Social Host Liability Under Prop 64

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Cannabis Basics: Federal Law

- Yes, it’s still illegal under federal law
- Cannabis is classified as a Schedule I Substance (21 U.S.C. § 812, Schedule I)
- Simple possession of cannabis is a felony punishable by up to five years in prison (for a first offense) (21 U.S.C. § 841(d))
Cannabis Basics: State Law

- Legal medical use: 28 states & D.C.
- Legal recreational use: 8 states & D.C.
- Ballot measures for medical and/or recreational use expected in several states in 2017 & 2018
- Legislative measures expected/pending in several other states
Cannabis Basics: State Law

Image source: Greenwave Advisors, LLC
Cannabis Basics: State Law

• Legal sales estimated at $7 billion in 2016
  • Over $1 billion in Colorado alone
• Projected sales (assuming no serious federal crackdowns) range from $18-30 billion by 2021
• Tax revenues exceeding expectations
• Some protections for the industry:
  • Cole Memoranda
  • Rohrabacher-Farr amendment
• BUT: mixed messages from the Trump Administration
Recreational Cannabis in California: Individual Use

Adults 21+ may:

• Smoke or ingest cannabis or cannabis products
• Possess 28.5 grams of non-concentrated cannabis for personal use
• Possess 8 grams of concentrated cannabis for personal use
• Give away the above amounts to other 21+ adults Grow up to six plants

Cal. Health & Saf. Code § 11362.1(a)
Recreational Cannabis in California: Retail Sales

• Starting in 2018, licenses will be issued for retail marijuana sales

• Retail locations restricted to adults 21+

• Retailers cannot also be licensed as retailer of alcoholic beverages

• Local governments have power to regulate, or prohibit, retail sales (but not personal use)

• Local jurisdictions may allow cannabis cafés

Cal. Bus. & Prof. Code §§ 26140, 26054, 26200
Social Host Liability: Alcohol

Current State of the Law

Basic Premise: a person is responsible for his or her own alcohol consumption—and the consequences to third parties.

Example #1: Holly Golightly throws a fantastic party with lots of champagne. Paul drinks too much champagne; on his way back to his apartment, Paul trips and breaks his ankle. Holly is not liable to Paul for his own intoxication-induced injuries.
Social Host Liability: Alcohol

Current State of the Law

Basic Premise: a person is responsible for his or her own alcohol consumption—and the consequences to third parties.

Example #2: same situation, except Paul trips and falls into O.J. Berman, causing Berman to break his ankle. Holly is not liable to Berman for the injuries Paul caused while intoxicated.
Social Host Liability: Alcohol

Current State of the Law

• A private (not-for-profit) social host is not liable for the acts of a guest to whom he or she served alcohol

• Limited exception for adults who, at their residences, knowingly furnish alcoholic beverages to minors

Civ. Code, § 1714
Social Host Liability: Alcohol

Current State of the Law

- A commercial (for-profit) social host is not liable for the acts of a patron to whom he or she served alcohol
  - But: selling or giving alcohol to a “common drunkard” or “obviously intoxicated person” is a misdemeanor
  - Limited exception for parties licensed to sell alcohol who provide alcohol to “obviously intoxicated” minors

Bus. & Prof. Code, §§ 25602 & 25602.1
Social Host Liability: Alcohol

The California Supreme Court’s 1970’s Detour

• Until 1970’s, social host liability was the same as today

• California Supreme Court creates social host liability for private and commercial hosts with three cases:
  - *Vesley v. Singer* (1971) 5 Cal.3d 153 (commercial)
  - *Berhnard v. Harrah’s Club* (1976) 16 Cal.3d 313 (commercial)
  - *Coulter v. Superior Court* (1978) 21 Cal.3d 144 (private)

• The Legislature responds in 1978 with legislation expressly abrogating these three cases, eliminating social host liability once again
Social Host Liability: Cannabis

Nobody Knows

• Social host statutes expressly refer to intoxication from alcohol
  ▪ “[T]he furnishing of alcoholic beverages is not the cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries” (Civ. Code § 1714(b), emphases added)
  ▪ “No person who sells . . . any alcoholic beverage . . . shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person by the consumer of such alcoholic beverage.” (B&P Code § 25602(b), emphases added)
• Adult Use of Marijuana Act did not amend these statutes to include cannabis, or address social host liability otherwise
Social Host Liability: Cannabis

Possible Outcomes – No Social Host Liability

• Courts could apply general personal responsibility statute to use of cannabis:
  ▪ “Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person.” (Civ. Code, § 1714(a).)

• Intoxicated cannabis user would be solely responsible for injuries caused as a result of his or her own use; provider of cannabis would not be a proximate cause.
Social Host Liability: Cannabis

Possible Outcomes – Social Host Liability

• Courts could reject extension of Civ. Code § 1714(a) to parties who provide cannabis to others

• *Vesley, Bernhardt,* and *Coulter* were abrogated solely as to alcoholic use, so their holdings as to proximate cause in cannabis cases could govern
Social Host Liability: Cannabis

Possible Outcomes – Social Host Liability

- Courts could impose a duty on hosts to prevent guests/patrons from driving while intoxicated as a result of cannabis

  - *Vesley, Bernhardt,* and *Coulter* all address drunk driving cases; easy to apply the same rationale to driving while high

  - Delayed and extended effect of edibles make it more difficult for a host to determine if/when a person is able to drive

  - Lack of a cannabis “breathalyzer” to determine whether effects of cannabis ingestion contributed to negligent driving make it more likely that recent cannabis use will automatically be blamed for a car accident
Social Host Liability: Cannabis

Possible Outcomes – Liability

• Expect social host liability for cannabis provided to minors
  ▪ *Vesley, Bernhardt*, and *Coulter* proximate cause analysis could apply
  ▪ Courts could analogize to existing exceptions for parties who provide alcohol to minors
  ▪ Courts could also find liability through negligent failure to supervise (E.g., CACI 412)
Going Forward

• Consider proposing legislation to include cannabis in statutes preventing social host liability

• Wait and see how courts treat social hosts serving cannabis

• When pricing insurance for cannabis cafés, insurers may want to consider the ambiguity in the law

• Consider asking homeowners about cannabis use

• Individuals: be stingy with your cannabis until the law clears up