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Failure to Warn Claims against the Recreational Marijuana Industry

By Michael P. Adams

What can claims against the alcohol and tobacco industries teach practitioners about how to defend failure to warn claims against the burgeoning recreational marijuana industry?

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On January 1, 2014, marijuana became available to the public in Colorado for recreational purchase and use. Three months later, on April 14, 2014, Kristine Kirk called the police to report that her husband, Richard, was behaving erratically and hallucinating. Noelle Phillips, *Richard Kirk Sentenced to 30 years in Prison in 2014 Observatory Park Slaying of His Wife*, Denver Post (April 7, 2017), **https://www.denverpost.com**. Ms. Kirk informed the police that she believed that her husband had eaten a marijuana-infused candy and was on prescription pain medication. Twelve minutes into the recording, a gunshot rung out and nothing more was heard from Ms. Kirk. Police arrived at the Kirk residence shortly afterward and found Mr. Kirk in an intoxicated state. The police arrested Mr. Kirk, and prosecutors charged him with the first-degree murder of his wife. Police recovered a partially eaten marijuana candy from the Kirks' home. Lab testing performed later that evening confirmed Mr. Kirk had tetrahydrocannabidol (THC)—the primary psychoactive (mind altering) chemical in marijuana—in his blood at a concentration of 2.3 ng/ml.

Two years later, the guardians of the Kirks' three children filed a wrongful death lawsuit against Nutritional Elements, Inc., the dispensary where Mr. Kirk allegedly purchased the marijuana candy, and Gaia's Garden, which allegedly manufactured, packaged, and distributed the candy. *See Kirk v. Nutritional Elements, Inc.*, Case No. 2016-cv-31310, Filing I.D. C412DD7A1A436 (Denver County Court). The plaintiffs brought causes of action for strict product liability and negligence, predicating their theories of liability on a failure to warn. Specifically, the plaintiffs alleged that the defendants failed to provide instructions for the proper consumption of the candy, such as a serving size, whether the candy should be consumed on an empty stomach, or whether the candy should be taken if the consumer is on prescription medication. The plaintiffs also alleged that the defendants failed to warn that the candy should not be taken in combination with other drugs, contained more than 100 mg of THC, could cause intoxicating effects, and that the intoxicating effects of the candy could take several hours to develop. The lawsuit is believed to be the country's first wrongful death action brought against the recreational marijuana industry.

Although *Kirk v. Nutritional Elements* is believed to be the first lawsuit of its kind, similar suits will likely follow. Prior to 2020, eleven states (Alaska, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont and Washington) and the District of Columbia have legalized marijuana for recreational use. Jeremy Berke and Shayanne Gal, *All the States Where Marijuana is Legal and More That Just Voted to Legalize It*, Business Insider (November 6, 2020), **https://www.businessinsider.com**. In 2020, four more states (Arizona, Montana, New Jersey, and South Dakota) passed measures to legalize and tax recreational marijuana. Alicia Wallace, *Four More States*

Just Legalized Recreational Weed. Here's How Long You'll Have to Wait to Buy It, CNN (December 4, 2020), **https://www.cnn.com**. The marijuana industry is one of the fastest growing industries in the United States. Total legal sales are projected to grow at a compound annual growth rate of 14 percent, reaching nearly $30 billion by 2025. Chris Hudock, *U.S. Cannabis Industry Market Projections Up 20 percent to $30 Billion by 2025*, New Frontier Data (September 17, 2019). Two-thirds of Americans now support legalizing marijuana. Andrew Daniller, *Two-thirds of Americans Support Marijuana Legalization*, Pew Research Center (November 14, 2019).

Failure to warn claims against the recreational marijuana industry will implicate state regulatory schemes, especially labeling requirements, as well as the common law.

The insurance industry has nonetheless been slow to embrace the marijuana industry, in no small part due to marijuana's continued status as an illegal Schedule 1 drug under the Controlled Substances Act, but there are strong financial incentives for this to start to change. One report suggested that the U.S. marijuana industry could pay about $1 billion in annual premiums, were it insured to levels normal for other businesses. *Understanding and Opening Up the US Cannabis Insurance Market*, New Dawn Risk (May 2020), **https://www.newdawnrisk.com**. Despite marijuana's quasi-legal status, six large insurers have reportedly entered the market, mostly offering a core set of policies consisting of commercial general liability, property damage, and product liability. *Id.* If the movement to legalize marijuana for recreational use continues to gain momentum, it is reasonable to expect additional insurers will try to enter this market.

It is also reasonable to expect more tort-based lawsuits against the recreational marijuana industry. Many of these potential tort-based lawsuits will focus, as the plaintiffs did in *Kirk*, on claims based on a failure to warn. As applied to the recreational marijuana industry, how can practitioners expect this area of the law to develop? And how can those expectations shape the way counsel defend claims against the recreational marijuana industry for failure to warn? This article explores whether the legal development of failure to warn claims against the alcohol and tobacco industries can provide answers to these questions, and what those answers may be.

What Is Marijuana?

Marijuana refers to the dried leaves, flowers, stems, and seeds of the *Cannabis sativa* or *Cannabis indica* plant. Marijuana contains the mind-altering chemical THC and over 100 compounds that are chemically related to THC, called cannabinoids. Marijuana is the most commonly used psychotropic drug in the United States, after alcohol. When marijuana is smoked, THC and other chemicals in the plant pass through the lungs into the bloodstream, which rapidly carries them throughout the body to the brain. *Marijuana Research Report*, National Institute on Drug Abuse (July 2020). The user begins to experience effects almost immediately. *Id.* Many people experience a pleasant euphoria and sense of relaxation. *Id.* Other common effects, which vary dramatically among different people, include heightened sensory perception, laughter, altered perception of time, and increased appetite. *Id.* If marijuana is consumed in food or beverages, these effects are somewhat delayed—usually appearing after thirty minutes to one hour—because marijuana must first pass through the digestive system. *Id.* Eating or drinking marijuana delivers significantly less THC into the bloodstream than smoking an equivalent amount of the plant. *Id.* Because of the delayed effects, people may inadvertently consume more THC than intended. People who have taken large doses of marijuana may experience an acute psychosis, which includes hallucinations, delusions, and a loss of the sense of personal identity. *Id.* Although detectable amounts of THC may remain in the body for days or even weeks after use, the noticeable effects of smoked marijuana generally last from one to three hours, whereas the effects of marijuana consumed in food or drink may last longer.

The intoxicating effects of marijuana affect one's ability to drive. THC disrupts the functioning of the brain areas that regulate balance, posture, coordination, and reaction time. Studies have found a direct relationship between blood THC concentration and impaired driving ability. *See* Rebecca L. Hartman & Marilyn A. Huestis, *Cannabis Effects on Driving Skills*, Clinical Chemistry 59:3 (2013) 478–92; Rebecca L. Hartman et al., *Cannabis Effects on Driving Lateral Control With and Without Alcohol*, Drug and Alcohol Dependence 154 (2015) 25–37.

Are There Adverse Health Consequences Associated with Marijuana Use?

There is a paucity of evidence, but in 2017, the National Academy of Medicine issued a comprehensive research report on the subject with mixed findings. The Academy found moderate evidence of no statistical association between cannabis smoking and the incidence of lung cancer. *The Health Effects of Cannabis and Cannabinoids*, National Academy of Sciences, Engineering, and Medicine, 143 (2017). The Academy, however, found limited evidence of an association between current, frequent, or chronic marijuana smoking and some cancers. *Id.* at 146. Marijuana use during pregnancy was found to be associated with lower birth weight, but the Academy found the relationship between smoking marijuana during pregnancy and other pregnancy and childhood outcomes to be unclear. *Id.* at 246.

While the long-term adverse health consequences associated with marijuana use may not be definitively known for some time, the Academy did find some evidence of medium- and short-term adverse health consequences associated with marijuana use. For example, the Academy found that marijuana use is likely to increase the risk of developing schizophrenia and other psychoses; and the higher the use, the greater

the risk. *The Health Effects of Cannabis and Cannabinoids*, National Academy of Sciences, Engineering, and Medicine at 289. There was also substantial evidence of a statistical association between marijuana use and an increased risk of motor vehicle crashes. *Id.* at 230. Further, the Academy found moderate evidence of a statistical association between marijuana use and an increased risk of overdose injuries, including respiratory distress, among children in states where marijuana is legal. *Id.* at 236. These findings may be used to support claims of injuries caused by marijuana use.

Failure to Warn Claims Relating to Marijuana Use

Failure to warn claims against the recreational marijuana industry will implicate state regulatory schemes, especially labeling requirements, as well as the common law.

Labeling Regulations Applicable to the Recreational Marijuana Industry

One important difference between the development of failure to warn claims as applied to alcohol and tobacco industries, on the one hand, and the recreational marijuana industry, on the other hand, is that there are federal laws, such as the Alcoholic Beverage Labeling Act and the Cigarette Labeling and Advertising Act, that mandate labeling requirements for cigarettes and alcohol. Because marijuana remains illegal under federal law, there are no such federal regulations applicable to marijuana. The states that have legalized recreational marijuana, however, have enacted labeling requirements. *See*, *e.g.*, Illinois Cannabis Regulation and Tax Act, 410 ILCS 705/1-1 *et seq.* Counsel defending individuals or companies in the recreational marijuana industry must be aware of these labeling requirements as they afford potential defenses to compliant defendants in failure to warn claims. Certain labeling requirements that pertain to dangers associated with recreational marijuana use that may not be generally known or recognized are also discussed below. Most states recognize that a product's compliance with applicable regulations is admissible evidence that the product is not defective. Compliance, however, is not dispositive, and counsel should be prepared to demonstrate not only that a product complied with applicable statutes and regulations, but that the requirements imposed by those statutes and regulations provided adequate warnings to consumers.

Application of the Common Law to the Recreational Marijuana Industry

Section 402A of the Restatement (Second) of Torts concerns the strict liability of sellers of products for physical harm to users or consumers. Comments h, i, and j to Section 402A, in particular, relate to when a seller has an obligation to supply a warning. Restatement (Second) of Torts §402A, cmts. h, i, j (1965). The comments indicate that a seller may be required to provide a warning when a product is "unreasonably dangerous," and that the question whether a product is "unreasonably dangerous" turns at least in part on whether the dangers associated with the product are ordinary common knowledge. *See* Restatement (Second) of Torts, §402A, cmts. i, j.

Many product liability cases have adopted this approach. "[T]he determination of whether a product is unreasonably dangerous is accomplished by evaluating whether the dangerous propensities of the product are known to the ordinary consumer. If the dangers are known, then the product is not defective and the manufacturer is under no duty to provide a warning." *Dauphin Deposit Bank & Trust Co. v. Toyota Motor Corp.*, 596 A.2d 845, 848 (Pa. Super. Ct. 1991). Whether a product is unreasonably dangerous is an objective question, not a subjective question. "The determination of whether a duty to warn exists involves a question of foreseeability, which must be resolved under a standard of objective reasonableness." *Garrison v. Heublein, Inc.*, 673 F.2d 189, 191 (7th Cir. 1982). "[W]here the danger is evident to most users of a product, there is no duty to warn an occasional, inexperienced user." *Pemberton v. American Distilled Spirits Co.*, 664 S.W.2d 690, 693 (Tenn. 1984). A significant factor to consider in determining whether a danger is unreasonable is the nature of the product. When a product is not a new product of which consumers are not yet knowledgeable, there is typically no duty to warn of the product's dangerous characteristics. *Id.*

Common knowledge in the context of comments i and j of the Restatement (Second) of Torts connotes a general societal understanding of the risks inherent in a specific product or class of products. *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 427 (Tex. 1997). The standard for finding common knowledge as a matter of law is a strict one. The term "common knowledge" encompasses "those facts that are so well known to the community as to be beyond dispute." *Id.*

There are similarities between alcohol, tobacco, and marijuana that have led some to suggest that society's regulation of alcohol and tobacco provides a good precedent for regulating marijuana, rather than criminalizing it.

Section 388 of the Restatement (Second) of Torts concerns the negligence of sellers of products known to be dangerous for their intended use. It generally provides that a seller of products has no duty to warn of obvious dangers in a product that is not defective. However, liability may still attach if the seller fails to exercise reasonable care to warn of certain dangers that are not obvious to the average user. Restatement (Second) of Torts §388, cmt. k. The Restatement provides general legal concepts in the area of product liability that have been adopted by courts across the country. Courts have applied these concepts to industries comparable to the recreational marijuana industry, most notably the alcohol and tobacco industries. Courts will likely apply the Restatements to product liability cases involving the recreational marijuana industry.

Treatment of Alcohol and Tobacco

There are similarities between alcohol, tobacco, and marijuana that have led some to suggest that society's regulation of alcohol and tobacco provides a good precedent for regulating marijuana, rather than criminalizing it. *See* Mark K. Osbeck & Harold Bromberg, *Marijuana Law in a Nutshell* 391–92 (2017). Therefore, practitioners defending the recreational marijuana industry from failure to warn claims should consider the law's development in the areas of alcohol and tobacco for guidance. Practitioners should bear in mind, however, that this comparison is of course imperfect. Specifically, lawyers defending the alcohol and tobacco industries from failure to warn claims stand to benefit from courts' recognition that the dangers or potential dangers associated with drug and alcohol use are generally known and recognized. This general knowledge is beneficial because most courts hold that there is no duty to warn of generally known or recognized dangers, or, at minimum, that any such duty is not as broad as the duty to warn of unknown or unrecognized dangers. Whether the dangers associated with marijuana use are generally known and recognized is an open question.

Alcohol

Courts recognize that the dangers associated with the consumption of alcohol are generally known to the ordinary consumer. Alcohol is consequently not rendered unreasonably dangerous due to the absence of a warning of such dangers, and courts have held that there is no duty to warn of them. *Garrison*, 673 F.2d at 192 (affirming the district court's dismissal of the plaintiff's consumer product liability suit against the defendant alcohol manufacturer and distributor, holding that there was no duty to warn the plaintiffs of the common propensities of alcohol because "the dangers of the use of alcohol are common knowledge to such an extent that the product cannot objectively be considered to be unreasonably dangerous"); *Maguire v. Pabst Brewing Co.*, 387 N.W.2d 565, 570 (Iowa 1986) (plaintiffs' complaint against the defendant brewing company failed to state a claim by alleging that the defendant's products carried no warning as to the dangerous effects of overconsumption because "the risks of intoxication presented to consumers of draft beer is sufficiently known to consumers"); *Pemberton*, 664 S.W.2d at 693–94 ("Alcohol has been present and used in society during all recorded history and its characteristics and qualities have been fully explored and developed and are a part of the body of common knowledge"); *Dauphin Deposit Bank & Trust Co.*, 596 A.2d at 849 (affirming the trial court, which sustained the defendant distiller's preliminary objections in the nature of a demurrer, because the consequences of consuming alcohol were well known, and the dangers inherent in the consumption of alcohol and its effects on those operating motor vehicles were common knowledge to the ordinary consumer). As discussed below, it is less clear that the dangers associated with recreational marijuana use are also generally known, and it is therefore more likely that the failure to warn of such dangers will lead to courts finding that the absence of such warnings renders recreational marijuana products unreasonably dangerous.

Tobacco

Courts have likewise recognized that the dangers associated with tobacco use are generally understood. Tobacco, like alcohol, is consequently not considered unreasonably dangerous due to a failure to provide warnings of the dangers associated with it. *Sanchez v. Liggett & Myers, Inc.*, 187 F.3d 486, 490 (5th Cir. 1999) (affirming the district court's dismissal of claims against tobacco companies that derived from product liability because the dangers from the addictive properties of cigarettes were within the ordinary knowledge common to the community under Tex. Civ. Prac. & Rem. Code. Ann. §82.004(a)); *Hollar v. Philip Morris Inc.*, 43 F. Supp. 2d 794, 807 (N.D. Ohio 1998) (dismissing the product liability claims of two plaintiffs who began smoking in 1968 and 1971 because "the case law is well settled that the health hazards of smoking were within the ordinary citizen's 'common knowledge'" at that time); *Grinnell*, 951 S.W.2d at 427 (holding that the defendant's cigarettes were not unreasonably dangerous to the extent that the general health dangers attributable to cigarettes were commonly known as a matter of law by the community when the plaintiff began smoking).

In *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 273 (D.R.I. 2000), the court examined the evidence of society's general knowledge of health hazards associated with smoking. It held that it could take judicial notice of the community's common knowledge of the general disease-related health risks associated with smoking, including the risks of contracting cancer as of 1964, based on the formation of committees to study those risks in the early 1960s and the subsequent passage of regulations to address those risks. Likewise, practitioners may cite this same type of evidence to argue that the dangers associated with marijuana use are generally known.

Are Dangers Associated with Marijuana Use Generally Known?

Courts may deem marijuana unreasonably dangerous, and growers, packagers, and distributors may be required to warn potential consumers of those dangers, if dangers associated with marijuana are not generally known. One simple point that practitioners can use to argue that the dangers associated with marijuana use are generally known is that marijuana remains a Schedule 1 drug, which, as defined by the Controlled Substances Act, means that it has no currently accepted medical use (in the eyes of the federal government) and a high potential for abuse. If, as in *Guilbeault*, the formation of committees to study the effects of cigarette smoking, and the promulgation of labeling regulations, act as indicia of society's general knowledge of the dangers associated with cigarette smoking, it can be argued that marijuana's inclusion as a Schedule 1 drug and the passage of state labeling regulations reflect society's general recognition of dangers posed by marijuana's intoxicating effects. But even if those dangers are generally known, that does not mean that other dangers related to marijuana use are also generally known.

For example, courts have held that a product can be unreasonably dangerous due to its habit-forming propensities if those propensities are not generally known. *See Grinnell*, 951 S.W.2d at 431 (concluding that because the defendant tobacco

company did not conclusively establish that the dangers of addiction to nicotine were common knowledge, the plaintiffs could maintain their strict liability marketing defect claims to the extent those claims were based on the addictive qualities of cigarettes). There is a perception among some that marijuana is not addictive. Although it is true that the withdrawal effects of marijuana are relatively mild compared with, say, opioids, research has consistently found that marijuana is habit forming. Studies suggest that 30 percent of those who use marijuana may have some degree of marijuana-use disorder. Hasin DS, Saha TD, Kerridge BT, et al., *Prevalence of Marijuana Use Disorders in the United States Between 2001-2002 and 2012-2013*, JAMA Psychiatry, 1235–42 (2015). Nine percent of those who use marijuana will become dependent on it. Anthony JC, Warner LA, Kessler RC, *Comparative Epidemiology of Dependence on Tobacco, Alcohol, Controlled Substances, and Inhalants: Basic Findings from the National Comorbidity Survey*, Exp. Clin. Psychopharmacol, 244–68 (1994); Lopez-Quintero C, Pérez de los Cobos J, Hasin DS, et al., *Probability and Predictors of Transition From First Use to Dependence on Nicotine, Alcohol, Cannabis, and Cocaine: Results of the National Epidemiologic Survey on Alcohol and Related Conditions (NESARC)*, Drug Alcohol Depend., 115(1-2):120–30 (2011). The number is even higher for those who start using marijuana in their teens, with about 17 percent of such users becoming dependent on marijuana. Hall WD, Pacula RL. *Cannabis Use and Dependence: Public Health and Public Policy*, Cambridge, UK: Cambridge University Press (2003). Many states require that a warning of marijuana's habit-forming propensities be included on marijuana products. *See, e.g.*, 8 Ill. Adm. Code 1300.940; NAC 453D.824(1)(h); WAC §314-55-105. Growers, packagers, and distributors of recreational marijuana products would be wise to include such warnings, even in states that do not require them.

There is additional risk that certain marijuana products, namely edibles and topicals, may present dangers that are not generally known in the community. Courts have held that intoxicating products whose dangers are generally known may present dangers that are not generally known when used in uncommon ways or combinations. In *Villa v. Phusion Projects*, 2012 U.S. Dist. LEXIS 205105 (S.D. Tex. Sep. 28, 2012), the court granted in part and denied in part a motion to dismiss (converted by the court to a motion for summary judgment) filed by the defendant, the manufacturer of the caffeinated alcoholic beverage Four Loko, in a product liability suit filed on behalf of a plaintiff who alleged that he suffered a stroke after consuming two cans of the drink. *Id.* at *1–2. The defendant argued that the plaintiff's claims should be dismissed pursuant to Tex. Civ. Prac. & Rem. Code §82.004 because the dangers of alcoholic beverages are well known. *Id.* at *8. The court agreed that the dangers of alcoholic beverages are well known but found that by introducing caffeine into the alcoholic beverage, the defendant had created a different class of product. *Id.* at *10–12. In reaching that finding, the court discussed comment i to section 402A of the Restatement (Second) of Torts. *Id.* Comment i contrasts the inherently dangerous form of products with unreasonably dangerous forms of those products. The court noted that comment i described the latter forms as combining the inherently dangerous form with another product. *Id.* at 12. The court thus denied in part the defendant's motion to dismiss.

Defense counsel should anticipate that plaintiff's counsel will attempt to argue that marijuana edibles and topicals are unreasonably dangerous in that they present dangers different from those presented by smoking marijuana, and that the dangers presented by edibles and topicals are not generally known among the community. Because the intoxicating effects of marijuana edibles are delayed, there is a danger that the consumer will overindulge and that the effects might be felt at an unexpected time. One of the theories of liability presented by the plaintiffs in *Kirk* was that the marijuana candy contained no instructions for use, such as a serving size. Another cautionary tale arising from the lack of such instructions involved the tragic death of Levy Thamba, a 19-year-old student who jumped to his death from a Denver hotel balcony after eating a marijuana cookie. *See* Kieran Nicholson, *Man Who Plunged from Denver Balcony Ate 6x Recommended Amount of Pot Cookie*, Denver Post (Apr. 7, 2014). The single cookie reportedly contained six servings of marijuana. *Id.* Most states, including Colorado, have now adopted labeling requirements for marijuana products that mandate a warning regarding the delayed effects of edibles and limit the amount of THC that can be included in a single serving size and overall product. *See*, *e.g.*, 1 CCR 212-13 3-1015; 410 ILCS 705/55-21; CMR 18-069-001 11.4.2(H); 935 Mass. Reg. 500.150(3)(a)(5); Mich. Admin. Code R 420.504(1)(h); NAC 453D.828(1)(n); WAC §314-55-105. Some states, like Oregon, require that marijuana products be scored into single servings and demand that additional warnings concerning the serving size be included if this is not possible. OAR 333-007-0210. Many states also dictate that marijuana topicals contain an explicit warning that the product is not intended to be ingested, as this could lead to over-consumption. CMR 18-069-001 11.5.2(D); OAR 333-007-0060(15)(b); WAC §314-55-105. When defending cases involving these types of theories, it will be imperative for defense counsel to understand how the product was packaged and consumed, what warnings were contained on the product, and whether those warnings complied with state labeling requirements.

Where federal regulations afford defendants in the alcohol and tobacco industries powerful defenses based on preemption, defendants in the retail marijuana industry cannot invoke defenses based on federal labeling requirements.

What Defenses Are Available Based on Compliance with State Statutes and Regulations?

Where federal regulations afford defendants in the alcohol and tobacco industries powerful defenses based on preemption, defendants in the retail marijuana industry cannot invoke defenses based on federal labeling requirements. Nonetheless, many jurisdictions recognize defenses, at least with respect to claims for negligent failure to warn, available to defendants that comply with industry regulations. *See S. L. M. v. Dorel Juvenile Group, Inc.*, 514 Fed. Appx. 389, 391 (4th Cir. 2013) ("a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation"); *Covell v. Bell Sports, Inc.*, 09-cv-2470, 2010 U.S. Dist. LEXIS 126626, 2010 WL 4783043, at *18 (E.D. Penn. Sep. 8, 2010) (denying the plaintiffs' motion for new trial based, in part, on the admission of evidence reflecting the defendants' compliance with Consumer Product Safety Commission standards because such evidence was relevant and admissible on the question of defectiveness); *St. Louis Univ. v. United States*, 182 F. Supp. 2d 494, 501 (D. Md. 2002) (industry standards and regulations properly admitted if relevant to the defect at issue). Defendants in the recreational marijuana industry faced with claims based on failure to warn should be prepared to invoke their compliance with state labeling requirements as a defense.

That said, while compliance with statutes and regulations is relevant and admissible on the issue whether a product is defective, it is not controlling. *See, e.g.*, *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438 (10th Cir. 1987) (noting it was proper under Kansas law to instruct the jury that the fact that a tampon package warning was in conformity with Food and Drug Administration regulations was not a defense in a strict liability action if a reasonable and prudent manufacturer would have taken additional precautions); *Sours v. General Motors Corp.*, 717 F.2d 1511, 1517 (6th Cir. 1983) ("We hold that GM's alleged compliance with FMVSS 216, along with its other evidence of adherence to industry customs and standards, was properly left for the jurors to factor into the calculus that comprises reasonable design in a case of strict products liability"); *Foyle v. Lederle Labs.*, 674 F.Supp. 530, 533 (E.D.N.C. 1987) ("In summary, compliance with FDA regulations is evidence of due care but it is not controlling"); *Carlin v. Superior Court*, 920 P.2d 1347, 1352 (Cal. 1996) (noting that compliance with FDA regulations was relevant in an action for failure to warn, but affirming the appellate court's opinion vacating the trial court's order granting the defendant's motion to dismiss the plaintiff's strict liability cause of action); Restatement (Second) of Torts §288C ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."). For this reason, counsel defending clients in the retail marijuana industry should anticipate that plaintiffs' counsel will argue that marijuana products are unreasonably dangerous, notwithstanding compliance with warnings and instructions mandated by state regulations.

Are the Warnings Adequate?

Because compliance with state labeling regulations is not dispositive, defendants in the retail marijuana industry will need to show that their warnings and instructions are adequate. This requires a degree of specificity. *See*, *e.g.*, *Burnette v. Dow Chemical Co.*, 849 F.2d 1269, 1276 (10th Cir. 1988) (reversing summary judgment in Dow's favor because there was a question of fact whether a warning that labeled a chemical as an "irritant" was adequate, given the dangers posed by the chemical). The degree of specificity required is a function of the potential magnitude of the harm and the likelihood of its occurrence. 63A Am Jur 2d Products Liability §1083. A warning may be inadequate if it is not specific about the particular risk or the nature of the possible injury. *Id.*

Courts have adopted varying approaches to determine whether warnings are adequate. In *Bituminous Casualty Corp. v. Black & Decker Manufacturing Co.*, 518 S.W.2d 868 (Tex. App. Ct. 1974), the Texas Court of Civil Appeals, summarizing the state of the law, held that a warning is legally adequate if: (1) it is in a form that could reasonably be expected to catch the attention of a reasonably prudent person in the circumstances of the product's use; (2) the content is of such a nature as to be comprehensible to the average user; and (3) it conveys a fair indication of the nature of the danger to the mind of a reasonably prudent person. *Id.* at 872–73. The Eleventh Circuit has stressed that the warning must inform the user of the product's potential risks. *See Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1497 n.7 (11th Cir. 1985) (indicating that adequacy requires complete disclosure of the existence and extent of risk involved in the use of a product); *Thornton v. E.I. DuPont de Nemours & Co.*, 22 F.3d 284, 289 (11th Cir. 1994) (indicating that whether a warning is legally adequate depends on the language used and the impression that language is calculated to make upon the mind of the average product user).

Some states have adopted legislation to address warning defects. For example, to determine whether a warning is adequate, Connecticut requires a trier of fact to consider: (1) the likelihood that the product would cause the harm suffered by claimant; (2) the ability of the product seller to anticipate at the time of manufacture that the expected product user would be aware of the product risk, and the nature of the potential harm; and (3) the technological feasibility and cost of instructions. Conn. Gen. Stat. §52-572q(b). Washington has defined a product as not reasonably safe by virtue of inadequate warnings,

> if, at the time of manufacture the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate and the manufacturer could have provided the warnings or instructions which the claimant alleges would have been adequate.

RCW 7.72030(1)(b).

Questions to Consider When Assessing Whether Warnings and Instructions Are Adequate

When assessing the adequacy of warnings and instructions provided with retail marijuana products, counsel should consider the following non-exhaustive list of questions:

Was it likely that the product would cause the harm suffered? For certain risks,

especially long-term health risks (e.g., lung cancer), there does not appear to be sufficient evidence at this time to establish a likelihood that use of the product will cause the harm (although plaintiffs may attempt to introduce expert testimony to the contrary), so the lack of such warnings may not render a product defective. For other risks (e.g., driving under the influence of marijuana), there may be sufficient evidence to justify the imposition of a warning requirement. Still other risks, such as the increased risk of developing schizophrenia and other psychoses, present a closer call. Counsel defending claims against clients in the retail marijuana industry for failure to warn should be prepared to marshal medical evidence to support their clients' position.

What was the feasibility of providing the warning? While a defendant cannot typically show that its burden would be substantial in providing a more in-depth warning, it may often claim that more detailed warnings lead to warning dilution. For example, in *Broussard v. Continental Oil Co.*, 433 So. 2d 354 (La. App. Ct. 1983), the plaintiff was using a hand tool produced by the defendant at the time of the plaintiff's injury. *Id.* at 354. The tool had one warning label that instructed the user to read the operator's manual before use. *Id.* at 356. The plaintiff failed to do so and was injured when the tool was used in an explosive environment (the manual included an adequate warning regarding operation in an explosive environment). *Id.* The plaintiff argued that ten warnings should have been placed on the tool itself. *Id.* The court rejected this view, noting that an otherwise adequate warning provided in the operator's manual was sufficient in this context. *Id.* at 358. Placing too many warnings on the product, the court concluded, would "decrease the effectiveness of all of the warnings." *Id.*; *see also* Restatement (Third) of Torts §2, cmt. i ("excessive detail may detract from the ability of typical users to focus on the important aspects of the warnings…"). Defense counsel, faced with arguments by plaintiffs' counsel that additional warnings should have been placed on marijuana products, should consider making counter arguments predicated on warning dilution.

Was the warning comprehensible to the average user? In *Ramirez v. Plough, Inc.*, 863 P.2d 167 (Cal. 1993), a caretaker who could not understand or read English gave the defendant's drug product to the four-month-old plaintiff. *Id.* at 168–69. The package insert warned that use of the drug could cause Reye's Syndrome in young children. *Id.* at 169. The child suffered injuries as a result of the drug, and the child's guardian sued, alleging that the defendant's warnings were inadequate because they were not in Spanish. *Id.* at 170. The court concluded that, although it may be reasonable to anticipate a non-English reading person would use the product, legislative and regulatory standards in the area of drug warnings were substantial and required only English language warnings. *Id.* at 177. The court acknowledged that both state and federal agencies were aware of possible dangers to those unable to read English warning labels and had still mandated English-only labels. *Id.* at 174–76. In the recreational marijuana context, states have adopted labeling regulations that require pictorial warnings. Many courts will consider evidence of compliance with those pictorial warning requirements as relevant and admissible evidence that a warning was adequate and comprehensible to the average user. *Id.* at 171, n.3. The use of such warnings by growers, packagers, and distributors in the recreational marijuana industry will mitigate their exposure to failure to warn claims that arise from an alleged failure to print warnings or instructions in various languages.

Was the warning in such a form that it could reasonably be expected to catch the attention of a reasonably prudent person? Most states' labeling regulations prescribe the prominence, font size, and emphasis of certain warnings that must be provided with marijuana products. *See*, *e.g.*, Maine Reg. 18-069-001 11.4.2(H); 935 Mass. Reg. 500.105(6)(c)(1). Again, courts will consider evidence of compliance with those regulations as relevant and admissible to show that a product was not defective.

Conclusion

The development of failure to warn claims as applied against the alcohol and cigarette industries may serve as a lodestar for the development of such claims against the recreational marijuana industry, although the comparison is imperfect. Practitioners should counsel their clients as to defenses available based on compliance with state labeling requirements and arguments that the dangers associated with marijuana use are generally known. Practitioners should also be prepared to gather and proffer evidence to refute claims that compliance with state labeling requirements is not dispositive because state-mandated warnings are not adequate.

For certain risks, especially long-term health risks (e.g., lung cancer), there does not appear to be sufficient evidence at this time to establish a likelihood that use of the product will cause the harm (although plaintiffs may attempt to introduce expert testimony to the contrary), so the lack of such warnings may not render a product defective. For other risks (e.g., driving under the influence of marijuana), there may be sufficient evidence to justify the imposition of a warning requirement.