WEBINAR

D&O and Management Liability for Cannabis Companies: The Risks & Emerging Markets for Coverage

Thursday, October 7, 2021

Kimberly Blair
Partner – Chicago, IL
312.821.6139
kimberly.blair@wilsonelser.com

Dean Rocco
Partner – Los Angeles, CA
213.330.8922
dean.rocco@wilsonelser.com

Jonathan Meer
Partner – New York, NY
212.915.5639
jonathan.meer@wilsonelser.com
Introductions

Dean Rocco, Wilson Elser Los Angeles
Jonathan Meer, Wilson Elser New York
Kimberly Blair, Wilson Elser Chicago

Directors & Officers
Coverage and Claims, Generally

- Common Law: Duty of Loyalty and Care
- Areas of Liability for Directors and Officers
  - Employment laws
  - Antitrust laws
  - Environmental laws
  - FDA, RICO, IRS, OSHA
  - Bankruptcy: Zone of Insolvency/Deepening Insolvency
  - Securities laws
Key Elements of the D&O Insurance Policy

- Side A: Coverage where company indemnifies
- Side B: Coverage where company declines to indemnify
- Side C: Entity Coverage
- Key Terms and Provision
  - Claims Made and Reported
  - Retroactive Date
  - Related Claims Provisions
  - Other conditions, provisions and exclusions

Legalization Reforms

- Marijuana Opportunity Reinvestment And Expungement (MORE) Act Or The “Schumer/Booker/Wyden” Bill
- The SAFE Banking Act
- Intersection Of The Interstate Commerce And Intrastate Cannabis Regulatory Structures

Changes in the Law on the Horizon?
Recent Trends with D&O Liability Impacting Cannabis Companies

- #MeToo (D&O Liability and Sexual Harassment in the Workplace)
  - Vasquez v. BlueBird World LLC dba Medible Dispensary, Oregon State Court
  - EEOC v. AWMA Investment Group LLC, US Dist. Court, D. Maryland
- Diversity Claims
- Covid-19 related Litigations
- Data Breach Liability Claims

Genesis and Types of Cannabis D&O Lawsuits

- Shareholder Litigation
- Third-Party Litigation

Cannabis Securities Litigation

- 28 Securities Class Actions in last 7 years
- Canopy Growth Corporation
- HEXO Corporation
- Chronos Group
- Trulieve Cannabis Corp
- Tilary Inc.
Setting the Stage:
The Vicious Cycle of Cannabis D&O Liability

- Impact of unavailability of traditional financing
- Disclosure risks via private memoranda
- Regulatory minefields

- The Cycle
  - Errors
  - Claims
  - Losses
  - Increased Premiums
  - Non-Renewals and Carriers
  - Exit from the Market

Take Away Thoughts:
Compliance and Communication Are Important

- Regulatory compliance and organizational chain of responsibility is key
- Best practices when making public statements about a company
- Clearly understanding and communicating the company’s business operations and potential exposures.

Presenters

Dean A. Rocco
Partner
Los Angeles, CA
p. 213.330.8922
e. dean.rocco@wilsonelser.com

Jonathan E. Meer
Partner
New York, NY
p. 212.315.5439
e. jonathan.meer@wilsonelser.com

Kimberly E. Blair
Partner
Chicago, IL
p. 312.821.6139
e. kimberly.blair@wilsonelser.com
Kimberly Blair focuses her litigation practice on professional liability, including accountants, attorneys, insurance agents, real estate agents, technology and media professionals, consultants, brokers, architects and engineers in addition to directors and officers liability, insurance coverage and bad faith matters. Kim is a co-chair of the firm’s Lawyers Liability practice. She has tried cases in Illinois and has appellate experience throughout the United States, including a number of published appellate decisions on coverage matters. She is an active member of the Professional Liability Underwriters Association (PLUS).

Carrier clients rely on Kim’s vast experience in all 50 states rendering coverage opinions on all types of professional liability insurance policies, as well as her resolute defense of wrongful denial claims and prosecution of declaratory judgment actions. Kim develops a strong rapport with the attorneys and other professionals she defends, envisioning herself in their positions and skillfully guiding them toward positive outcomes. To add further value to her client relationships, Kim frequently addresses in-house claims professionals and insureds on topics such as coverage, liability and damages.

In addition, Kim defends private- and public-sector employers in all aspects of federal and state employment discrimination laws, handling cases arising under state and federal fair employment practices statutes. She is quite literally at her clients’ side before such administrative and judicial tribunals as the U.S. Equal Employment Opportunity Commission, the National Labor Relations Board or the U.S. Department of Labor, including state and federal administrative agencies and courts. Recognizing that employers seek cost-effective resolutions to complex and potentially protracted cases, when appropriate she seeks to accommodate them through alternate resolution options, including arbitration, conciliation and mediation.

Jurisdictions
Kim has litigated actions in Illinois, Wisconsin, Pennsylvania, New York, North Carolina, South Carolina, California, Utah, Colorado, Kentucky, Michigan, Ohio and Mississippi.

Representative Matters


**Education**

Vanderbilt University School of Law, J.D., 2000

University of Illinois at Urbana-Champaign, B.A., 1997, magna cum laude; Phi Beta Kappa

**Certifications/Licenses**


Jonathan Meer focuses his practice on insurance coverage, including monitoring and coverage determinations, with a concentration on directors and officers (D&O), professional errors and omissions (E&O), lawyers’ (LPL), employment practices and cyber liability programs. Jonathan represents the interests of primary and excess insurers based in the United States, China, London and Bermuda in high-exposure claims against directors and officers of public and private companies, nonprofit boards, financial institutions and insurance companies. He has addressed claims related to shareholder class actions seeking multimillion-dollar damages against public companies and their directors and officers, as well as other high-profile fraud cases involving a variety of issues.

In addition, Jonathan's litigation practice focuses on commercial litigation and professional liability. He has experience with matters arising under E&O policies covering attorneys, co-op boards, software developers, engineers, consultants, agents and other professionals. Jonathan's practice also includes employment matters involving all types of discrimination and harassment, retaliation and wrongful termination claims.

Jonathan is active in firmwide development activities, including serving on Wilson Elser's Associate Focus Committee and the firm's Peer Mentor Committee.

Areas of Focus

**Directors & Officers Liability**
Jonathan has successfully participated in mediation and litigation of D&O and other insurance coverage disputes. He regularly represents D&O insurers as coverage and monitoring counsel in complex shareholder class actions against public companies and their directors and officers for violations of federal securities laws and in shareholder derivative suits against directors and officers for breach of fiduciary duty and mismanagement in the context of mergers and acquisitions and other business transactions. Jonathan advises insurance companies and claims administrators on all coverage issues, including those involving excess insurance, extra-contractual liability, policy language, conflicts of laws, reinsurance, co-insurance, rescission, misrepresentation and the interplay of other insurance clauses. He currently represents insurers regarding product lines exposed to the subprime mortgage and financial crisis and has actively participated in numerous mediations.

**Employment Practices Liability**
Jonathan’s practice includes employment matters in the courts and before federal, state and local agencies. Such services include direct representation of clients and litigating, mediating and negotiating favorable resolutions of EEOC charges and civil actions involving a wide range of claims for violations of state and federal employment laws, including claims alleging gender, age and race discrimination under Title VII of the Civil Rights Act of 1964, wrongful termination, sexual harassment and retaliation claims.
Awards & Distinctions

AV® Preeminent™ Rated by Martindale-Hubbell

Education

Rutgers School of Law, J.D., 2006
Cornell University, M.P.A., 2003
Cornell University, A.B., 2002, cum laude

Certifications/Licenses

Professional Liability
Jonathan's litigation practice includes the defense of liability actions against a variety of professionals and representation of professionals in general business disputes in miscellaneous E&O claims. Jonathan has diverse experience handling all aspects of claims and litigation assessment, management and resolution.

Cyber Liability, Data Privacy & Security
Jonathan continues to develop his proficiency in a wide range of cyber liability matters, representing primary and excess insurers as coverage and monitoring counsel in connection with first-party and third-party claims under cyber liability insurance policies. His practice also addresses insurance coverage with respect to data security and privacy protection and coverage for technology errors and omissions.

Clerkships

Honorable Sebastian Lombardi,
Superior Court of New Jersey
Dean Rocco is a pragmatic, results-oriented attorney who leverages the firm’s geographic reach and strength across multiple disciplines to the benefit of clients. He takes great pride in building longstanding partnerships with clients through responsive communication and consistent, positive results in keeping with clients’ business philosophies and litigation objectives.

Dean is the Western Region Chair of the firm’s national Employment & Labor practice. In that capacity, he maintains a significant practice representing employers and management in a wide range of employment litigation. He lends his knowledge and perspective to building effective personnel programs and policies, counseling employers and managing risk during difficult employee issues, and training employers on legal compliance and best practices.

Dean also serves as co-chair of the firm’s national Cannabis Law practice. Dean works with clients inside and outside the cannabis industry to navigate the complex and quickly evolving framework of recreational and medical marijuana laws impacting their businesses.

As a distinguished attorney and recognized authority in his field, Dean is routinely asked by media outlets, business organizations and professional associations to share his perspectives on evolving legal issues.

Areas of Focus

Employment Counseling, Training & Litigation
Clients routinely seek Dean’s help navigating difficult personnel issues, managing employees with disabilities and medical leave rights, complying with wage-and-hour regulations and developing sound personnel policies. Clients also call on Dean to train management and employees on a variety of subjects, such as discrimination and harassment prevention, managing employees within the law, and complying with wage-and-hour laws.

Dean also maintains a significant employment litigation practice covering a broad range of cases, including breach of employment contract, discrimination and harassment, violations of disability and medical leave laws, and workplace torts such as defamation and wrongful termination in violation of public policy. In addition, Dean frequently litigates individual, representative and class action wage-and-hour lawsuits alleging claims such as denial of meal periods and rest breaks, misclassification of employees, non-payment of wages, off-the-clock work, unlawful commission and bonus plans, and violations of statutory pay provisions.
Awards & Distinctions
Selected for inclusion in California Rising Stars, 2010

Education
Pepperdine University School of Law, J.D., 2000, Judicial Externship, Los Angeles County Superior Court, Honorable Lawrence J. Mira
University of Michigan, B.A., 1997

Certifications/Licenses

Dean has successfully enforced employer-promulgated arbitration programs, secured restraining orders against employees involved in workplace violence, and prosecuted actions against employees engaged in unfair competition and misappropriation of trade secrets.

Cannabis Law
Dean regularly works with cannabis organizations and ancillary businesses, assisting start-ups with business formation and governance, processing licensing applications, supporting commercial transactions, guiding mergers and acquisitions, structuring fundraising, building sound employment policies and practices, reviewing insurance coverage, and guiding regulatory compliance in the growth, transportation, processing, production or distribution of cannabis-related products. When disputes arise, Dean leverages the firm's strength across multiple disciplines to effectively litigate commercial, products liability, professional liability, intellectual property and employment law claims.

For employers of all types, Dean provides guidance on legalization's impact on employment law issues such as job applications, drug testing, accommodating employees' use of cannabis for medical purposes and cannabis as a cause or treatment for workplace injuries.

Fair Housing & Discrimination
Dean has significant experience counseling clients and defending against litigation asserting discrimination under state and federal fair employment and housing laws. He has defended hotels and business establishments against claims of discrimination under the Unruh Civil Rights Act.

Representative Matters

Employment Litigation, Single Plaintiff
Obtained summary judgment in a lawsuit by a former employee alleging her employer defamed her post-separation upon showing the alleged conduct was either privileged, not actionable or not attributable to the employer
Obtained summary judgment of a lawsuit by a former outside salesperson alleging his employer and managers failed to accommodate his disability, discriminated against and harassed him due to his disability, violated the California Family Rights Act and terminated his employment for complaining about perceived workplace abuses upon showing the employee was not qualified to perform the essential functions of his job and was terminated for poor performance
Obtained summary judgment of a lawsuit by a former hospital employee alleging breach of implied contract not to terminate without good cause and intentional infliction of emotional distress upon establishing the employee was employed at-will and the employer never engaged in actionable conduct
Secured dismissal of a former employee's claims of defamation and interference with prospective economic advantage against a co-worker as a sanction for the employee's abuses of discovery during the litigation
First-chaired the trial of a disability discrimination lawsuit by a former hospital employee and obtained a complete defense verdict; before trial, obtained summary judgment of the employee's race and age discrimination and harassment claims against the hospital and an individual supervisor
Obtained summary judgment in a lawsuit by a hospital employee alleging age and national origin discrimination upon demonstrating the employee could not show pretext in the termination decision and certain claims were barred by applicable statute of limitations
Second-chaired the trial of a disability discrimination case that settled favorably during trial
Second-chaired the trial of an age and disability discrimination case that settled favorably on eve of trial
Secured an order dismissing a lawsuit by a former student alleging defamation against the executive of a professional training and testing company upon showing the student could not invoke theories of respondeat superior against the executive
Secured an order dismissing a lawsuit alleging sexual harassment, discrimination and retaliation through summary judgment
First-chaired the trial of a race discrimination case that settled favorably on eve of trial
Secured the dismissal of a former employee's discrimination lawsuit upon filing a motion to deem her a "vexatious litigant"

First-chaired the defense in administrative hearing before Division of Labor Standards Enforcement and secured an order in favor of a surgical center accused of failing to pay a doctor's wages at the time it terminated his employment contract

Secured a court order finding a former employee engaged in spoliation of evidence by destroying surreptitious tape recordings of termination meetings with managers

Recovered stolen property and secured both monetary damages and restraints on trade for a company in an action against former employees who used company property and trade secrets to form a competing business

Obtained summary judgment of lawsuit by a former employee alleging her employer and supervisor engaged in sexual harassment and discrimination upon establishing the alleged conduct did not evidence discriminatory animus

Secured a "walk-away settlement" in a race discrimination case upon discovering the former employee engaged in theft and other misconduct

Obtained a favorable resolution in a lawsuit by former employee alleging the company violated the California Family Rights Act upon demonstrating the individual's medical leave did not actually concern a “serious health condition” under the statute

Achieved a favorable resolution in a lawsuit by 10 former employees alleging the company and their supervisor engaged in race discrimination, retaliation and harassment

**Employment Litigation, Representative and Class Action**

Secured the dismissal of a claim against a national shipping company under California's newly established Labor Code Private Attorney General Act (Bounty Hunter Law) after establishing an absence of “aggrieved employees”

Secured the dismissal of a class action brought by an outside salesman for a national office support company on the grounds the individual class representative could not adequately represent the class

Secured a non-monetary settlement in a representative action under the Labor Code Private Attorney General Act

Secured a favorable settlement for a regional franchisee facing claims it unlawfully deducted wages from employees, misclassified sales managers as exempt, and failed to provide employees meal periods and rest breaks

Secured a favorable, structured settlement for group of regional food distribution companies facing claims they misclassified and failed to pay overtime and expenses to outside salesmen, delivery drivers, merchandisers and demonstrators

Secured a favorable, structured settlement for a regional sporting goods retailer facing claims it misclassified and failed to pay overtime to managers

Secured a favorable settlement for a national mortgage company facing claims of improper payroll record keeping, unpaid overtime and denied meal periods

Secured a favorable settlement for a national copying and printing company facing a class action alleging the existence of an unlawful commissions and bonus plan and related Labor Code violations

Secured a favorable settlement for an international corporate compliance auditing firm facing claims of misclassified field officers and resulting unpaid overtime