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Looting To Test Limits Of Pot Dispensary Insurance Coverage

By **Jack Queen**

Law360 (June 5, 2020, 10:24 PM EDT) -- On May 31, as hundreds of protesters peacefully marched toward the Chicago police headquarters to demand justice for the killing of George Floyd, a group of roughly 40 people had a different destination in mind: a cannabis dispensary on the city's South Side.

They emerged from cars and broke into Mission Dispensary, with staff fleeing before the store was ransacked and picked clean of cannabis and cash, according to Kris Krane, president of dispensary operator 4Front Ventures.

"Everything of value was taken, and the store was mostly destroyed," Krane said in a mournful Facebook post the next day. He said the perpetrators appeared to be professional thieves exploiting a crisis.

Mission was not alone, with looters targeting dispensaries while peaceful demonstrations for racial justice, sometimes met by brutal police crackdowns, sprang up across the country. Nearly every dispensary in California's Bay Area was hit, according to local news reports, along with medical and retail stores from Denver to Chicago to Boston.

Dispensaries, already reeling from the coronavirus pandemic, were especially attractive targets. And as businesses across the country prepare to file insurance claims for looting — some estimate the damage across all businesses could top \$2 billion — marijuana companies are grappling with coverage questions unique to an industry that is illegal under federal law.

Many hold pricey policies with low limits and tangles of security and regulatory compliance conditions. Valuing their inventory, a Schedule I narcotic, is difficult. And successful claims might not be enough to overcome the twin shocks of a pandemic and a historic wave of nationwide protests.

"This will probably be the largest riot and civil unrest loss in history," said Jodi S. Green of Nicolaidis Fink Thorpe Michaelides Sullivan LLP. "There is a disparate impact on cannabis. They're very attractive targets with valuable products. Especially for smaller mom-and-pop stores already hurting from the COVID interruption, I wouldn't be surprised if we saw some of these businesses go under."

Federal illegality creates headaches for cannabis businesses at all levels, from banking to

contracts to compliance. Insurance offerings have improved, but a global pandemic and historic protest movement this year have laid bare the challenges that remain.

"There are going to be unique challenges when it comes to insurance, like there are with everything in this space," said Jonathan S. Robbins, chair of Akerman LLP's cannabis practice group. "It's harder, more expensive, and there are more pitfalls."

Insurers now offer policies tailored to the cannabis industry, and federal courts have recognized marijuana as an insurable product. But operators pay a premium for those policies, and coverage limits and sublimits are often low. Many marijuana companies also skimp on coverage because their expenses are high and margins razor-thin, according to insurance attorneys.

4Front declined to comment on its insurance options. Attorneys told Law360 they expect most property insurance to cover looting and robberies, though smaller operators might hit their coverage limits before being made whole. And while coronavirus-related business interruption claims are usually treated as separate occurrences, the twin blows could trigger aggregate coverage limits.

"It's a double whammy," Robbins said. "There's been a lot of litigation since COVID over business interruption. ... The unrest is only going to complicate that."

How carriers will react to the wave of pandemic- and looting-related claims is an open question. Public officials including Chicago Mayor Lori Lightfoot have called on insurers to cut checks without delay, and public pressure could encourage swift reimbursement.

Some insurers, however, will meticulously investigate claims before opening their pocketbooks. Cannabis policyholders could be subject to particular scrutiny thanks to the laundry list of conditions they must meet when buying coverage, including beefed-up security and specialized security vaults. If those are found to be lacking, carriers could deny coverage on false representation grounds.

Marijuana policyholders are also beholden to strict state regulations on the storage, movement and tracking of cannabis. As riots approached, some may have breached those regulations as they sought to protect their product.

"If you move all your cannabis because you're scared of protests and do it in your mother's Chevy, and looters happen upon the Chevy and take the cannabis because it wasn't being safely transported, that could raise eyebrows," said Michael Sampson of Leech Tishman Fuscaldo & Lampl LLC.

Conversely, he said, dispensaries that choose to not move inventory for fear of breaking the law could also face scrutiny from their insurers. Whether coverage applies is likely to come down to what options were available to dispensaries as unrest crept close.

After several MedMen dispensaries in Los Angeles were ransacked last weekend, the company temporarily shuttered all 43 of its locations nationwide. Other operators, including San Francisco's Sparc, followed suit after their locations were hit. Dispensaries that failed to take precautions could find themselves in a bind.

"This comes up a lot in the insurance context — mitigating a loss once it's happened," Sampson said. "If something is happening, not taking any action to minimize the loss may

catch the insurer's attention."

When cannabis is stolen, federal case law generally holds that it qualifies as an insured product. This principle was spelled out clearly in a 2016 case in Colorado, *Green Earth Wellness v. Attain Insurance*, where the court found cannabis is covered as long as the carrier knows what it is insuring.

The trouble is usually determining what the product is worth. Marijuana prices fluctuate wildly between states and across classes of products, and unlike most consumer goods, there are not firmly established market prices. That could be the crux of most coverage disputes.

"One of the most difficult things in responding to loss of cannabis, whether it's from theft or fire or riot, is what was the value of the cannabis at the time," said Ian Stewart of Wilson Elser Moskowitz Edelman & Dicker LLP. "It's still one of these areas where there will be big differences of opinion."

The same goes for business interruption coverage, particularly as the disruptions of coronavirus and riots converge. Parsing how much lockdowns impacted demand and how much revenue was lost during riots could present overlapping causation questions and wrangling over how much coverage is due.

Take Massachusetts, where unlike many states, recreational dispensaries were not deemed essential business that could remain open under lockdown. Some were still tallying their interruption losses when they reopened, only to be looted and forced to shutter while they rebuild. Pure Oasis, a Dorchester recreational dispensary, reportedly lost \$100,000 worth of cannabis.

"You have a lot of businesses that were teetering on the ability to maintain operations, but then they lost their inventory and on top of that, they don't know how long they have to wait to be paid out," Robbins said. "Are these businesses going to be able to survive? Unfortunately, I think a lot won't be."

Unprecedented times raise novel questions. If tear gas seeps into a dispensary and damages cannabis, could that trigger a pollution exclusion? If President Donald Trump invokes the Insurrection Act to "quell" unrest, could military action exclusions preclude coverage? Attorneys said some carriers could resort to crafty arguments like these to stem their losses.

Coverage will come down to the facts on the ground and the language of the policy. The advice to cannabis dispensaries is straightforward: Inform carriers immediately. Document losses quickly and meticulously. Save every bill, invoice and business record. As insurers and businesses parse historic losses, they will be carefully scrutinizing rarely invoked policy provisions.

"In the past 24 hours, I've talked to clients about pandemics, riots, civil commotion, insurrection and cyberattacks," Sampson said. "These are not topics that an insurance coverage lawyer spends a ton of time talking about. But it's just a further reminder that this is 2020."

--Editing by Aaron Pelc.

