



**Lowenstein Sandler's Insurance Recovery Podcast:
Don't Take No For An Answer**

**Episode 28 -
Not Up in Smoke: Insuring Against the Risk of Legal
Cannabis**

By [Michael D. Lichtenstein](#) and [Peter Slocum](#)
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Michael Lichtenstein: Hi everyone, and welcome to Don't Take No For An Answer, an insurance recovery podcast. I'll tell you, I've been thinking about pot lately, a lot. Because as some of you may know, nationally, more than half of the states have legalized either cannabis, which I think is the more politically correct term these days. Have legalized it either for medical, or for adult recreational use. And so, I've been thinking about it's relationship to insurance, because these businesses are businesses like any other. You've got cultivators, and you've got processors, manufacturers, distributors, drivers, retailers. And there are insurance needs for all aspects of this business, just like there are for other businesses.

But I know from my own experience and also colloquially, that insurance is a bit of a mess in this space. So the good news is, one of my partners Peter Slocum, who will be joining us. You'll be hearing from him in a second. He's in our white collar group, here at Lowenstein. And he does quite a bit of work for clients in the state of New Jersey. And so, I thought we could have a podcast with Peter, where he could talk a bit about the state of the industry, here in New Jersey. And I will then interweave my questions and observations about the relationship, between those businesses and insurance needs and availability in the marketplace. So, hi Peter. Welcome to Don't Take No For An Answer.

Peter Slocum: Thank you, Michael. Pleasure to be here.

Michael Lichtenstein: Wonderful. If you want to take a minute and talk to our listeners just about who you are and what you do, that would be great. And then, why don't you tell us a bit about your experiences here in New Jersey, with the cannabis businesses?

Peter Slocum: Sure, absolutely. A pleasure to meet everybody through the podcast universe. Peter Slocum, I've been with the firm now for this stint, for about four and a half years. Before I got to Lowenstein, I spent about five years give or take, working in Trenton. Which for those who are not in New Jersey, is the capital of the state for then governor, Christie. Various roles in the

attorney general's office, and the governor central office. And so again, a good understanding as to how New Jersey ticks, and how it doesn't tick so well. On the private side, for about five and a half years, I've been involved in the cannabis space. And so, I got a good sense as to what is going on, what has gone on. And in fact at one time or another, I have represented in one way or another, about half of all the entities that currently have licenses. So, I'd like to think I know a little bit about what's going on here, in New Jersey.

Michael Lichtenstein: All right. Well, I'm going to put you to that test. So, why don't you tell the listeners the short form version of what has been happening in this space, and what is happening currently?

Peter Slocum: Sure. So, New Jersey's been very politicized with this cannabis space. And a lot has to do with just politics, and who's in the office, when. So tiny bit of history is that, New Jersey's medical cannabis program was signed into law at the very tail end of governor Corzine's administration. So, he was a Democrat. He was the lame duck. Governor Christie, a Republican, was coming in. And so, they signed the cannabis medical program to gift to the new Republican administration. Christie's folks weren't particular fans of it. And there were a lot of obstacles put up. They tried to reduce what the statutory minimum number of facilities were. They didn't go over so well. But bottom line is, over eight years under the Christie administration, there was not too much action. You had the bare minimum number of medical facilities, and they were all non-profits.

Peter Slocum: Governor Murphy comes in. In 2017, he's campaigning and stumping. And he's a big proponent of cannabis reforms. And as soon as he gets elected, he starts firing both barrels to ramp up the program, as fast as possible. He wants to not only increase the number of medicals, but it also get recreational on board. So on the rec side, which I think, is where a lot of folks are interested these days, there were efforts in 2019 or so, to get it passed by legislation. Folks in the legislature were not interested in doing it. At least, not enough to get it passed by legislation itself. So, they put it to the voters. Voters approved it in November 2020 overwhelmingly, to allow recreational in the state. They very quickly passed a statute earlier this year, in February.

Michael Lichtenstein: So, let me interrupt you just for one sec.

Peter Slocum: Sure.

Michael Lichtenstein: Do I have this right? When the voters approved it, we actually amended the New Jersey state constitution?

Peter Slocum: Correct.

Michael Lichtenstein: So, I have a constitutional right in this state, to use Cannabis, right?

Peter Slocum: You have a constitutional right to authorize your legislature, to allow you to use cannabis.

Michael Lichtenstein: Okay. Which in fact, we have done, correct?

Peter Slocum: Sure. Why not?

Michael Lichtenstein: All right. I just wanted to get that clear.

Peter Slocum: Yeah. It didn't need to be in the constitution. But New Jersey politics, it was easier to pass the buck and say, voters, you decide. Rather than, me the politician. So where we stand currently on the rec side of New Jersey is that, we have a statute. We have a governing body that's going to oversee it, and we have emergency interim ranks. We do not yet have a request for application process, they haven't opened it yet. But folks are pushing them pretty hard to do so, and we expect the RFA to open up, hopefully by the end of the year.

Michael Lichtenstein: Can you talk to us a bit Peter, about... I said it at the top of the podcast. The way I understand it, you have cultivators who are growers, I would think. You have manufacturers, who are making products. You have wholesalers who are taking it from manufacturers, and then distributing it to retailers. As I understand it, you need special licensed drivers to get the product from the wholesaler, to the retailer. And then, you have the retailers. But can you just talk in a little bit more detail? Because I think, this will be important when we talk about the risks at each step of this process, from plant to retail sale. And that will feed nicely, I think, into the insurance component. And some of the difficulties I think, that folks who are in this space are having, when it comes to ensuring against these risks in a way that, like I said, every other business really does. But this business in particular, is having unique problems.

Peter Slocum: Absolutely. So just a touch of history, to put in context. New Jersey's original statutes for the medical... so, they must be vertically integrated. That means one business from seed, to final joint, to selling the joint, must be one enterprise. So, they had their own structure. Going forward, there was a bigger effort, particularly in the rec side, to get as many people into the industry as possible. So, they've vulcanized the licenses and broken them up. So, it's actually six different kinds of operations. And for the most part, they can't cross germinate. So you have cultivators, the people who grow the pot. Manufacturers, so people take the flower and turn it into the product. You have wholesalers, which is what you expect a wholesaler to be. Distributors, which are more like glorified drivers. Cannabis retailers, which actually sell the product. And then cannabis delivery, like delivering your pizza to your house. Those are the six kinds of licenses going forward, on the rec side.

Michael Lichtenstein: And of those categories, which are the ones that you've done the most work for?

Peter Slocum: So at the moment, there is no RFA process for people to apply. Have folks who are gearing up for their application, but there's no opening yet.

Michael Lichtenstein: So when you talk about cultivators for example, this is what I think about, you'll tell me if I've at it right or wrong. I would think the biggest issue for a cultivator would be that, their crop fails.

Peter Slocum: Absolutely.

Michael Lichtenstein: Or is otherwise, destroyed. Is that right?

Peter Slocum: Absolutely. So these facilities, bio security is a huge issue. And if you design the facility the wrong way so that you have mold spores coming in, it can destroy your business. Think about it, if you're walking around in the garden or the street outside, you get things on your shoes that mean nothing to me, to walk into my house. But I subject them into a clean, secure environment. And then, you get a little bit of mold building up inside the facility, and it just spreads like wildfire. And you just lose your entire crop. You need to destroy it all, start from scratch.

Michael Lichtenstein: And I assume manufacturers who are taking the flower, drying it out, if I remember how it works from when I was in college. And then, turning it into the variety of products from joint, which I would think is old school. To edibles, which I guess is the new normal for cannabis products. I think they have the same types of risks that any other manufacturer has, right? They could have bad batches, batches could go out into the public, that don't perform the way they should perform.

Peter Slocum: Sure.

Michael Lichtenstein: Or the way they're intended to perform. They have the same issues with people visiting, and having third party type liability. And they have first party property issues, right? They have all the same potential liabilities, right?

Peter Slocum: Sure. And there's a lot of state mandated testing for either cannabis product. But not withstanding testing, things still happen because, that's just life.

Michael Lichtenstein: Are there any liability protections that they have in at the state level, because of the testing? In other words, has anyone said, well, we're going to test it. If we say it's okay, you don't have to worry about it?

Peter Slocum: I'm not aware of it being litigated yet. Because so far, these are all patients who have their issues. Nobody's on the rec side yet. So, they all got medical issues. It's hyper regulated.

Michael Lichtenstein: And then, drivers. Drivers need auto insurance, presumably. And retailer. So I understand on the retail side, that this is mostly a cash business in New Jersey.

Peter Slocum: Absolutely. Because getting transactions with federally chartered banks, is a very serious problem.

Michael Lichtenstein: And of course, where you have cash, you can have theft. Theft from the inside, presumably. You could have theft of cash, theft of product. And you could also have theft coming from the third parties, your classic stick up job, right?

Peter Slocum: Significant risk, of course.

Michael Lichtenstein: So a little bit on the federal level, just for the listeners who don't know, I mean, the cannabis space is still illegal at the federal level. And I think that's the reason why you have difficulty with banks, for example. And why banks don't want to do business in the cannabis space. Because, there's a concern that they will actually be furthering a business that is still, I think, largely a felony at the federal level. And now rolling it into insurance, pun intended. You have the same issue for the major players in the insurance space, is that, there's a real hesitancy for major admitted carriers in the state, including the state of New Jersey. To get involved in ensuring any of these, I think you laid out probably six different steps that are now not going to be vertically integrated. They're going to specifically be separate, and all have their own individual insurance needs.

There's been a real hesitancy, because there's a real question as to whether or not by providing insurance, they're actually furthering an illegal enterprise. I think there are issues for them as to whether or not proper policy would even permit them to ensure conduct that at least at the federal level, is considered criminal. And whether those contracts would even be enforceable. So I can tell you, there are a couple of legislative initiatives that have been floating through Congress, for a couple of years. And I know as of March, they're both back tied up in committees that are designed to eliminate both of those problems. First is called, the SAFE Banking Act. And SAFE stands for Secure And Fair Enforcement. And as I understand that act, that's supposed to make it easier for federally chartered banks to come into the cannabis space, and allow these businesses to function, the way a normal business does.

Which is, at the end of the night, you can go to the bank and deposit your dollars, and not have to keep huge amounts of cash. And not have to transport huge amounts of cash. Now on the insurance side, there's something called the CLAIMS Act. Which is, the Clarifying Law Around Insurance of Marijuana. And it's designed to do the same thing, in the insurance base.

And it's designed to give admitted carriers, cover. That if they do provide insurance to cultivators, or wholesalers, or retailers, or drivers, that they're not actually violating the law. And they're actually providing insurance coverage for activities that are permissible, even if the federal law itself hasn't yet changed. And I think, these are important bills. Let's focus on insurance. If the CLAIMS act gets passed, I think it will largely open up the insurance space. And I think you'll see a lot more traditional insurance carriers, offering coverage to folks in the cannabis space. So, let's go right to insurance. It's my understanding, and you can give me your take on this, Peter. That there are really, very few insurance carriers that are willing to offer any coverage to folks who are playing in the cannabis field. Has that been your experience?

Peter Slocum: Absolutely. In New Jersey, there's only a handful that I'm aware of. But those that do play, they're not the big names, and they don't have the best track record. Without going into any detail, you pay a bunch of money to someone so that they can assure you. And then when you finally have a claim, they pull out all the stops and say, no, wherever they can. Even if, it's a bunch of BS.

Michael Lichtenstein: That's Peter Slocum. Plain talk. Right. So it sounds like, and this again, is my understanding, that you're dealing with few carriers. And they're not the name brand carriers. What about premiums themselves? It's my understanding that the cost of this coverage is not inexpensive, notwithstanding the fact that your claim experience may not be a good one. Has that been your experience?

Peter Slocum: Well because, supply and demand, [inaudible 00:14:12] expect, if you're only one of a few shops in town willing to do this, you're going to jack up your price. Plus, there is a general perception and it's not a wrong one, that these businesses have more cash to know what to do with. So, why not charge them extra?

Michael Lichtenstein: And this is a particular interest to me, because I practice a lot in the D&O, directors and officers, and errors and omission space. And this is the type of insurance that covers directors and officers of companies. And my understanding is that, that type of coverage is virtually unavailable right now. That it's very difficult for a director or for an officer of a company, to get this type of insurance. And even when they can get it, I've seen examples where they might be paying a hundred thousand dollars premium, for a million dollars of coverage.

And that is a ratio that is just out outrageously high, by typical standards. And some might say that it's barely having any insurance at all, really. And my sense is that... so then you ask yourself, well, who's going to be willing to actually be a director of a company in this space, if they can't get appropriate insurance coverage? And who's going to want to be an officer. And my understanding is that, it does really limit the pool of players that can actually come in and engage. And from a public policy perspective, that seems to me to be problematic and a real weakness, I would say.

Peter Slocum: Sure. And particularly in the past, when these entities in New Jersey, were not for profits, right? Because, you're going to be a board member on a not-for-profit board. You're not getting paid for your membership... so you're incurring this huge liability and risk of maybe getting sued, and you might not have any coverage to cover you from when you do get sued. It's a problem.

Michael Lichtenstein: And also, talking about other forms of liability, we oftentimes think in the insurance basis, what's insurance to protect the business or insurance to protect an individual director or officer? But insurance also protects the publically injured parties. Because it guarantees that if you are hurt by a product in this case, that there actually is a solvent entity standing behind it. So that there, actually is some financial redress. Now I know the thought is that, every cannabis company has nothing but cash, and they don't know what to do with it. But I'm sure that's more myth, than reality.

Especially now in New Jersey, with this nascent recreational industry. It's my understanding, you're going to have a lot of small businesses. I may be bombing pop, I don't mean that in a derogatory way. But shorthand way of saying, they're going to be small, largely inexperienced. And probably, funded only sufficiently to start their business. So if you've got an injured third party, I think they're in a much better position if they've got actual real

insurance. And if they're not able to get that, I mean, I think that's just creates another problem for folks in the state of New Jersey or other -

Peter Slocum: Definitely. There's a big drive to have smaller players in. And as many small players in, as possible.

Michael Lichtenstein: All right. Any other words Peter, for our listeners, when it comes to cannabis?

Peter Slocum: No. It's a fascinating time here, in New Jersey. Even though... as fast as pot law moves in the state, for folks who say great, we passed amendment in 2020, where's my pot? It's going to be a long time off, folks. Because, they haven't even opened the RFA process yet. Then they need to apply, they got to judge. They got to review. And then, they award. And then after they award, people need to build their business. So, we're a long ways off, I think.

Michael Lichtenstein: All right. Well on that down note...

Peter Slocum: Sorry.

Michael Lichtenstein: We'll give Peter the... that's all right, Peter. Thank you so much for joining us. Thanks for the listeners. And we'll see you on our next podcast.

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