Bergner.

Decriminalizing or Rescheduling Marijuana

Paul Tetrault, JD, CPCU, ARM, AIM, executive director, Insurance Library Association of Boston, served as panel moderator. He noted that industrial hemp was legalized by decriminalizing it through a mandate of the CSA. So, why is it necessary for Congress to go through the Safe Banking Act instead of decriminalizing or rescheduling marijuana's status?

The cannabis business is very cash based, which makes it a high-risk business to operate. It is mostly local, state-chartered community banks that will conduct business with the cannabis industry. Bergner explained that the Safe Banking Act was designed to give banks the flexibility to allow cannabis businesses to access the banking system and other financial services. It was meant as a way to “wash the money that is produced by cannabis and make it clean again so that banks can take it and not be liable.”

During the mark-up stage of the bill, the insurance industry was able to include language that provided it safe harbor.

There are multiple federal proposals on the table, from descheduling marijuana entirely to rescheduling. There does not appear to be much appetite for descheduling marijuana because the government would not be able to regulate it at all. “They would have to reinvent the wheel for the U.S. Food and Drug Administration, and it would take a lot to figure that all out,” said Bergner.

There is also a proposal to reschedule marijuana. The CSA has five categories, or schedules, that are used to classify drugs based upon their abuse potential, accepted medical applications in the U.S. and safety and potential for addiction. Marijuana is on Schedule 1, along with heroin, ecstasy and LSD. Cocaine is among the Schedule 2 drugs. Cold



Paul Tetrault, Jon Bergner, Max Riffin and Michael DeNault took part in a panel discussion on the cannabis insurance market at the Boston chapter of the CPCU Society's I-Day.

and cough medicines are considered Schedule 5.

The argument for rescheduling marijuana is that it is unreasonable to group it with such drugs as heroin. In addition, scientists are not allowed to research Schedule 1 drugs unless given a federal exemption.

“In terms of public acceptance or understanding the medical benefits, rescheduling [marijuana] and opening it up to more research would be beneficial because we could have some better information. THC is not well understood and certainly not in the concentrations we're talking about consumers consuming this days ... Better understanding the long-term impacts and what could potentially happen, I think, would be important,” said Bergner.

Cannabis in the Commonwealth

Massachusetts legalized the recreational use of cannabis in 2016, and the first retail store opened in 2018. The Cannabis Control Commission (CCC) is charged with implementing and administering the laws enabling access to medical and adult-use marijuana in the Commonwealth. It has five commissioners consisting of one appointee each from the governor, treasurer and attorney general, and two members agreed upon by the majority of those three constitutional officers.

Although the commissioners sit in the same office, they can only speak to one another in a public forum in front of an audience, noted DeNault. The commissioners are appointed to a four-year term. We are currently in the third year with a large backlog of businesses that have yet to receive even a provisional license, according to DeNault. “The typical application is about 800 pages, and it takes about 250 hours to review. If not approved after 12 months, you need to reapply.”

Without a provisional license, marijuana businesses cannot build out or start working their equipment. Some are at risk of losing investors. One of DeNault's clients had a lease on a building for a year and a half, but he could not buy insurance yet because there was no business to insure. (He had a lessor's risk policy). “There's such a holdup with the CCC, all of these businesses trying to form are failing before they even start.”

There are between 15 to 20 dispensaries currently open in the state. In Fitchburg, for example, 13 licenses were approved in 2016, but only two are in operation. “With the state dragging its feet, not only does it prevent businesses from opening, it's promoting a black market and keeping prices high,” said DeNault.

If it is any consolation, Bergner said that other states are not really doing a much better job of it. Some are looking to Mass. as a template for their own regulations. He explained that one source of

frustration for the CCC commissioners is the conflict between getting licenses at the town level and at the state level. They depend on the legislature for guidance. “When you have these different levels of government that are at odds in some ways — or at least not consistent or coherent — that creates this backlog,” said Bergner.

You’re Already in the Cannabis Business

Although there are about five different insurers officially servicing the cannabis industry, according to DeNault, it can be argued that most admitted carriers are in the cannabis industry but do not know it. If a carrier insures a commercial property with lessor’s risk insurance, the carrier may not know whether the property management company that owns the building is leasing to dispensaries or not, noted Bergner.

“Insurers need to look at their books of business and try to figure out if they are exposed. And if so, how. I think it’s a huge issue. You can’t put your head in the sand,” said Bergner.

Would the cannabis industry be better served by captive insurers and alternative risk transfer methods or try to work with standard market carriers?

“We’re working with captive markets right now because it’s such a specialty coverage, but five years from now, who knows what is going to happen? The carrier we represent may end up being a standard carrier because of how normal this supply chain of businesses is going to be. I think it’s moving toward that space,” predicted DeNault.

Bergner agreed. Although none of NAMIC’s member companies are looking to enter the cannabis market now, if the issue of legal liability at the federal level is resolved, he does not see any reason why more companies would not see the potential for this market. “There are projections that it will be a \$21 billion industry next year, and some predict that it would be closer to \$40 billion and \$50 billion if you removed a lot of barriers whether it is state-level and the CCC or the federal level legal issues,” said Bergner. ■

One-Third of Impaired Driving Deaths Caused by Repeat Offenders

WASHINGTON, D.C. — Despite our nation’s roadways becoming safer over the past few years, impaired driving remains a major highway safety problem nationwide. A new study from the Governors Highway Safety Association (GHSA) is calling for a systemic and holistic approach to high-risk impaired drivers that focuses on the individual and the need to treat the underlying problem prompting the unsafe behavior.

GHSA defines a high-risk impaired driver as someone who lacks the restraint or self-control to resist driving while impaired. These drivers meet one or more of three criteria: They drive with a blood alcohol concentration (BAC) of 0.15 g/dL or higher after consuming alcohol; they have consumed a combination of drugs and alcohol; and are repeat offenders.

The high-risk impaired driver population accounts for a disproportionate number of fatalities. Repeat offenders cause about one-third of impaired driving deaths each year, while high BAC offenders are involved in more than 60% of alcohol-impaired fatalities. There has been a 16% increase over the past 10 years in the number of impaired drivers killed in crashes who tested positive for both alcohol and other drugs.

Many of these offenders have not only a substance use disorder, but also a mental health disorder, according to research conducted by Cambridge Health Alliance at Harvard Medical School. The latter, however, often goes undetected.

Individualized justice is more effective at deterring high-risk impaired drivers than the typical legislative response of heavy fines and incarceration, according to criminal justice experts. Going beyond screening and assessment, this approach also calls for testing drivers for the presence of not only alcohol, but also other drugs. Many drug-impaired drivers escape detection due to

limitations with enforcement practices or policies that do not require drug testing. Additionally, many states lack the toxicology resources necessary to process drug screenings. ■

CID Launches Insurance Technology Council

HARTFORD, CONN. — Connecticut Insurance Department (CID) Commissioner Andrew Mais chaired the initial meeting of the Department’s recently formed Advisory Council on Technology.

The council was created to share information important to consumers and other stakeholders, including the industry, regulators, technology companies and Insurtechs, which will shape the future of how insurance will be managed and marketed to consumers.

“Technology advances, as evidenced in the growing Insurtech world, are changing the insurance landscape in many ways,” said Commissioner Mais. “As regulators, it is important that the Connecticut Insurance Department closely collaborates with all stakeholders and Insurtech startups to both support the growth of innovation and to protect consumers, which is the center of all regulatory activity.”

The commissioner noted that the council will play a “central role in offering actionable steps that impact how companies can evolve with new technology, interact with consumers and serve their customers.

The Insurance Department is working to be both a facilitator with the industry and innovative startups that support Gov. Ned Lamont’s efforts to streamline and reengineer how state government serves Connecticut’s consumers. ■