

Ohio Appellate Decision Tackles Excluded Coverage for Marijuana Use

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The insurance industry is no stranger to advances in technology, changes to public policy, and navigating the laws surrounding such changes. Insurance companies are tasked with making rapid-pace changes to the way they conduct business, including modifying the terms of their insurance policies to ensure they fit within the confines of applicable state insurance laws and, when uncertainty exists, understanding how those policies would likely be treated in a court of law.

One area where uncertainty abounds is in connection with the marijuana, or cannabis, industry. The increasing number of states legalizing marijuana for both recreational and medical use raises critical questions regarding if and how insurance coverage should be made available with respect to auto or other general property and casualty insurance claims involving damages or injuries that occur when a person is under the influence of marijuana.

A recent decision from the Court of Appeals of Ohio, *Grange Ins. v. Cleveland*, 2022-Ohio-4303 (App. 6th Dist. 2022), addressed these issues as well as the novel issue of extending alcohol intoxication exclusions to insured persons who use cannabis – that is, whether insurance companies should be permitted to exclude coverage for a person driving under the influence of marijuana, when a state prohibits insurance companies from denying coverage for accidents caused by alcohol. While the *Grange* decision arguably raises more questions than it provides answers, the appellate court’s decision serves as a clear warning to all drivers, regardless of their personal marijuana use, as well as to companies that employ and ensure drivers as part of their business.

[Grange Ins. v. Cleveland, 2022-Ohio-4303](#)

The *Grange Ins. Co. v. Farmers Ins.*[1] case involved a driver insured by Grange Insurance Company (Grange) who caused bodily injury and property damage while driving under the influence of marijuana. Specifically, the driver was dismissed from her work after showing visible signs of impairment. As she was leaving, she proceeded to drive her car through the employer’s store window, hitting one person and nearly hitting another person, and crashing into two additional vehicles while fleeing the scene, eventually leaving her car disabled and sending her to the hospital. The driver admitted to smoking “weed” in her deposition and that the acts related to this event were attributed to such use.

Grange denied coverage to the driver on two grounds, which the court upheld. First, the insurance policy contained a criminal act exclusion which the Ohio Appellate Court found applied because the insured committed

a criminal act while driving, as recreational use of marijuana currently remains illegal in Ohio. [Ohio legalized medical marijuana in 2016, authorizing its use by patients with any of 21 medical conditions whose certified physician confirms marijuana will be used to treat the condition(s).] Second, the insurance policy contained a controlled substance exclusion which excludes coverage for bodily injury or property damage arising out of the sale, use, manufacture, delivery, transfer, or possession by any person of a controlled substance under federal law. The court accepted the insured driver's admission under oath stating she was under the influence of marijuana, a controlled substance, while driving.

Farmers Insurance of Columbus, Inc. (Farmers), which covered one of the persons struck by the intoxicated driver, argued that the controlled substance exclusion in Grange's policy should be void as against public policy because Ohio prohibits insurance companies from excluding coverage in the event of damage or injury caused by alcohol use. Farmers' argument hinged on Ohio's state law (and supporting policies) prohibiting insurance companies from denying claims associated with the consumption of alcohol in the state. Farmers argued the Court of Appeals should extend the prohibition on intoxication-exclusion provisions with respect to alcohol to cannabis, as well.

The Court of Appeals summarily dismissed this argument, and thinly veiled its displeasure therewith, stating:

"Farmers cites no cases directly in support of this argument. Although many states have eased their regulations regarding the distribution and use of marijuana, it remains a controlled substance under federal law. Further, Ohio has legalized marijuana for medical use only, see R.C. Chapter 3796. Thus, there are clear reasons to treat marijuana use differently than alcohol use. Accordingly, we find that appellant's second assignment of error is not well-taken.[2]"

In sum, the Appellate Court denied Farmers' invitation to extend Ohio's policy of prohibiting alcohol exclusions to prohibit cannabis exclusions in relevant insurance policies in the state (demonstrating the Appellate Court's refusal to engage in judicial activism on the topic of cannabis exclusions). The Appellate Court identified both the federal illegality of marijuana and that Ohio's marijuana reform applied only to medical patients as the bases for the state to "treat marijuana use differently than alcohol use."

Alcohol (& Marijuana) Exclusion Laws

Insurance laws, including the contents of insurance policies, are regulated on a state-by-state basis. Historically, starting in the 1940s, states began passing laws permitting these exclusions, known as alcohol exclusion laws (AEL). The legislative intent behind AELs is to discourage people from drinking alcoholic beverages and to save insurance companies money from alcohol-related claims. At the time, it was believed that a person would be less likely to drive while impaired by alcohol if insurance companies in the state could deny claims for damages, including but not limited to medical bills associated with injuries caused by the consumption of alcohol.

Today, a growing number of states are overturning AELs, resulting in insurance companies being prohibited from denying coverage in the event damages or injuries are caused by alcohol use. According to the National Institute of Alcohol Abuse and Alcoholism, about sixteen states (including Ohio) and the District of Columbia prohibit insurance companies from including exclusions for alcohol intoxication. The National Association of Insurance Commissioners (NAIC) Uniform Individual Accident and Sickness Policy Provision (UPPL) model act includes a

wide range of exclusions for insureds engaging in a felony or illegal occupations. However, because not all states that adopted this model act also adopt the specific illegal activity exclusions, it is not clear how many states allow or prohibit these exclusions.

The Ohio Court of Appeals Decision

The Appellate Court in *Grange* was unpersuaded by Farmers' argument, and declined to extend the state's prohibition against alcohol exclusions to create a prohibition against cannabis exclusions in relevant insurance policies. The Ohio Court of Appeals cited three reasons sufficient for the court to "treat marijuana use differently than alcohol use":

1. marijuana remains illegal under federal law,
2. Ohio has only legalized the use of marijuana for medicinal purposes, and
3. no legal precedent exists to extend the policy beyond the state's prohibition against alcohol exclusions to cannabis exclusions.

(Medical marijuana use was not at issue in this case.)

In effect, the decision indicates that in Ohio – and in the fifteen other states, plus D.C., that also prohibit AELs – insurance companies must cover claims for damages and injuries resulting from car accidents caused by drunk drivers, but the same laws and policies do not require them to cover claims resulting from "drugged" drivers – that is, drivers under the influence of marijuana.

Despite the clear result in *Grange*, the Appellate Court's reasoning in the case perhaps provides more questions than answers to the insurance industry, cannabis industry, and all drivers and passengers regardless of their personal marijuana use. That is, would the outcome of the case have been different in any of the following scenarios:

- if marijuana was no longer illegal under federal law?
- if Ohio had legalized the use of marijuana for recreational purposes at the time of the accident?
- if any relevant legal precedent existed in extending the policies behind AELs to cannabis?
- if there was a factual dispute regarding impairment being caused by marijuana use in a particular case?
- Unfortunately, in *Grange*, the Ohio Court of Appeals' decision provides little guidance with respect to any of these issues, other than flagging them as relevant to their decision.

Addressing Damages Caused by Marijuana Impairment

Impaired driving issues involving marijuana appear to be on the rise. According to peer-reviewed research and data[3], co-use of marijuana or illicit drugs with alcohol increases the risk for driving impairment. Additionally,

previous research demonstrates evidence of a statistical association between marijuana use and increased risk for motor vehicle crashes – however, limitations in these studies prohibit a finding of causation.[4]

Other scientific studies, however, have been unable to link (delta-9) THC-levels in a driver’s blood to driving impairment.[5] Scientists acknowledge that the effects of marijuana on an individual’s driving performance likely vary by the dose and potency of the product consumed, as well as the means of consumption (e.g., whether marijuana is smoked or eaten), and the amount and length of marijuana use by the individual over time. As a study published by the CDC concluded, “Additional data are needed to clarify the contribution of drug and polysubstance use to impaired driving prevalence and the resulting crashes, injuries, and death.”[6]

Despite this scientific uncertainty and despite the questions raised by the *Grange* case, plenty of wisdom can be gleaned from the appellate decision, and insurance companies and companies that employ drivers, in addition to every driver regardless of their personal marijuana use, are well advised to examine the extent of, and exclusions in, their existing coverage. Such exclusions, in the cannabis context, can render unavailable the lion’s share of coverage to which a policyholder believes they are entitled in the event of an accident caused by marijuana impairment. Even non-users of marijuana are well-advised to take heed of these issues, as such policies may effectively leave a person innocently injured by a marijuana-impaired driver (such as the victim insured by Farmers in the *Grange* case) with no way to recover their medical expenses or property damage if the driver is unable to pay and their own policies do not fill in the gap.

While the future of insurance coverage for claims resulting after marijuana use will remain on state-by-state basis, we can expect regulators and legislators to continue to tackle these novel issues aggressively throughout the foreseeable future. These activities will most likely result in different policies and laws being embraced by different states – mirroring the states’ conduct surrounding AELs, but not necessarily reflecting or embracing the same alcohol-related policies when applied to cannabis – all with the goal of best serving policyholders and drivers alike.

[1] *Grange Ins. Co. v. Farmers Ins.*, 6th Dist. Lucas No. L-22-1059, 2022-Ohio-4303.

[2] *Id.* at ¶ 20.

[3] National Institute on Drug Abuse, Marijuana, U.S. Department of Health and Human Services, National Institutes of Health (2018). <https://d14rmgtrwzf5a.cloudfront.net/sites/default/files/1380-marijuana.pdf> and Busardo FP, Pichini S, Pellegrini M., et al., Correlation between blood and oral fluid psychoactive drug concentrations and cognitive impairment in driving under the influence of drugs, 16:84–96 (2018).

[4] National Academies of Sciences, Engineering, and Medicine, The health effects of cannabis and cannabinoids: the current state of evidence and recommendations for research, (2017). <https://www.nap.edu/read/24625/chapter/18>

[5] *Id.*

[6] Centers for Disease Control and Prevention, Morbidity and Mortality Weekly Report: Driving Under the Influence of Marijuana and Illicit Drugs Among Persons Aged ≥ 16 Years (2019).

<https://www.cdc.gov/mmwr/volumes/68/wr/mm6850a1.htm>

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