Section 1

Legal Analysis of Michigan's Medical Marijuana Act

(Homeowners Policy)

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January 1, 2011

Farm Bureau Insurance Company
7971 Main Street
P. O. Box 169
Birch Run, MI 48415-0169

Re: Insured: John Doe
Policy No.: XXX1234
Claim No.: YYY0000
Date of Loss: January 1, 2011

Dear Mr. Greenjeans:

We have now had an opportunity to complete our review and analysis of the various investigations into the facts and circumstances surrounding the fire of January 1, 2011 and the unusual claims submitted by Mr. and Mrs. John Doe as a result thereof, conduct the Examination Under Oath of John Doe, conduct an extensive review of Michigan's Medical Marijuana Act and are now in a position to provide you with our comments and recommendations toward the further handling of the file.

Quite frankly, with the exception of the issues involving the claims that may be impacted by Michigan's Medical Marijuana Act, there is nothing of substance that would prevent the Company from completing its adjustment of Mr. Doe's claims pursuant to its normal practices and procedures. Based upon our discussions, this correspondence will, for all intent and purposes, focus solely on the impact of Michigan's Medical Marijuana Act on Mr. Doe's claims for personal property damages associated with the damage or destruction of items affiliated with his "manufacturing" of what Mr. Doe deems "medically necessary marijuana."

APPLICABLE POLICY PROVISIONS

The policy in question is a Homeowners Policy (Form GH 65 01 10 07) which also contains the Homeowners Policy Amendatory Endorsement (Form GH 66 32 10 08), the Special Form (Form GH 63 02 10 08), the Loss Evaluation Form - 03 with Dwelling Guaranteed Replacement Costs (Form GH 64 03 10 08) and the Personal Property Replacement Cost Loss Evaluation Form (Form GH 64 06 10 07). The policy provisions which may have an impact on this situation include the following:

Homeowners Policy (Form GH 65 01 10 07)

* * *

DEFINITIONS

* * *

4. **"Business"** means farming, a trade, profession, or occupation, all whether full or part-time.

Under **COVERAGE C - PERSONAL PROPERTY** the policy states at pages 5 - 6:

* * *

Property Not Covered. We do not cover:

* * *

12. property that an **insured** possesses in violation of any state and/or federal law.

From our perspective, we do not believe that there exists any other policy provisions which are directly impacted by the potential application of the MMMA to this particular fire loss and the subsequent claim for damages to the structure, its contents and claims for additional living expenses. Putting it another way, our review of the Homeowners Policy, Special Form and the Homeowners Policy Amendatory Endorsement does not provide us with any clear cut language which we believe limits, excludes or denies coverage for claims associated with fire loss to a dwelling or contents where the presence of marijuana, whether legal or not, has been confirmed. If you believe any other

policy provisions might come into play, please let us know and we would be more than happy to review and analyze them.

REVIEW AND ANALYSIS OF THE MICHIGAN MEDICAL MARIJUANA ACT

On December 4, 2008 the Michigan Medical Marijuana Act (hereinafter referred to as the "MMMA") was enacted into law. Without doubt, this piece of legislation is one of the most poorly written pieces of legislation we have ever had the opportunity to review and analyze. That opinion has been supported by a number of commentators, prosecutors, doctors and judges. More importantly, it has led to chaos with respect to all those impacted by it. As noted in an article in the November 2010 edition of "The Grand Rapids Lawyer" entitled **"Doctor, it hurts." "Okay, use marijuana"**, authored by Timothy K. McMorrow of the Kent County Prosecutor's Office:

> "The MMMA is a complicated, and poorly drafted, piece of legislation. It has led to an explosion of claims from those charged with possession of marijuana that they really only had the marijuana for medical purposes."

As noted by Court of Appeals Judge Peter O'Connell in his excellent concurring opinion in the case of People v. Redden, _____NW2d _____, 2010. WL 3611716 (September 14, 2010 Mich App):

> "The problem, however, is that the MMMA is inartfully drafted and, unfortunately, has created much confusion regarding the circumstances under which an individual may use marijuana without fear of prosecution. Some sections of the MMMA are in conflict with others, and many provisions in the MMMA are in conflict with other statutes, especially the Public Health Code. Further, individuals who do not have a serious medical condition are attempting to use the MMMA to flout the clear prohibitions of the Public Health Code and engage in recreational use of marijuana. Law Enforcement Officers, prosecutors, and trial court judges attempting to enforce both the MMMA and the Public Health Code are hampered by confusing and seemingly contradictory language, while healthy recreational marijuana users incorrectly review the MMMA as a de facto legalization of the drug, seemingly unconcerned that marijuana use **remains illegal under both state and federal law**. (People v. Redden, *supra* (Judge O'Connell's concurring opinion, 2010 WL 3611716 at page 14). (emphasis added)

The situation is also confusing for insurers as most policies contain language which impacts, excludes, or eliminates coverage for damages to property that an insured possesses in violation of state or federal law, or where damages occur as the result of an activity which is in violation of state or federal law. This aspect of the claim will be discussed in greater detail below.

Under the MMMA a person is allowed to possess and use a limited amount of marijuana if a physician states: "After having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship," that the patient is likely to receive therapeutic or palliative benefit from the use of marijuana. More specifically, the MMMA allows a "qualifying patient" to possess a certain amount of usable marijuana or marijuana plant if he or she possesses a registry identification card.

The MMMA has created a procedure whereby individuals may, upon presentation of a doctor's certificate, receive from the Michigan Department of Public Health (DPH) a card certifying the individual may use marijuana for medical purposes. In order to become a "qualifying patient," an individual must be diagnosed by a physician as having a "debilitating medical condition" which, according to the act, is basically any condition that produces specific symptoms including: severe and chronic pain, seizures, nausea and muscle spasms.

To obtain a registry identification card, all the patient must do is submit the written certification with the information outlined. A "qualifying patient" can also specify a primary care giver to assist in cultivating the plants. This person is someone who has been named by a "qualifying patient" as the person who would assist them with the medical use of marijuana as set in compliance with the MMMA.

Under the MMMA a person may have up to two and half ounces of marijuana and 12 plants; for two people that would permit five ounces and 24 plants. In the case at issue, Mr. Doe indicated that contained within the insured structure were plants associated with he, his wife, his father and also a person for whom Mr. Doe was the designated "care giver." Thus, he is claiming entitlement to 10 ounces of marijuana and as many as 48 plants. He is also claiming the loss of a paraphernalia associated with the growth and cultivation of these plants, such as special lamps, growing equipment, etc.

Perhaps the best method of analyzing this situation is to focus on the impact of the MMMA from a state law and then a federal law perspective. Ultimately, our conclusions in this opinion are based upon our believe that, in the final analysis, the MMMA **does not** alter or in any way impact state or federal law on the issue of whether the possession, distribution or sale of marijuana is illegal. Quite frankly, we do not believe the MMMA changes anything with respect to the Michigan's statutory prohibition against the possession, use or distribution of marijuana either; in reality, the

MMMA is nothing more than a statutory "**affirmative defense**" to any such prosecution.

As such, we will split our analysis into two parts: First, a review of state law and federal law. Secondly, we will then attempt to analyze the relationship between state/federal law and the policy provisions with respect to this claim.

Analysis of the MMMA from a state law perspective:

There are several very interesting aspects of the MMMA that seemed to have been lost in the maelstrom of hyperbole, public comment, and judicial interpretation. Although Judge Peter O'Connell's concurring opinion in Redden is not, in and of itself, binding precedent, it can be utilized by parties and judges interpreting the act as persuasive authority. We believe Judge O'Connell's concurring opinion is an excellent starting point for the analysis of the MMMA with respect to Michigan law and the great majority of what you are about to review has its roots in Judge O'Connell's concurring opinion.

To begin with, we think it is important that everyone understand that the MMMA (MCL 333.2641 *et seq)* was passed by referendum, that being Proposition I of the 2008 Ballot, which presented the MMMA to the people of Michigan for a vote. That proposition described the proposed MMMA as purporting to do, among other things, the following:

a. Permit physician approved use of marijuana by registered patients as may be approved by the Department of Community Health;

b. Permit registered individuals to grow limited amounts of marijuana for qualifying patients in an enclosed, locked facility;

c. Require the Department of Community Health to establish an identification system for patients qualified to use marijuana and/or to grow marijuana; and

d. Permit registered and unregistered patients and primary care givers to assert medical reasons for using marijuana **as a defense to any prosecution involving marijuana**. (emphasis added).

However, as noted by Judge O'Connell, the ballot proposal obfuscated the more confusing and contradictory aspects of the actual legislation. A brief review of that background gives you a better sense of what is actually at issue.

In reality, the MMMA was based upon model legislation provided by a group known as the Marijuana Policy Project, a Washington, D.C. based lobbying group organized to **decriminalize both the medical and recreational uses of marijuana**. The statutory language of the MMMA was actually drafted by a representative of the Marijuana Policy Project. The confusion caused by courts reading the statute in a piecemeal fashion, and taking provisions out of context, has worked to the advantage of those, like the Marijuana Policy Project, who want to legalize outright the possession, use and sale of marijuana.

Taking advantage of the confusion caused by this horribly written statute, proponents of liberalized marijuana regulations having taken to the airwaves, billboards, and newsprint to claim that the MMMA legalizes shops that sell marijuana, collective growing facilities and the cultivation and sale of marijuana as a commercial crop. Moreover, a "cottage industry" has quickly sprung up whereby individuals who primarily wish to use marijuana recreationally are taking advantage of what Judge O'Connell referred to as "pot docs," physicians who would give them written certification for medical marijuana without bothering to establish either a bona fide physician-patient relationship or the existence of a terminal or debilitating medical condition. Indeed, in the Redden case the physician who was relied upon by the defendants, a Dr. Eric Eisenbud, was an **Opthamologist** who was associated with "The Hemp and Cannabis Foundation Medical Clinic." Interestingly, when Dr. Eisenbud testified at the preliminary examination, he admitted that he had only seen each defendant once, refused to divulge what their debilitating medical condition was, and acknowledged that he was not scheduled to see them until they were due to renew their documentation for using marijuana for medical purposes.

As with the case at issue, it appears that a few doctors have issued a very large number of certifications for the use of medical marijuana. One would have to be rather gullible to believe that each and everyone of these certifications are legitimate.

From our perspective, it seems obvious that the basic assumption upon which the MMMA is based is that marijuana can be used for medicinal purposes; however, it is also just as obvious that this premise is completely inconsistent with the Public Health Code, and state and federal law. As will be discussed in greater detail below, by classifying marijuana as a Schedule 1 Substance under the Public Health Code, and federal law, the people of the State of Michigan and the United States Congress have determined that marijuana has "high potential for abuse and has **no accepted medical use in treatment in the United States** or lacks accepted safety for use in treatment under medical provisions." MCL 333.7211. This is totally at odds with the stated purposes of the MMMA which stands for the proposition that seriously ill individuals should be allowed to use medical marijuana without fear of arrest because modern medical research has supposedly discovered beneficial uses of marijuana in treating or alleviating the pain, nausea and other symptoms associated with a variety of debilitating medical conditions. MCL 333.26422(a).

In Judge O'Connell's concurring opinion, and as will be discussed in the section below entitled "**Relationship Between the MMMA and Federal Law**", the MMMA has **no effect on federal prohibitions** of the possession or consumption of marijuana. See also the recent federal opinion in United States v Hicks, __F Supp 2d __ (No. 07-20176 Ed Mich, 2010); 210 WL 272 4286 at *3, citing Gonzales, 545 US 1; 125 S Ct 219 5; 162 L. Ed. 2d 1 (2005).

Similarly, we do not believe that the MMMA does not create any specific **right under state law** to use or possess marijuana. The statute does not, in any way, shape or form, revise or repeal any state statute with respect to the use or possession of marijuana; the drug remains a Schedule 1 Substance under the Public Health Code, MCL 333.7212(1)(c). As noted in MCL 333.7211, a Schedule 1 Substance has **no accepted medical use in treatment in the United States** or lacks accepted safety for use in treatment under medical supervision. Accordingly, **mere possession of marijuana remains a misdemeanor offense**. (MCL 333.7403(2)(b)); the **manufacture of marijuana remains a felony** (MCL 333.7401(2)(d))

Moreover, the MMMA **does not codify a right to use marijuana**; as note by Judge O'Connell in his concurring opinion, "it merely provides a procedure through which seriously ill individuals using marijuana for its palliative effect can be identified and **protected from prosecution under state law**." Putting it another way, these individuals are, unequivocally, still violating the Public Health Code by using marijuana but the MMMA sets forth particular circumstances under which they, perhaps, will not be arrested or otherwise prosecuted for their violation of Michigan law; if prosecuted, they can assert the MMMA as an affirmative defense.

Thus, we have a situation where the people of Michigan have concluded that although marijuana is classified by both state and federal law as a harmful substance that has no accepted medical use in treatment in the United States, and its use and manufacturer are generally prohibited, law enforcement resources should not be used to arrest and prosecute those with serious medical conditions who use marijuana for its palliative effect. As noted in the statute itself:

> "Data from the Federal Bureau of Investigation Uniformed Crime Reports and the Compendium of Federal Justice Statistics show that approximately 99 out of 100 marihuana arrests in the United States are made under state law, rather than under federal law. Consequently, changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana."

MCL 233.26422(b)

Thus, it is perfectly clear that any individual who possesses, uses or manufacturers marijuana in the State of Michigan, **including qualifying patients who have been issued a valid registry identification card and their primary care givers, are violating State law and the Federal Controlled Substances Act and are still subject to arrest and punishment for doing so**. All that the MMMA really does is act **as an affirmative defense to prosecution under the Public Health Code**; this allows an individual to use marijuana by releasing them from the threat of arrest and prosecution. However, that result only occurs if the user meets **all** of the requirements of the MMMA; prosecution is still permitted under the Public Health Code if the individual fails to meet any of the requirements set forth by the MMMA.

Analysis of the MMMA from a Federal law perspective:

The impact of the MMMA on federal law is, in striking contrast to its impact on Michigan's legal and medical professions, seems almost negligible. From our perspective this is due, in no small part, to the fact that there is some history (both factual and legal) upon which the parties can rely to make their decisions. More specifically, there exists a relatively clear cut history of legal decisions emanating from California voters' November 1996 enactment of an initiative entitled the "Compassionate Use Act of 1996," which was another attempt to insure that seriously ill individuals have the right to obtain and use marijuana for medical purposes. Cal. Health & Safety Code Ann. 11362.5 (W Supp. 2001). Ostensibly that statute created an exception to the California laws prohibiting the possession and cultivation of marijuana; that prohibition was no longer applied to a patient or his primary care giver who possess or cultivate marijuana for the patient's medical purposes upon the recommendation or approval of a physician.

Just as in Michigan, immediately upon the passage of the initiative, numerous groups organized "Medical Cannibus Dispensaries" ostensibly to meet the needs of qualified patients. One of those groups was known as the "Oakland Cannibus Buyers' Cooperative" which became the subject of a significant opinion by the United States Supreme Court in 2001: United States v Oakland Cannibus Buyers' Coop, 532 US 483; 121 S. Ct. 1711; 149 L. Ed. 2d 722 (2001), which is discussed in detail below.

In order to understand the impact of federal law on this situation, we believe it is important to "begin at the beginning", that being the federal statutes as classifying marijuana as a Schedule 1 Controlled Substance. It is primarily based upon this status that the United States Supreme Court in Oakland Cannibus Buyers' Cooperative held that there is no medical necessity exception to the Controlled Substances Act Prohibitions on manufacturing and distributing marijuana; putting it another way, Congress recognizes no acceptable medically use for marijuana and, therefore, its possession is generally prohibitive.

As noted above, Schedule 1 Controlled Substances are subject to the most strict regulation because they have a high potential for abuse and there exists no currently accepted medical use in treatment in the United States. 21 U.S.C. §812(b)(1)(A)-(C) The Controlled Substances Act [Title 21] even prohibits physicians from prescribing Schedule 1 drugs 21 U.S.C. §812(b)(1)(A)-(C); 829.

Clearly, Congress has made the determination that marijuana belongs on Schedule 1 in furtherance of its compelling interest in combating drug abuse and protecting the public from the dangers associated with the use of drugs. In Oakland Cannabis Buyers, the Supreme Court upheld Congress' determination that marijuana has no medical value and, therefore, could not be used as defense to a federal charge of manufacturing or distributing marijuana; stated otherwise, there can be no necessity for a substance that has no medical value.

In Oakland Cannabis Buyers the United States sued to enjoin the Cooperative and its Executive Director under the Controlled Substances Act, arguing that its activities violated the prohibitions on the distribution, manufacture and possession with the intent to distribute or manufacture a controlled substance, marijuana. The Federal District Court enjoined the Cooperative's activities but the Cooperative continued to distribute marijuana and the District Court found the Cooperative in contempt, rejecting its defense that any distributions were medically necessary.

The Ninth Circuit Court of Appeals held that the District Court should have weighed the public interest and considered factors such as the serious harm in depriving patient's of marijuana in deciding whether to modify the injunction. After the Ninth Circuit Court of Appeals reversed and remanded the matter was presented to the Supreme Court of the United States.

The Supreme Court noted the Controlled Substances Act contains language which is "absolute" and that for marijuana there is but one express exception to its criminal status, that being government - approved research projects. Since the cooperative was not conducting such a project, the Supreme Court rejected its argument that "medical necessity" was an exception to the Controlled Substances Act. Since Federal crimes are defined by statute rather than by common law, whether an exemption should be created is a question for legislative judgment, not judicial inference. Looking at this statute, the Supreme Court concluded that its provisions leave no doubt but that the defense of "medical necessity" whether based on the California statute or otherwise, was unavailable.

The Cooperative also argued that the use of Schedule 1 drugs could be medically necessary notwithstanding the fact they have "no currently accepted medical use." The Supreme Court held that it was clear from the text of the Act that Congress has made a determination that marijuana has no medical benefits worthy of an exception.

As noted in Hicks, supra, state medical marijuana laws should not, and cannot, supercede Federal laws that criminalize the possession or distribution of marijuana. The Supremacy Clause of the Constitution unambiguously provides that if there is any conflict between Federal and State law, **Federal law shall prevail**. Thus, Federal law prohibiting the use, sale or distribution of marijuana is valid despite any State laws suggesting an exception due to medical necessity. Oakland Cannabis Buyers Cooperative, supra, and United States v Scarmazzo, 554 F Supp 2d, 1102, 1109 (Ed. CAL, 2008).

Simply put, the MMMA has **no effect on Federal law** and the possession of marijuana remains illegal under Federal law, even if it is possessed for medicinal purposes in accordance with State law., Gonzales, supra, 545 US at 27.

ANALYSIS OF POLICY AT ISSUE IN LIGHT OF MMMA

As we previously indicated to you, the combination politically charged environment associated with the MMMA, unclear and inconsistent provisions which lead to multiple interpretations of the statute, and what Judge O'Connell referred to as "obfuscating words and phrases in the MMMA" have resulted in so much confusion that law enforcement officials, criminal defense attorneys, judges, and even the medical profession have all been left with a complete lack of guidance as to how to determine their rights and obligations under the law, or advise their clients regarding their rights and obligations. The situation is exacerbated because the lack of any clear direction from Michigan's Appellate Court have led many people to believe that the MMMA supports and legalizes the marijuana business.

Judge O'Connell's concurrence discusses, with a significant amount of logic, the difficulties associated with the Appellate Court taking a "case-by-case" approach to resolving all the issues found in the MMMA. A "piecemail" approach would take years and would leave defendants, prosecutors, law enforcement, entrepreneurs, cities, municipalities and others in a state of confusion for an extended period of time.

On the other hand, Judge O'Connell felt that one-well-thought-out opinion interpreting the essential provisions of the Act and providing a basic framework for its future application would give everyone a clear understanding of their individual rights and protections under the Act. It was for that reason that he decided to draft an extended concurring opinion, one that we think goes a long way toward achieving the goal he set forth.

We have a similar problem with respect to the application of the MMMA to insurance policy provisions; perhaps, even more difficult. Whereas a trial judge who has to interpret MMMA only has to evaluate and analyze one statute we have to not only analyze the statute but we have to do so

in the context of policy language that is ill-suited for this type of situation. Without attempting to make any excuses, this is one of the reasons it has been so difficult to come up with a "final opinion" on this topic and Mr. Doe's claims under this policy.

As noted above, we do not believe that your policy carries with it any specific language which eliminates, limits, or excludes coverage under the "dwelling" portion of the policy insofar as the MMMA is concerned. That may not be the case with all Farm Bureau policies but it appears to be so with respect to this Homeowner's Policy.

The only policy language that we believe exists in the policy which has a direct impact on the situation is found in **Section 1 - Property Coverages, Coverage C - Personal Property** at the section entitled "**Property Not Covered**" where the policy provides that it does not cover:

> 12. Property that an **insured** possesses in violation of any state and/or federal law. (Form GH 65 01 10 07 at pg 6 of 17)

To begin with, we believe that both State and Federal law clearly state it is illegal, under all circumstances, to sell or purchase marijuana. Contrary to many commentators, the MMMA does not legalize the possession, use and cultivation of marijuana; rather, it does nothing more than create an "affirmative defense" to any criminal charges that might be brought involving the possession, use or cultivation of marijuana.

Given that the mere possession of marijuana remains a misdemeanor offense and the manufacture and/or distribution of marijuana remains a felony, we believe it is a fair assessment of the Company's policy that, with respect to personal property, **coverage is not afforded** for any "property that an insured possesses" which relates to the use, possession, cultivation or distribution of marijuana. Please note this conclusion is slightly different than that referenced in the article you provided us which states:

> ".... No-Fault Carriers can only reimburse costs associated with assisting the patient with his or her medical use of marijuana. An example of such a cost would be a grow lamp or other materials to assist with growing the marijuana plants. Since it is lawful under the Act to provide paraphernalia to a care giver or a qualified patient, items used for consumption of medical marijuana would be compensable under the No-Fault Act.

The principle basis for this potential distinction has to do with the fact that the No-Fault Act deals with a statutory scheme dealing with, among other things, reimbursement for reasonable medical

expenses; no such language exists in your Homeowner's policy.

Thus, while it may be arguably "lawful" under the No-Fault Act to provide paraphernalia to a care giver or qualifying patient (we are not convinced this is an accurate assessment of the law since we do not believe that the MMMA created any legal rights, simply an affirmative defense to potential criminal prosecution) the distinction lies in the fact that under the No-Fault Act compensation for reasonable medical expenses is required. In a Homeowner's policy of insurance there is no such mandate and, therefore, we look to the simple words contained within the policy provisions and conclude that any property that an insured possesses which is in violation of a "state or federal law" **is not covered**.

Applying this to the Doe situation we would argue that even the "paraphernalia utilized in cultivating, using, and distributing marijuana, is not covered. No doubt, Mr. Doe will argue that items such as his grow lamp and the fixtures in which the marijuana in his home was growing could be used for other purposes and, therefore, should be covered. We reject that premise on the theory they were not **at the time of the fire** being used for any other such purpose.

We also believe it is important to understand the distinction between the policy's classification of these items as "not covered" as opposed to their being the subject of a sub-limit or an applicable exclusion. Where, as here, a particular category is "not covered" the burden of proof is placed on the insured to establish that the policy does, in fact, provide coverage. Were this an exclusion, it would be the Company's burden to establish that property otherwise covered would be excluded.

As you may recall, Mr. Doe initially argued he believed he was entitled to compensation for his loss of marijuana plants under the "additional living expenses" portion of the policy. However, after we went through that section of the policy with him, line by line, during the Examination Under Oath, even he admitted there was no factual or legal basis for that interpretation. We stand by that approach at this time and do not believe the cost of getting marijuana from some other source is compensable under the policy. We would also note that any action on the part of Mr. Doe associated with the purchase of marijuana would, once again, subject him to potential criminal penalties and there is absolutely no reason why the Company should be contractually obligated to pay for such a criminal act.

This leads us to the next aspect of our analysis of this situation, that being the possible classification of the marijuana and various paraphernalia associated with its growth as "business" equipment. As you know, the policy provides under Coverage C - Personal Property a sum of $1,000 on property used at any time or in any manner for any **business** purpose. Business is defined as: ". . . farming, a trade, profession or occupation, all whether full or part-time." Assuming, for

purposes of argument, that the growth of 48 marijuana plans in the Doe residence constitutes a form of "farming" (a term which is undefined by the policy) an argument could be made that this sub-limit would apply if coverage were otherwise afforded and not excluded. However, under the terms and conditions of the MMMA there are some potential problems with this approach.

For example, according to the MMMA, the only compensation that can be received are costs associated with assisting a patient with medical use of marijuana; reimbursement for the monetary expenses incurred in the course of assisting a qualifying patient in the medical use of marijuana. The MMMA does not specifically authorize compensation to a primary care giver for the labor in cultivating marijuana or for otherwise assisting a qualified patient in its use. Nor is there any specific language indicating that a care giver may profit financially from his role. Last, but not least, to the extent that someone is growing medical marijuana for their own use, it would seem obvious that such a operation is not a "business" in the strictest sense of the word.

Since the act purports to take the "profit" out of the equation it may be difficult to assert that the process of growing, cultivating, and assisting a qualified patient is a "business" as that term is defined in the policy. We can certainly indicate to you it has been our experience in handling literally dozens of cases involving the "business" limitation (on both a first and third party basis) that the Courts look upon these provisions with an extreme amount of dislike and see no reason why they would differ their approach with respect to the concept of "business" under the policy in relation to the growth of marijuana pursuant to the MMMA.

The last issue that creates some significant difficulty in this situation is how to assess damages if it is determined that medical marijuana and/or the associated paraphernalia is somehow covered under the policy. It is very difficult to utilize the typical terminology of "actual cash value" and/or "replacement cost value" for a Schedule 1 Controlled Substance; remember, these types of substances cannot even be prescribed by a physician and, therefore, there is **no market** for them.

Throughout his Examination Under Oath Mr. Doe kept bringing up the amount it costs to purchase seeds (6 for $90), clones ($25 each) or fully mature marijuana plants ($2,000 - $4,000 a piece). Clearly the "market value' has increased by the very fact it is an illegal substance. Moreover, Mr. Doe seems to be approaching this topic from the perspective that one can go out and "purchase" seeds, clones and/or mature plants. By all accounts this would constitute a violation of both state and federal law.

Mr. Doe's position would be that any cost associated with the purchase of seeds, clones, mature plants would represent nothing more than reimbursement for his expenses and he should, therefore, be entitled to his "loss" even if it is nothing more than reimbursement to a "not for profit business." Again, we do not believe this approach makes logical or legal sense; even if it did, it

would, at best, provide him with the opportunity to recover the policy limit of $1,000 for "business" personal property.

CONCLUSION

For the reasons set forth above, we do not believe the Company is required to compensate Mr. Doe for any losses associated with the destruction by fire of his marijuana plants, growing lamps or other paraphernalia associated with the growth, cultivation and distribution of marijuana. This conclusion is intended to encompass any claimed loss of items which he believes are somehow protected by the MMMA. In our opinion, there is a world of difference between saying that the purchase, cultivation and sale of marijuana is "legalized" by the MMMA versus what the Act actually does accomplish: the creation of an "affirmative defense" to any State (not Federal) charges for violations of Michigan law in that regard.

We also do not believe that the "business" sub-limit applies because we are not convinced that the activities involved constitute a "business" as that term is defined by the policy. If, however, the Company disagrees with this conclusion (for whatever reason) then the argument would have to be that his operation is a not-for-profit **business** and invoke the policy sub-limit of $1,000 on any such "business" property.

Our last commentary on this topic comes about as a result of our numerous discussions with Mr. Greenjeans regarding not only this particular situation but the possible ramifications of the MMMA on other Farm Bureau policies, particularly those involving traditional farm operations. As indicated at the beginning of this correspondence, there are a number of different types of policies involved in that regard and we were not instructed, and certainly have not had the opportunity, to go through each and every one of them and provide and analysis of each. Moreover, Mr. Greenjeans has provided us with several potential scenarios which certainly give us cause for pause as to the potential ramifications of your policy terms and conditions. For example, what impact does the fact that a typical farm policy does not have a sub-limit on "business" property given the very nature of the insured's activities.

In this regard, we have two separate and unequal recommendations. First, we believe the Company can simply stand by its policy provisions that **coverage is not afforded** for any personal property associated with the use, possession, cultivation, or sale of marijuana; do not apply a "business" sub-limit, do not pay for growing lights and other drug paraphernalia, and do not pay for loss of use, loss of inventory, additional living expenses, the insured's increased cost of having to get "medical marijuana" from other sources, etc. The factual and legal basis for this is simple: the possession, cultivation, use and distribution of marijuana is illegal and Farm Bureau, as an insurer should not, and cannot, reimburse someone for their illegal activities.

The alternative approach would be to basically conclude there exists such a significant amount of confusion and inconsistency in the statutory language and the case law interpreting it as to result in the creation of a policy provision which provides a nominal amount of coverage for this type of property (personal and, potentially, even real property) and simply declare it to be the maximum amount the Company is willing to provide coverage for. This is not unlike the approach that has been utilized with respect to mold and criminal sexual misconduct.

Rather than debate the issue as to whether something is mold related, whether it is an "intentional act" or the result of some mental deficiency or condition which eliminates the insured's ability to "know or should have known" that his or her actions were harmful simply include a policy provision that allows a payment of up to $250 for such "damages." On any claims associated with the purported application of the MMMA to the use, growth, possession, or cultivation of marijuana would result in the issuance of a check in the amount of the policy limit of $250 and the matter would be resolved. In all honesty, although this may be the "simplest" and "efficient" way of handling the situation we are not in favor of it as we believe it would result in the knowing payment of sums of money to an individual for the loss of items associated with an illegal activity even though you, obviously, would have altered the terminology of your policy to provide for that exception.

From our perspective, sometimes you simply have to do the "right thing" for the reason that it is the right thing to do regardless of all the public policy issues, medical and legal policy debates, and inconsistent case law. We believe this is just such a situation.

In light of the above we believe the Company should immediately contact Mr. Doe and formally advise him of the Company's decision in this regard. In all honesty, we do not have any specific position with respect to whether the remaining aspects of Mr. Doe's claims are consistent with the Company's understanding of his losses or whether they believe them to be exaggerated or otherwise unsupported. If that is the case, then the Company should take the formal step of "rejecting" any "Proofs of Loss" and any "Sworn Statement in Proof of Loss" for whatever reason it feels are applicable. We also believe it would be appropriate to include language such as the following:

a. To the extent that you have, or may, make any claim for damages to personal property involved in the use, possession, cultivation, or distribution of marijuana, that property is not covered under the terms and conditions of the policy as it was possessed by you in violation of State and/or Federal law. In that regard please refer to that Section of the Policy entitled: **SECTION I - PROPERTY COVERAGES, COVERAGE**

> **C - PERSONAL PROPERTY, Property Not Covered,** at paragraph 12 wherein the policy states:
>
> 12. Property that an **insured** possesses in violation of any State and/or Federal law. (Form GH G5 01 10 07, page 6 of 17).

The next full paragraph of the "rejection" letter should specifically indicate that to the extent Farm Bureau has rejected his "Proofs of Loss" and/or "Sworn Statement in Proof of Loss" that does not constitute a denial of those claims. Indeed, the Farm Bureau is confirming that coverage is afforded to him for those specific claims. However, the amounts he has claimed do not, in the Company's opinion, accurately reflect the actual cash value of the damaged property, the amount of loss and damage actually suffered, or the amounts which may be due and owing under the policy.

You should also indicate to Mr. Doe that it should be expressly understood that with respect to those claims involving any personal property relating to the use, possession, cultivation, or distribution of marijuana, those claims are **fully, formally and finally denied**, for the reasons set forth above.

We have also drafted language we believe would be beneficial with respect to creating a specific time line within which the statute of limitations would not be tolled. That language would be as follows:

> Should you have any questions or comments regarding this responses, particularly with respect to those portion of your claims that are fully, formally denied, the Farm Bureau Mutual Insurance Company of Michigan will, as a courtesy to you, respond where appropriate. However, it should be expressly understood that any such response is not intended to be, nor shall it be considered, an effort to do any of the following:
>
> 1. Re-open our investigation into your claims;
> 2. Re-evaluate our formal denial of your claims, and/or
> 3. Enter into negotiations regarding the denial of your claims.
>
> Absent an express, written acknowledgment by us that your claim file will be reopened, the denial of your claims has been waived or that we are willingly entering into negotiations with you to resolve any or all factual/legal disputes, this correspondence constitutes our formal

and final decision with regard to your claims under the captioned policy.

Furthermore, it should be expressly understood that in taking these positions regarding your claims under the captioned policy, the Farm Bureau Mutual Insurance Company of Michigan does not waive any rights or other valid defenses which it may have under the policy, which may become known to us through further investigation or under Michigan Law; any and all such rights and defenses are hereby expressly reserved.

Hopefully, this correspondence adequately addresses all of the issues raised by this most unusual situation, provides you with a cogent analysis of them, and a clear understanding of the basis for our opinions and recommendations. If, however, that is not the case, please do not hesitate to contact us at your convenience as we would be more than happy to discuss this matter in further detail.

Very truly yours,

YEAGER, DAVISON & DAY, P.C.

Phillip K. Yeager

PKY:slb
Enclosure