What Cannabis Cos. Must Know About Strict Product Liability

By **Ian Stewart** (March 15, 2023)

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The term "product liability" is used by many in the cannabis industry to generically describe a wide variety of product risks, some of which do not fall within the traditional legal definition of strict product liability that arises from a defective or dangerous product.

This broad definition encompasses non-bodily injury claims by consumers or competitors who allege consumer fraud, false advertising, label errors and unfair competition. Although such claims have given rise to significant product recalls and consumer class actions involving cannabis products, these should be considered a distinct set of risks compared with traditional product liability injury claims.

New medical research relevant to traditional product risks continues to emerge, such as research findings announced in February by the American College of Cardiology that people who use marijuana daily have a significantly increased risk of developing coronary artery disease.

This article discusses important factors that cannabis companies must consider when evaluating the traditional product liability risks of cannabis products.

Traditional Product Liability

It is axiomatic that a manufacturer, distributor or retailer is liable in tort if a defect in the manufacture or design of a product causes injury while the product is being used in a reasonably foreseeable way.

Strict liability has been invoked for three types of product defects that include manufacturing defects, design defects and warning defects, which include inadequate warnings or failures to warn. Any person or entity that is an integral part of the overall production and marketing enterprise may be subject to strict product liability.

Prospective plaintiffs' counsel seek to overcome current obstacles to proving liability for cannabis products under the common tests used by courts. In addition to liability for failure to warn, this includes proving a design defect through the consumer expectation test and the risk-utility test.

Each state has adopted one or both of these standards, or a modified version, though a few states do not recognize product liability under state law.

The Consumer Expectation Test

Approximately 25 states have adopted some version of the consumer expectation test as a means to prove strict product liability.

Under this test, the plaintiff must prove that the product did not perform as safely as an ordinary consumer would have expected it to perform when used — or misused — in an intended or reasonably foreseeable way. The plaintiff also must establish that the product's failure to perform safely was a substantial factor in causing the harm alleged.

Typically, a jury will not be instructed to apply the consumer expectation test unless the product is one about which the ordinary consumer can form minimum safety expectations.

The consumer expectation test does not apply merely because the consumer states that he or she did not expect to be injured by the product, but rather is reserved for cases where the everyday experience of the product's users permits a conclusion that the product's design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the design.[1]

The consumer expectation test does not rely on medical or scientific testimony. Evidence as to what the scientific community knew about the dangers is not relevant to show what the ordinary consumer of the product reasonably expected in terms of safety. It is the knowledge and reasonable expectations of the consumer that are relevant.[2]

It is doubtful that the hypothetical ordinary consumer has formed minimum safety expectations about any cannabis product. The legal market is simply too new and fragmented with inadequate uniformity around product labels and warnings.

It is nevertheless likely that the consumer expectation test will become a viable theory of liability against cannabis companies within the next five years as product labels, warnings and instructions are harmonized through the coordination of state regulators, efforts by third-party standards organizations and the eventual implementation of a federal regulatory scheme.

The cannabis industry should therefore pay attention to how cannabis consumers are educated around product risks, discussed in greater detail below.

The Risk-Utility Test

An alternative means of proving a strict product liability design defect is the risk-utility test, also called the risk-benefit test, some version of which has been adopted in approximately 30 states.

Under California's version of this test, which is similar to that used in many states, the plaintiff must prove that the product's design was a substantial factor in causing harm.

If the plaintiff can meet this burden, the jury is instructed to find for the plaintiff unless the defendant proves that the benefits of the product's design outweigh its risks. The jury considers several factors such as the likelihood and gravity of the product's potential harm and the feasibility, cost and disadvantages of an alternative safer design. Expert testimony is typically required.

The specific risks and benefits of cannabis currently remain unclear because federal illegality has largely precluded the availability of reliable studies on questions of safety and efficacy.

Cannabis research is now catching up to the faster-moving consumer behavior and public policy. The number and quality of recent cannabis-related studies have increased as a result of cannabis legalization at the state level and removal of hemp from the Controlled Substances Act.

The rules around cannabis research have also been relaxed through recent legislation. On Dec. 2, 2022, President Joe Biden signed into law the first stand-alone federal cannabis bill

in U.S. history. The Medical Marijuana and Cannabidiol Research Expansion Act, which passed with strong bipartisan support in both chambers of Congress, facilitates cannabis research by streamlining the application process for scientific marijuana studies and removing existing barriers for researchers that frequently slow the research process.

Attorneys soon will attempt to prove strict product liability against cannabis products using the risk-benefit test by hiring experts who will interpret emerging data in a manner most favorable to the plaintiff. As we discussed in a previous article, various new studies identify possible associations between the use of high-THC products and cardiovascular conditions, mental health issues or particular harm to certain consumer populations.

Failure to Warn

The liability test with the best chance of resulting in a liability determination is failure to warn.

To prove a warnings defect, the plaintiff must establish that the defendant failed to adequately warn of a potential risk that was known or knowable in light of the scientific and medical knowledge that was generally accepted in the scientific community at the time of manufacture, distribution or sale.

The plaintiff also must prove that an ordinary consumer would not have recognized the potential risk without the warning.

Per the First Appellate District of California in the 2009 case of Taylor v. Elliott Turbomachinery Co. Inc, product manufacturers, distributors and retailers therefore have a duty to warn consumers about the hazards inherent in their products "so that the consumer may then either refrain from using the product altogether or avoid the danger by careful use."[3]

It is not enough for an individual defendant to claim that it had no actual knowledge of the hazard or risk. Rather, according to the California Supreme Court in Carlin v. Superior Court in 1995, the defendant "is held to the knowledge and skill of an expert in the field; it is obliged to keep abreast of any scientific discoveries and is presumed to know the results of all such advances."[4]

On the other hand, as established by the California Supreme Court in Anderson v. Owens-Corning Fiberglas Corp. in 1991, a defendant may defend itself by presenting state-of-the-art evidence that "the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution."[5]

Certain emerging risks from use of cannabis products are not dissimilar to those associated with some prescription drugs and nutraceutical products, including risks that may be unavoidable. In that case, as the Fifth Appellate District of California held in Buckner v. Milwaukee Electric Tool Corp. in 2013, "the supplier must give an adequate warning to enable the potential user to make an informed choice whether to use the product or abstain."[6]

We expect lawsuits premised on warnings failure to increase. For example, some lawsuits already have alleged that cannabis companies seek to take advantage of the public's perception of cannabis products as safe and healthy despite the fact that THC and other cannabinoids have been linked to various adverse side effects.

It also has been alleged that although edible cannabis products are linked to more severe adverse effects than smoking marijuana, those products have been marketed by some companies as the safer and healthier alternative.

The hemp industry, meanwhile, should brace for similar allegations brought against hemp-derived THC products that are becoming increasingly popular and available.

Cannabis Product Risk Mitigation

To reduce product liability risks, myths and misperceptions about cannabis use must be dispelled so that companies can engage customers in an informed evidence-based conversation about their cannabis products. Education is therefore essential to properly mitigate the true liability of products that contain cannabinoids.

This includes education for both cannabis companies and their customers.

Similar to how companies in other market sectors mitigate risk, cannabis companies should designate persons within the organization to have responsibility for understanding the state-of-the-art product risks and stay informed of emerging data. This internal education should then be disseminated to customers in the form of reasonable product warnings and instructions.

Cannabis companies will eventually embrace more robust cannabis product warnings, but these warnings must be factual to result in effective risk reduction. More thorough product warnings may happen suddenly through new regulations or it may be through a slower process that is accelerated by large jury verdicts.

Either way, it is difficult to imagine a future without cannabis and hemp product disclaimers of the type that accompany most over-the-counter medical products and other regulated consumer products.

Warnings may include statements about the difference between smoking cannabis and orally consuming it, the duration of effects, cannabinoid ratios and the impact on impairment, the risk of adverse health effects, and warnings directed to specific vulnerable groups.

Allowing the establishment of any standard that stops short of this demand for accuracy will only exacerbate the confusion that already plagues the industry.

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[1] See e.g., Soule v. General Motors Corp. (1994) 8 Cal. 4th 548, 560; Saller v. Crown Cork & Seal Co. Inc. (2010) 187 Cal. App. 4th 1220, 1233-1234.

[2] See e.g., Morton v. Owens-Corning Fiberglas Corp. (1995) 33 Cal. App. 4th 1529, 1536.

[3] Taylor v. Elliott Turbomachinery Co. Inc., 171 Cal. App. 4th 564, 577 (2009).

[4] Carlin v. Superior Court, 13 Cal. 4th 1104, 1113 (Cal. 1996).

[5] Anderson v. Owens-Corning Fiberglass Corp., 53 Cal. 3d 987, 1004 (Cal. 1991).

[6] Buckner v. Milwaukee Electric Tool Corp., 222 Cal. App. 4th 522, 532 (2013).