Cannabis, Consumer Fraud and Beyond

By Elizabeth Dalberth Sweeney & Sheehan, P.C.

As states continue to legalize the recreational use of cannabis, litigants are getting more creative with regard to suing cannabis companies. The recent case of *Centeno and Wilson v Dreamfield Brands, Inc. and Med for America, Inc.,* case number 22STCZ33980, filed on October 20, 2022, in the Superior Court of the State of California, County of Los Angeles, illustrates how consumers are using claims of consumer fraud to sue manufacturers and sellers of cannabis. This case also raises several interesting ancillary issues involving cannabis law, insurance and trends.

Cannabis consumers Jasper Centeno and Blake Wilson sued the defendants, Dreamfield Brands, Inc. and Med for America, Inc., which are both California companies, alleging that the defendants committed fraud with regard to the manufacture, sale and marketing of the Jeter brand of pre-roll cannabis products. The complaint alleges that the advertising for the Jeter pre-rolls emphasized the potency of the strain, declaring, "This is the one joint that will get you to Mars quicker than Elon Musk." The Jeter pre-rolls listed THC content at 46%; however, the plaintiffs' testing of the product revealed a much lower THC content of 23% to 27%. If true, this means that the THC content was inflated by 70% to 100% and was well above the general THC content range of 18% to 35%. Also, pursuant to the California Department of Cannabis Control regulations, the THC content presented on the label must be within plus or minus 10% of the true THC content of the product, and the Jeter pre-roll labels did not comply with this regulation. The suit includes a

class action element and alleges violations of California's Unfair Competition Law, California's False Advertising Law, breach of express warranty, negligent and intentional misrepresentation, and unjust enrichment. The suit is based on the premise that most consumers prefer and seek out cannabis with a higher THC content. Plaintiffs posit that, because of this demand, the sellers can set a higher price for products with a higher THC content. Plaintiffs then allege that sellers "lab shop" and use whichever lab provides them with the highest potency rating. The plaintiffs claim that they were injured because they would not have purchased the product if they had known that the THC content listed on the product was inflated. They also allege that they overpaid for the product due to the defendants' misleading labeling. The plaintiffs claim that they relied on the defendants' misrepresentations and false advertising, and the plaintiffs use a reasonable person standard in alleging that reasonable consumers not only expect that the declared THC content is substantially the same as the true THC content, but also expect that the labels of cannabis products comply with California state regulations. They further allege that the defendants' misrepresentations were intended to induce reliance, that the plaintiffs reasonably relied on the misrepresentations when purchasing the product, and that the misrepresentations were a substantial factor in the decision to purchase the product. The plaintiffs request economic damages, punitive damages, restitution and an injunction.

The case was filed on October 20, 2022, and, as an initial conference is scheduled in February 2023, it is only in the beginning stages of the lawsuit. Certainly, it shows that consumers are willing to sue cannabis companies for failing to deliver an advertised high, and that there are legal avenues to pursue these claims, even if damages are purely monetary.

The case also illustrates several additional issues relevant to cannabis law. One such issue is that the *Centeno* plaintiffs did not allege products liability and sued under theories of fraud instead. This is presumably because, under California law, products liability damages generally consist of lost wages, medical bills and pain and suffering, which are not alleged in the *Centeno* complaint. However, under the right facts, a cannabis case could allege products liability for mislabeled products, and could also include claims for false advertising and failure to warn. In fact, there have already been claims of personal injury caused by cannabis use. For example, in Denver, Colorado, Levy Thamba, a first-time user, ingested six times the suggested amount of an edible, jumped out of a window and died. The dispensary clerk advised Thamba and his five friends to split an edible cookie six ways, but when Thamba did not feel immediate effects, he ate the entire cookie himself, seemingly unaware of its potency. In another case that went into suit, a plaintiff/son sued his father and the defendants, a cannabis seller and a cannabis manufacturer, claiming that the father ingested product, suffered a psychotic break, and shot and killed his wife and the mother of his son. *Andrew Kirk v. Nutritional Elements and Gaia's Garden*, 2016-cv-31310 (D. Colo., April 13, 2016). The case sounded in strict liability and failure to warn but was resolved prior to trial. These cases show that businesses should be aware of products liability risks, and protection by way of insurance, and that responsible parties for products liability claims could include manufacturers and growers, packaging entities and dispensaries.

Another interesting issue involves insurance and centers on the Centeno plaintiffs' negligent misrepresentation claim, most likely alleged in an effort to ensure that there is insurance coverage, at least by way of the provision of a defense pursuant to a reservation of rights. However, one must look closely at policy language in evaluating whether negligent misrepresentation is actually covered under an insurance policy. For example, a claim may not fall within the "occurrence" or "accident" definition under the policy, and it has been held that deliberate or intentional conduct does not constitute an "accident" or "occurrence." *See. e.g., Lexington Ins. Co. v. Chicago Flameproof & Wood Specialties Corp.*, No. 17-cv-3513, 2018 U.S. Dist. LEXIS 135871, at *14 (N.D. Ill. Aug. 10, 2018) ("[M]ere inclusion of a negligence theory does not – and cannot – by itself satisfy the occurrence requirement. Nowhere in the complaint are there allegations of an unforeseen or accidental event . . .") One must also take into account the timing of when the representations were made relative to when the damages occurred; the damages must be caused by the "occurrence," and should not be too far removed from the misrepresentations. *See, e.g., Langevin v. Allstate Ins. Co.*, 66 A.3d 585 (Me. 2013) (property damage pre-dated alleged misrepresentation).

The above cases also show that, in consulting with clients, it is a good idea to raise insurance issues, and cannabis businesses of all sizes should be counseled to obtain insurance for both general liability and products liability. Small to mid-size businesses may want to economize when obtaining insurance to save on costs, but the failure to properly protect themselves could have devastating effects and could irrevocably damage a business.

The *Centeno* case also illustrates issues in the industry with regard to lab testing. Numerous states have had to address a lab's failure to fail samples for microbial contamination, and for certifying incorrect, inflated THC potency. This is an area that litigants will want to exploit. These issues could be resolved by regularly publishing failed tests, thus enabling consumers to make informed decisions about where they want to purchase their product. There should be substantive, enforced repercussions for failed tests, and state agency testing should be performed on a regular, random, and extensive basis. Cannabis businesses should protect themselves from suit by ensuring they are using reputable labs and should make the accuracy of testing a priority.

Last, and as an aside, the *Centeno* complaint alleges that the focus of the industry is on THC content; however, it should be noted that there is a growing interest in compounds called terpenes. Briefly, terpenes are natural compounds found in cannabis plants and are responsible for the scent of the plant. Terpenes do not produce a traditional high like THC, which is the cannabinoid responsible for the psychoactive "high" feeling. However, there is an expanding focus on how cannabinoids and terpenes work together to increase efficacy, which could mean that a high concentration of terpenes, with a low THC content, could still produce a significant high. Current studies show that terpenes can effectively be used for medical purposes, such as pain management. Members of the cannabis industry should be aware of and stay informed about this growing trend.

In sum, as cannabis litigation increases, all members of the industry, including attorneys, insurance carriers and cannabis businesses, from growers to sellers, need to keep abreast of the applicable law, how it is being applied by litigants, and ways to protect against avoidable, and possibly expensive, adverse outcomes.

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