Overview of Recent Developments Affecting Medical Marijuana

Thursday, May 3, 2012 General Session; 2:00 – 4:15 p.m.

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MUNICIPAL REGULATION OF MEDICAL MARIJUANA

A Comprehensive Review of Federal and State Law

League of California Cities
City Attorneys' Department
Spring Conference
May 2012

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Rarely does an area of the law receive as much judicial attention as California's medical marijuana laws. Since 1996, when voters approved the Compassionate Use Act ("CUA") as Proposition 215, cities have faced difficult issues concerning medical marijuana including its cultivation and distribution. To provide guidance in this evolving area of law, this paper provides an overview of the statutes and case law, as well as an in-depth look at various unsettled legal issues.

We begin with a summary of California's medical marijuana laws, followed by a discussion of the federal Controlled Substances Act ("CSA") and its potential conflicts with California's CUA and the Medical Marijuana Program ("MMP")[1] (referred to collectively as the "medical marijuana laws"), and key cases interpreting those laws. We then address case law regarding the collective cultivation and distribution model and local control, notably cities' ability to regulate certain medical marijuana activities. Courts have taken somewhat inconsistent approaches on these issues, and we attempt to reconcile them, where possible. We consider, too, various regulatory options for cities to consider in light of present statutory and case law. Finally, we provide a report on the federal government's recent efforts to enforce the CSA in California.[2]

COMPASSIONATE USE ACT

In 1996, California voters adopted Proposition 215 known as the Compassionate Use Act ("CUA"), codified as Health and Safety Code section 11362.5.[3] The stated purposes of the CUA are:

- To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.[4]
- To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes are not subject to criminal prosecution or sanction.[5]
- To encourage the state and federal government to implement a plan to provide for the safe and affordable distribution of medical marijuana.[6]

The CUA exempts patients and their "primary caregivers" from criminal liability under state law for the possession and cultivation of marijuana for personal medical use. A qualified patient is an individual who has received a physician's recommendation for the use of marijuana for a medical purpose, and the primary caregiver is someone who has consistently assumed

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[1]Some cases refer to the "MMP" as the "MMPA." For consistency, all references herein are to the MMP.

[2]The authors wish to recognize and express appreciation to Lee Ann Meyer of Best Best & Krieger LLP for her significant contributions to this paper.

[3]All statutory citations herein are to the California Health and Safety Code, unless otherwise noted.

[4]§11362.5, subd. (b)(1)(A).

[5]§11362.5, subd. (b)(1)(B).

[6]§11362.5, subd. (b)(1)(C).

responsibility for the housing, health, or safety of a patient.[7] This limited criminal defense does not extend to those who supply marijuana to qualified patients and their caregivers, and selling, giving away, transporting, and growing large quantities of marijuana remain criminal notwithstanding the adoption of the CUA.[8] It also provides protection to physicians who "recommend" marijuana to qualified patients. Physicians, however, cannot issue a prescription because marijuana is illegal under federal law.[9]

THE MEDICAL MARIJUANA PROGRAM

In 2003, the Legislature adopted the Medical Marijuana Program ("MMP") to clarify the scope of lawful medical marijuana practices. The MMP was intended to:

- Clarify the scope of the application of the CUA and facilitate prompt identification of qualified patients and their primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers;
- Promote uniform and consistent application of the CUA among the counties within the state;
- Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects; and
- Address additional issues that were not included in the CUA in order to promote the fair and orderly implementation of the Act.[10]

Additional terms are added to the MMP, including "qualified patient," defined as a "person who is entitled to the protections of Section 11362.5, but who does not have an identification card issued pursuant to this article."[11] There is also an expanded definition of "primary caregiver," which retains the same language as that in the CUA, but provides examples of individuals who may act as a primary caregiver, including owners and operators of clinics and care facilities. This definition also added the requirement that a primary caregiver must, with limited exceptions, be at least 18 years of age.[12]

One of the more important aspects of the MMP was its creation of a statewide medical marijuana identification card program, administered by the counties. Although participation in this program is voluntary, it allows those patients and primary caregivers to obtain an identification card thereby avoiding arrest for possession, transportation, delivery, or cultivation of medical marijuana.[13] The "amount established pursuant to this article" is addressed in Section 11362.77,

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[7] §11362.5, subd. (e); see also *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 771.
[8] *Id.* at 772.
[9] §11362.5, subd. (c).
[10] Stats. 2003, ch. 875, §1 (Sen. Bill No. 420).
[11] §11362.7, subd. (f).
[12] §11362.7, subd. (e).
[13] There is an exception when "there is reasonable cause to believe that the information contained in the card is false or falsified, the card was obtained by means of fraud, or the person is otherwise in violation of the provisions of this article." § 11362.71, subd. (e).

which authorizes possession of up to eight ounces of dried marijuana and no more than six mature or twelve immature marijuana plants.[14]

The MMP also provided additional narrow immunities to specified individuals for specific conduct related to the provision of medical marijuana to qualified patients: "As part of its effort to clarify and smooth implementation of the [Compassionate Use] Act, the Program immunizes from prosecution a range of conduct ancillary to the provision of medical marijuana to qualified patients. (§ 11362.765.)"[15] This "range of conduct" is carefully circumscribed, and includes transportation of marijuana by qualified patients for their own personal medical use under §11362.765, subdivision (b)(1). The MMP also immunizes from criminal liability a "designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana for medical purposes, in amounts not exceeding those established in subdivision (a) of Section 11362.77, only to the qualified patient of the primary caregiver, or to the person with an identification card who has designated the individual as a primary caregiver."[16] On the "sole basis" of this immunized range of conduct under Section 11362.765, the specified individuals are not subject to criminal liability under the enumerated Health and Safety Code sections relating to marijuana.

A key aspect of the medical marijuana laws is that there is no criminal immunity for commercial or for-profit distribution. Section 11362.765(a) provides "nothing in this section shall authorize . . . any individual or group to cultivate or distribute marijuana for profit." The MMP further provides that a primary caregiver who receives reasonable compensation for actual, out-of-pocket expenses incurred in providing services to a qualified patient "to enable that person to use marijuana under this article" shall not, "on the sole basis of that fact, be subject to prosecution or punishment under Section 11359 or 11360."[17]

Lastly, Section 11362.775 of the MMP provides additional immunities to specific individuals who associate to collectively or cooperatively cultivate medical marijuana: "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570." Like Section 11362.765, Section 11362.775 authorizes specific conduct (associating to collectively or cooperatively cultivate marijuana) by specific individuals (qualified patients with or without identification cards and their designated primary caregivers) and provides that, "solely on the basis of that fact," such individuals are not subject to criminal sanction for violation of state marijuana laws. (Emphasis added.) The Legislature's use of the phrase "collectively or cooperatively" has led to an unprecedented

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[14]The California Supreme Court decision in *People v. Kelly* (2010) 47 Cal. 4th 1008, discussed below, invalidated the quantity limits in section 11362.77, to the extent that those limits burden a defense under the CUA to a criminal charge of possessing or cultivating marijuana. In this respect, the court ruled, the limits constitute an impermissible amendment of the CUA.

[15]*People v. Mentch* (2008) 45 Cal.4th 274, 290.

[16]§11362.765, subd. (b)(2).

[17]§11362.765, subd. (c).

proliferation of medical marijuana collectives and cooperatives throughout the state. Together, the CUA and MMP have set the stage for one of the most contentious, and evolving, areas in California law.

THE FEDERAL CONTROLLED SUBSTANCES ACT

It is important to note the Federal Controlled Substances Act (CSA) prohibits all activities related to marijuana, including possession, cultivation, and distribution.[18] There is no exception for medical use.[19] The only lawful use of marijuana under federal law is in connection with a federally-approved research study in the public interest.[20] Thus, any state law recognizing medicinal use raises potential federal law preemption issues.

United States v. Oakland Cannabis Buyers' Cooperative

There are numerous federal cases involving medical marijuana and the CSA. The United States Supreme Court, however, first addressed the issue of medical marijuana in 2001. In *Oakland Cannabis Buyers' Cooperative*, the Court held that there is no "medical necessity" defense to federal criminal prosecution under the CSA's prohibition of the manufacture or distribution of marijuana.[21] Despite the decision, medical marijuana issues returned to the Court a mere four years later in *Gonzales v. Raich.* This time, the Court went further in its holding that there is no medical necessity defense to prosecution under the CSA.

Gonzales v. Raich

In *Raich*, the United States Supreme Court again held, notwithstanding the fact that possession and cultivation of marijuana may be non-criminal for certain individuals under California's CUA and similar laws in other states, federal regulation of marijuana under the CSA is within Congress' commerce power.[22] The Court held that even non-commercial intrastate cultivation of marijuana could have a substantial economic effect on interstate commerce. The mere fact that marijuana may be used for medicinal purposes "cannot possibly serve to distinguish it from the core activities regulated by the CSA."[23]

Although some argue that the Supreme Court's decision not to invalidate or overturn California's medical marijuana laws entirely implies the ability of the federal and state laws to coexist, others rely on these cases as support for the proposition that medical marijuana activities are patently illegal under federal law and should not be tolerated in California.

Marijuana legalization advocates argue there is no federal law preemption of California's medical marijuana laws. They rely on the following CSA language: "No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which

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[18] 21 U.S.C. § 801 *et seq.*

[19] 21 U.S.C. § 812(b)(1)(B) (As a Schedule I controlled substance, marijuana has no currently accepted medical use in the United States).

[20] 21 U.S.C. § 823(f).

[21] (2001) 532 U.S. 483.

[22] (2005) 545 U.S. 1.

[23] 545 U.S. at 28.

that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together."[24] In particular, advocates argue *Raich* did not "strike down" California's medical marijuana laws and that several California appellate decisions have found that the state's limited decriminalization of marijuana is not preempted by federal regulation under the CSA.[25] Nonetheless, the Supreme Court addressed such attempts to reconcile the CSA and state medical marijuana laws as follows: "[L]imiting the activity to marijuana possession and cultivation 'in accordance with state law' cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail."[26]

The Court also expressed concern regarding physicians who would have an "economic incentive to grant their patients permission to use the drug" as well as the consequences of exempting patients and caregivers from criminal liability for marijuana cultivation:[27] "The [California medical marijuana laws'] exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market. The likelihood that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious."[28]

Notwithstanding the language of the CSA and the Supreme Court's decisions in *Oakland Cannabis* and *Raich*, the scope of the CSA and federal preemption of California's medical marijuana laws are now at issue again. The California Supreme Court has granted review of a recent appellate decision finding federal preemption of municipal regulations, *Pack v. Superior Court* (*City of Long Beach*) (*"Pack"),* discussed in more detail below.[29] Moreover, in light of recent federal enforcement activity surrounding commercial marijuana operations in California, the Supreme Court's analysis now appears prescient.

FEDERAL LAW PREEMPTION ISSUES

To understand the current federal preemption issues, it is helpful first to trace the development of federal preemption case law in California courts. We take the appellate decisions in their chronological order so that the reader may follow the law as it has evolved to the present.

City of Garden Grove v. Superior Court (*Kha*)

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[24] 21 U.S.C. § 903.

[25] See *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734; *County of Butte v. Superior Court* (2009) 175 Cal.App.4th 729; *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798; *City of Garden Grove v. Superior Court* (*Kha*) (2007) 157 Cal.App.4th 355.

[26] 545 U.S. at 29.

[27] *Id.* at 30-32.

[28] *Id*.

[29] (2011) 199 Cal.App.4th 1070, *review granted* (Jan. 18, 2012), Case No. S197169.

The first California federal preemption case was *Kha*.[30] During a traffic stop, Garden Grove police seized a small amount of marijuana from Kha and issued him a citation for possessing less than one ounce while driving. Once the prosecutor discovered that Kha had a doctor's recommendation to use marijuana, however, the case was dismissed. Kha filed a motion for return of the marijuana, which the trial court granted. Seeing itself "caught in the middle of a conflict between state and federal law," the City of Garden Grove filed an appellate petition to vacate the trial court order, which the City viewed as ordering or directing the City to violate federal law.

The court of appeal (Fourth Appellate District, Division Three) denied the City's petition. The court held federal supremacy principles do not prohibit the return of marijuana to a user whose possession is legally sanctioned under state law. The court opined that Congress, in enacting the CSA, "clear[ly] did not intend to preempt the states on the issue of drug regulation."[31] The court expressed its view that it is "unreasonable to believe returning marijuana to qualified patients who have had it seized by local police will hinder the federal government's enforcement efforts. Practically speaking, this subset of medical marijuana users is too small to make a measurable impact on the war on drugs."[32] (See discussion below regarding recent federal enforcement activities, which suggests a different federal perspective.)

While recognizing that the CUA and MMP are silent on the issue of a return of marijuana once criminal charges are dismissed, the court concluded that "due process principles seem to us to compel" the return of marijuana lawfully possessed by a "qualified patient." The court then noted that retention of the marijuana, and its possible destruction, may be appropriate if the city is pursuing a marijuana-related prosecution, or if the defendant's possession does not comport with the CUA.[33] Thus, provided lawful possession is established (which is required under Section 11473.5 for a court to order the return of a controlled substance once a case is dismissed), *Kha* stands for the proposition that a "qualified patient" is entitled to the return of lawfully possessed medical marijuana once criminal charges are no longer pending, despite the CSA.

County of San Diego v. San Diego NORML

In 2008, a court of appeal next examined federal preemption in *San Diego NORML*.[34] The counties of San Diego and San Bernardino filed legal challenges to the MMP's requirement that counties implement and administer the state identification card program for qualified patients and primary caregivers. The Counties argued the MMP's voluntary identification card program, which provides limited arrest immunity, was an unconstitutional amendment to the CUA. The court of appeal (Fourth Appellate District, Division One) rejected the Counties' arguments and

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[30](2007) 157 Cal.App.4th 355.

[31]*Id* at 383.

[32]*Id.*

[33]*Id.* at 388.

[34](2008) 165 Cal.App.4th 798

held that "although the legislation that enacted the MMP added statutes regarding California's treatment of those who use medical marijuana or who aid such users, it did not add statutes or standards *to the CUA*. Instead, the MMP's identification card is part of a separate legislative scheme providing separate protections for persons engaged in the medical marijuana programs."[35]

As for federal law preemption, the court concluded that issuance of state identification cards to medical marijuana users and their caregivers does "not pose a significant impediment to specific federal objectives embodied in the CSA."[36] The court rejected the Counties' argument that the CSA and the MMP identification card program have a "positive conflict" because "the card issued by a county confirms that its bearer may violate or is immunized from federal laws."[37] The court concluded the CSA's objectives are to "combat recreational drug use, not to regulate a state's medical practices."[38] The *San Diego NORML* court did not recognize, however, the CSA prohibits all marijuana use is illegal recreational use and there is no exception for medicinal uses.

Qualified Patients Assn. v. City of Anaheim

Two years later yet another federal preemption decision was published. In a highly anticipated case, *Qualified Patients,* the same court of appeal that issued the *Kha* decision again ruled the medical marijuana laws are not preempted by the CSA.[39]

The City of Anaheim had enacted an ordinance that provided "it shall be unlawful for any person or entity to own, manage, conduct, or operate any Medical Marijuana Dispensary or to participate as an employee, contractor, agent or volunteer, or in any other manner or capacity, in any medical marijuana dispensary in the City of Anaheim." The ordinance defined a medical marijuana dispensary as any "facility or location where Medical Marijuana is made available to and/or distributed by or to three or more of the following: a qualified patient, a person with an identification card, or a primary caregiver." Finally, the ordinance provided for misdemeanor punishment for any person who violated any provision of the ordinance.[40]

A group identifying itself as the "Qualified Patients Association" together with an individual filed a lawsuit challenging the ordinance. Their lawsuit sought a declaratory judgment that the City's ordinance imposing criminal penalties for medical marijuana dispensary operation was preempted by the CUA and the MMP. Plaintiffs also asserted the ordinance violated the Unruh Civil Rights Act (Civ. Code, § 51).[41]

The trial court sustained the City's demurrer, without leave to amend, on the grounds that, as a matter of law, federal regulation of marijuana in the CSA preempted the CUA and the MMP to decriminalize specific medical marijuana activities under state law. The trial court also

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[35] *Id.* at 831.
[36] *Id.* at 826.
[37] *Id.*
[38] *Id.*
[39] (2010) 187 Cal.App.4th 734.
[40] *Id.* at 741-742.
[41] *Id.* at 742.

concluded plaintiffs failed to state a cause of action under the Unruh Civil Rights Act, which is aimed at "business establishments" (Civ. Code, § 51, subd. (b)), not local government legislative acts.

The court of appeal (Fourth Appellate District, Division Three) reversed the trial court's federal preemption ruling but affirmed the ruling on the Unruh Civil Rights Act. The court held that the CSA and federal supremacy principles do not preempt either the CUA claim or the MMP under the limited scope of federal preemption described in 21 U.S.C. § 903 because there was no conflict and the city had no power to enforce federal law.[42] Although the parties anticipated a precedential ruling on state law preemption (discussed below), *Qualified Patients* was a *federal* preemption decision: "California's decision in the CUA and the MMP to decriminalize for purposes of state law certain conduct related to medical marijuana does nothing to 'override' or attempt to override federal law, which remains in force."[43] Neither the CUA nor the MMP "mandate conduct that federal law prohibits, nor pose an obstacle to federal enforcement of federal law, [thus] the enactments' decriminalization provisions are not preempted by federal law."[44]

Reviewing the four "species" of federal preemption: express, conflict, obstacle, and field, the court concluded that express language in the CSA established that "Congress declined to assert express preemption in the area of controlled substances and directly foreswore field preemption [citation], leaving only conflict and obstacle preemption as potential bases supporting the trial court's preemption ruling."[45] The court of appeal determined there was no conflict preemption because "neither the CUA nor the MMP require [individuals to possess, cultivate, transport, possess for sale, or sell medical marijuana in a manner that violated federal law], there is no 'positive conflict' with federal law, as contemplated for preemption under the CSA."[46] That is, "[n]o positive conflict exists because neither the CUA nor the MMP requires anything the CSA forbids."[47]

Finally, as for obstacle preemption, the court explained that "[j]ust as the federal government may not commandeer state officials for federal purposes, a city may not stand in for the federal government and rely on purported federal preemption to implement federal legislative policy that differs from corresponding, express state legislation concerning medical marijuana."[48] The court of appeal concluded that "[t]he city may not justify its ordinance solely under federal law [citations], nor in doing so invoke federal preemption of state law that may invalidate the city's ordinance."[49] Accordingly, "[b]ecause the city has identified no defect on the face of plaintiffs' complaint concerning their cause of action for declaratory judgment that the city's ordinance is

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[42] *Id.* at 741.
[43] *Id.* at 757.
[44] *Id.* at 757.
[45] *Id.* at 758.
[46] *Id.* at 758.
[47] *Id.* at 758-759 (emphasis added).
[48] *Id.* at 761-762.
[49] *Id.* at 763.

preempted by state law, the city's demurrer fails. . . [,]" and the court reversed the trial court's ruling.[50]

Simply stated, the *Qualified Patients* court held that possession of medical marijuana does not constitute an offense under both state and federal laws. Thus, a city could not rely on federal preemption as the sole basis for banning collectives. The court said that, because possession and cultivation of medical marijuana do not violate state law, and a city has no power to punish for violations of federal law, a city may not justify a ban on medical marijuana collectives based solely on the federal prohibition on marijuana.[51] The *Qualified Patients* court adopted the view of the *San Diego NORML* court in concluding the CSA's objectives are to "combat recreational drug use, not to regulate a state's medical practices."[52] Neither court recognized the CSA prohibits all marijuana use as illegal recreational use and there is no exception for medicinal use.[53]

Given the appellate decisions in *Kha*, *San Diego NORML*, and *Qualified Patients*, it appeared that the federal law preemption issues were, for the most part, decided against preemption. As explained below, a new case would raise the federal preemption issue again, and this time, do so in a way with profound implications for cities and their ability to regulate medical marijuana.

Pack v. Superior Court (*City of Long Beach*)
The *Pack* opinion is one of the most controversial medical marijuana decisions to date.[54] At issue was the City of Long Beach's medical marijuana ordinance. It provided for comprehensive regulation of medical marijuana distribution facilities and defined "collective" as "an association of four or more qualified patients and their primary caregivers who associate at a location within the City to collectively or cooperatively cultivate medical marijuana."[55]

The City's ordinance not only regulated a collective's location but also its operation, by means of a permit system. The City required all collectives to submit applications and a nonrefundable application fee. The City set the fee at $14,742. Although there was no provision for a lottery in the ordinance, the City would create a lottery system for all qualified applicants for a limited number of operating permits. Only those medical marijuana collectives which had been issued medical marijuana collective permits could operate in the City.[56]

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[50] *Id.*
[51] *Id.*
[52] *Id.* citing *San Diego NORML*, *supra*, 165 Cal.App.4th at 826-827.
[53] As for state law preemption of the City's ordinance, the *Qualified Patients* court made it abundantly clear that the state law preemption issue was not ripe for review. The court added: "Whether the MMP bars local governments from using nuisance abatement law and penal legislation to prohibit the use of property for medical marijuana purposes remains to be determined." In fact, after supplemental briefing at the court's request, "the city and its amici curiae demonstrate the issue of state preemption under the MMP is by no means clear cut or easily resolved on first impressions." Significantly, the court stated: "We do not decide these issues."
[54] (2011) 199 Cal.App.4th 1070, *review granted* (Jan. 18, 2012), Case No. S197169.

[55] *Id.* at 1083-1084.
[56] *Id.*

Under the ordinance, each collective was required to install sound insulation, odor absorbing ventilation, closed-circuit television monitoring, and centrally monitored fire and burglar alarm systems. Collectives also had to submit representative marijuana samples to an independent laboratory to test for pesticides and other contaminants. After a permit issued, the collective had to pay an "Annual Regulatory Permit Fee," with the amount based on the number of collective members.

Plaintiffs Ryan Pack and Anthony Gayle were members of collectives that were closed for their failure to comply with the ordinance. They filed an action for declaratory relief "that the ordinance is invalid as it is preempted by federal law."[57] In quickly seeking injunctive relief, plaintiffs argued "they would be irreparably harmed by the continued enforcement of the ordinance, as there was no collective they could legally join in order to obtain medical marijuana. As to the probability of success, plaintiffs argued that the City's ordinance went beyond decriminalization and, instead, permitted conduct prohibited by the federal CSA, and thus was preempted."[58]

By the time they sought injunctive relief, however, the City had shut down the collectives. Plaintiffs argued they would be irreparably harmed by continued enforcement of the ordinance because the lottery had not occurred, and no collective had received a permit, so there was no collective they could legally join to obtain medical marijuana. In denying the preliminary injunction request, the court stated "[i]t is hardly equitable for [p]laintiffs to ask the court to enforce a federal law that they themselves are indisputably violating."[59] Meanwhile, the City conducted the lottery, which ultimately resulted in a permit for at least one collective.[60]

Undaunted, plaintiffs filed a petition for writ of mandate in the court of appeal. It issued an order to show cause and asked for briefing on the federal preemption issue. The court of appeal also invited *amicus curiae* briefing from various entities on both sides of the issue, including other cities considering or enacting medical marijuana collective ordinances, the United States Attorneys for California districts, the ACLU, and organizations advocating the legalization of marijuana.[61] Ultimately, the court of appeal granted the petition and found that the ordinance, "to the extent it permits collectives," *is* federally preempted.[62]

After summarizing the CSA, CUA, and MMP, the court stated that the CSA makes it "illegal to manufacture, distribute, or possess marijuana. [Citation] It is also illegal . . . to maintain any place for the purpose of manufacturing, distributing, or using any controlled substance[,]" including marijuana. The only exception "is the possession and use of marijuana in federally

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[57] *Id.* at 1084.
[58] *Id.*
[59] *Id.* at 1085.
[60] *Id.* at 1086.
[61] The United States Attorneys declined the invitation to submit an *amicus* brief but the court of appeal took judicial notice of "letters and memoranda which illuminate the federal government's position regarding the enforcement of the CSA with respect to medical marijuana collectives." *Id.* at 1086-1087.
[62] *Id.* at 1076.

approved research projects."[63] The CSA also "contains a provision setting forth the extent to which it preempts other laws."[64]

The court then described California voters' approval of the CUA, which added section 11362.5 to the Health and Safety Code, decriminalizing possession and cultivation of marijuana as applied to a patient or the patient's caregiver, "'who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.'"[65] The CSA did not preempt "simple decriminaliz[ation]."[66]

The MMP expanded the CUA's immunities, extending these to "possession for sale, transportation, maintaining a place for sale or use, and other offenses. Cultivation or distribution for profit, however, is still prohibited."[67] As noted, the MMP also provides arrest immunity by means of a voluntary identification card system. The court observed that the "statutory language provides that the card 'identifies a person authorized to engage in the medical use of marijuana.' (Health & Saf. Code, § 11362.71, subd. (d)(3).) It would be more appropriate to state that the card 'identifies a person whose use of marijuana is decriminalized.' As we discussed above, the CUA simply decriminalized the medical use of marijuana; it did not authorize it."[68]

The court next addressed the Attorney General's 2008 Guidelines, discussed in greater detail below.[69] In a footnote, the court added "[t]he Guidelines agree that California case authority has concluded that the CUA and MMPA are not preempted by the federal CSA. 'Neither [the CUA], nor the MMP[A], conflict with the CSA because, in adopting these laws, California did not "legalize" medical marijuana, but instead exercised the state's reserved powers to not punish certain marijuana offenses under state law when a physician has recommended its use to treat a serious medical condition.'"[70] Stated simply, the *Pack* court found that the CUA and MMP provide immunities to criminal prosecution under state law and not authorization to use marijuana in violation of the CSA.

The court then examined Long Beach's comprehensive regulation of medical marijuana collectives. It described the definition of a collective, the application, and application fee, and the lottery system for obtaining a permit.[71] In order to obtain a permit, a collective must demonstrate its compliance, and assure its continued compliance, with requirements such as odor absorbing ventilation and closed-circuit television monitoring. Collectives must agree to have representative samples independently analyzed by a laboratory to ensure they lack pesticides and contaminants. The "annual regulatory permit fee" begins at $10,000 for collectives numbering

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[63] *Id.* at 1077 (citing *United States v. Oakland Cannabis Buyers' Cooperative*, *supra*, 532 U.S. at pp. 489-490).

[64] *Id.*

[65] *Id.* at 1078 (quoting § 11362.5, subd. (d)).

[66] *Id.* (citing *Qualified Patients, supra*, 187 Cal.App.4th at 757).

[67] *Id.* at 1079 (citing § 11362.765).

[68] *Id.* at fn. 5 (emphasis added).

[69] *Id.* at 1082.

[70] *Id.* at 1081, fn. 12 (quoting Guidelines, below, at 3).

[71] The court pointed out that the ordinance contained no provision for a lottery system, but that no argument challenged the lottery on this basis. *Id.* at 1082, fn. 16.

between 4 and 500, then increases with the size of the collective.[72] "Violations of the ordinance are misdemeanors, as well as enjoinable nuisances per se."[73]

The court of appeal reviewed federal preemption law, noting that "'[t]here is a presumption against federal preemption in those areas traditionally regulated by the states. . . .'"[74] Examples of such matters include regulation of medical practices and state criminal sanctions for drug possession,[75] and "[m]ore importantly, a local government's land use regulation. . . ."[76]

As in *Qualified Patients*, the court quickly ruled out express and field preemption. Relying on *Wyeth v. Levine*,[77] involving the preemptive effect of the Federal Food, Drug, and Cosmetic Act ("FDCA"),[78] the court stated that the FDCA provided that "'a provision of state law would only be invalidated upon a "direct and positive conflict" with the FDCA.'"[79] The court found no distinction "between a federal statute which will only preempt those state and local laws which create a 'direct and positive conflict' (FDCA) and those which create 'a positive conflict . . . so that the two cannot consistently stand together' (CSA), and thus concluded "that the same construction applies here, and the federal CSA can preempt state and local laws under both conflict and obstacle preemption."[80]

To establish conflict preemption, one must show "that it is impossible to comply with the requirements of both laws."[81] "Since a person can comply with both the federal CSA and the City ordinance by simply not being involved in the cultivation or possession of medical marijuana at all, there is no conflict preemption."[82] The court did find one exception – the requirement that collectives have samples tested by an independent laboratory: "[T]his provision appears to *require* that certain individuals violate the federal CSA."[83] As a result, "[i]n this limited respect, conflict preemption applies."[84]

Relying on *Qualified Patients*, the court of appeal explained that "[o]bstacle preemption arises when the challenged laws stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[85] Determining that, "to Congress, *all* use of marijuana is

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[72] *Id.* at 1083.

[73] *Id.* at 1082-1084.

[74] *Id.* at 1087 (quoting *Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 938).

[75] *Id.* (citing *Qualified Patients*, *supra*, 187 Cal.App.4th at p. 757).

[76] *Id.* (citing *Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1169).

[77] (2009) 555 U.S. 555.

[78] 21 U.S.C. § 301 *et seq.*

[79] *Id.* at 1088-1089 (quoting *Wyeth, supra*, 129 S.Ct. at 1196).

[80] *Id.* at 1089.

[81] *Id.* at 1090 (citing *Wyeth*, *supra*, 129 S.Ct. at 1199).

[82] *Id.*

[83] *Id.* (emphasis in decision).

[84] *Id.* at 1091-1092.

[85] *Id.* at 1091.

recreational drug use, the combating of which is admittedly the core purpose of the federal CSA[,]" the court concluded that "an ordinance which establishes *a permit scheme* for medical marijuana collectives stands as an obstacle to the accomplishment of this purpose."[86]

The court explained the legal distinctions between "making an activity unlawful and making the activity lawful. An activity may be prohibited, neither prohibited nor authorized, or authorized." Thus, "[w]hen an act is prohibited by federal law, but neither prohibited nor authorized by state law, there is no obstacle preemption."[87] Simply by not criminalizing conduct that Congress has criminalized, state law does not present an obstacle to Congress's purposes. Thus, "the CUA is not preempted under obstacle preemption."[88] The court emphasized: "The CUA simply decriminalizes (under state law) the possession and cultivation of medical marijuana [citation]; it does not attempt to authorize the possession and cultivation of the drug."[89]

Long Beach's ordinance, however, "goes beyond decriminalization into authorization." Specifically, "the City determines which collectives are permissible and which collectives are not, and collects fees as a condition of continued operation by the permitted collectives." The court agreed with the federal government's position "that state and local laws which license the large-scale cultivation and manufacture of marijuana stand as an obstacle to federal enforcement efforts."[90]

The court went on to observe that certain provisions of the ordinance which simply identified prohibited conduct without regard to the issuance of a permit, such as closing hours, age restrictions, and no alcohol consumption on the premises, imposed limitations on collectives, and, thus, did not authorize activity prohibited by the CSA. Further location restrictions, imposed as a limitation on the operation of collectives, would not be federally preempted. The latter restrictions, however, appeared as part of the permit process, and the court left it to the trial court on remand to interpret whether those provisions could stand alone. The court thus granted the petition for writ of mandate.[91]

The *Pack* decision disagreed with the federal preemption analysis in *Qualified Patients* and *San Diego NORML*:

> The United States Supreme Court has already set forth the purposes of the federal CSA are "combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances with a particular concern of preventing "the diversion of drugs from legitimate to illicit[92] channels.

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[86] *Id.* at 1091-1092 (emphasis in decision).

[87] *Id.* at 1092.

[88] *Id.* at 1092-1093 (emphasis added).

[89] *Id.* (citing *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 926).

[90] *Id.* at 1093-1094 (emphasis added).

[91] *Id.* at 1097.

[92] *Id.* at 1092.

> For this reason, we disagree with our colleagues who, in two other appellate opinions [*Qualified Patients* and *San Diego NORML*], have implied that medical marijuana laws might not pose an obstacle to the accomplishment of the purposes of the federal CSA because the purpose of the federal CSA is to combat recreational drug use, not regulate a state's medical practices. While this statement of the purpose of the federal CSA is technically accurate, it is inapplicable in the context of medical marijuana. This because, as far as Congress is concerned, there is no such thing as medical marijuana. Congress has concluded that marijuana has no accepted medical use at all; it would not be on schedule I otherwise. Thus, to Congress, *all* use of marijuana is recreational drug use, the combating of which is admittedly the core purpose of the federal CSA.

In determining that all marijuana use is illegal recreational use under the CSA, including purported medical use under state law, the *Pack* decision is contrary to *San Diego NORML* and *Qualified Patients* which found no federal law preemption. This conflict will be resolved by the California Supreme Court when it issues its ruling on federal preemption in the *Pack* case.

There is a final observation about *Pack*. Even if the California Supreme Court decides there is no federal law premption in *Pack*, cities should be aware of recent federal enforcement of the CSA in California. In a footnote, the *Pack* court cautions public officials concerning their potential criminal liability for aiding and abetting a violation of the CSA by permitting marijuana activity.[93]

CALIFORNIA'S MEDICAL MARIJUANA LAWS

The questions of federal preemption represent only one aspect of the complex nature of California's medical marijuana laws. There are unanswered questions concerning the meaning and scope of the CUA and MMP. California courts have provided some guidance. We start with summaries of California Supreme Court decisions concerning medical marijuana, followed by a discussion of the Attorney General Guidelines and selected court of appeal cases, and how they impact local regulation of medical marijuana activities. We conclude the section with a discussion of the cases directly addressing municipal control of medical marijuana.

California Supreme Court Cases

People v. Mower

Prior to adoption of the MMP, the California Supreme Court decided *People v. Mower*, where the court held that the CUA does not confer immunity from arrest or complete immunity from prosecution.[94] The court determined that Section 11362.5, subdivision (d) "reasonably must be

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[93]"There may also be an issue of whether the ordinance *requires* certain City officials to violate federal law by aiding and abetting (or facilitating (21 U.S.C. § 843(b))) a violation of the federal CSA." *Pack, supra,* 199 Cal.App.4th 1070, fn 27.

[94](2002) 28 Cal.4th 457.

interpreted to grant a defendant a limited immunity from prosecution, which not only allows a defendant to raise his or her status as a qualified patient or primary caregiver as a defense at trial, but also permits a defendant to raise such status by moving to set aside an indictment or information prior to trial on the ground of the absence of reasonable or probable cause to believe that he or she is guilty."[95]

People v. Wright

Four years later in *People v. Wright*, the defendant was convicted of possession for sale and transportation of marijuana after the trial court declined to instruct the jury that the CUA provides a defense to the transportation charge.[96] The MMP was enacted while the case was pending. The court held that the MMP, which specifically provides an affirmative defense to the crime of transporting marijuana by individuals entitled to the protections of the CUA (§ 11362.765), applied retroactively to cases pending at the time of its enactment. The court further held that the trial court erred in declining to instruct the jury on an affirmative defense to the transportation charge based on the CUA. The error was harmless, however, because the jury found that the defendant possessed the marijuana with the specific intent to sell it, not for his own personal medical use. The court also held that a qualified patient is not required to identify himself or herself to police as a medicinal user of marijuana as a condition to asserting any defenses under the MMP.

Ross v. RagingWire Telecommunications

The first civil California Supreme Court decision was *Ross v. RagingWire Telecommunications.*[97] The plaintiff, a qualified patient who was terminated from defendant company after a pre-employment drug test revealed his marijuana use, alleged disability-based discrimination and wrongful termination. The court held that the defendant could not state a cause of action under the California Fair Employment and Housing Act ("FEHA") based on the company's refusal to accommodate his use of medical marijuana:

> [G]iven the Compassionate Use Act's modest objectives and the manner in which it was presented to the voters for adoption, we have no reason to conclude the voters intended to speak so broadly, and in a context so far removed from the criminal law, as to require employers to accommodate marijuana use."[98] The court's analysis included the observation that "[n]o state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law. [Citations[.][99]

The court also articulated the following important principle regarding oft-claimed rights to marijuana under the CUA:

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[95] *Id.* at 484.
[96] (2006) 40 Cal.4th 81.
[97] (2008) 42 Cal.4th 920.
[98] *Id.* 930.
[99] *Id.* at 926.

> [T]he only 'right' to obtain and use marijuana created by the Compassionate Use Act is the right of 'a patient, or. . . a patient's primary caregiver, [to] possess[ ] or cultivate[ ] marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician' without thereby becoming subject to punishment under sections 11357 and 11358 of the Health and Safety Code. [Citation.][100]

This decision is a further example of the court's consistent approach to medical marijuana issues; a narrow interpretation of of the statutory scheme.

People v. Mentch

In 2008, the California Supreme Court issued, perhaps, its most important decision on medical marijuana. In addressing a controversial provision of the MMP, the court provided guidance as to the limits and narrow scope of the medical marijuana laws. In *People v. Mentch*, the court addressed the statutory immunities from prosecution for a range of conduct related to marijuana.[101] The court's decision provides an analytical foundation for pending and future issues concerning the CUA and MMP.

The specific issue before the court was whether Mentch qualified as a primary caregiver. The court held that a person is not entitled to the CUA or MMP immunities from criminal prosecution if the person claiming to be a primary caregiver merely supplies marijuana to a qualified patient:

A person "whose caregiving consisted principally of supplying marijuana and instructing on its use, and who otherwise only sporadically took some patients to medical appointments" cannot qualify as a primary caregiver under the CUA, nor did the MMP provide him with any defense.[102]

> Mentch himself highlights the dog-chasing-its-tail absurdity of allowing the administration of medical marijuana to patients to form the basis for authorizing the administration of medical marijuana to patients in his attempts to distinguish this case from *People ex rel. Lungren v. Peron, supra*, 59 Cal.App.4th 1383, and *People v. Urziceanu, supra*, 132 Cal.App.4th 747. *Peron* and *Urziceanu*, he argues, involved only casual or occasional provision of medical marijuana; here, in contrast, he "consistently" provided medical marijuana, "consistently" allowed his patients to cultivate medical marijuana at his house, and was his five patients' "exclusive source" for medical marijuana. The essence of this argument is that the occasional provision of marijuana to someone is illegal, but the frequent provision of marijuana to that same person may be lawful. The vice in the approach of the cooperatives at issue in *Peron* and *Urziceanu* therefore evidently was not that they provided marijuana to their customers; it was that they did not do it enough.

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[100] *Id.* at 929.

[101] (2008) 45 Cal.4th 274.

[102] *Id.* at 278.

> Nothing in the text or in the supporting ballot arguments suggests this is what the voters intended. The words the statute uses—housing, health, safety—imply a caretaking relationship directed at the core survival needs of a seriously ill patient, not just one single pharmaceutical need. The ballot arguments in support suggest a patient is generally personally responsible for noncommercially supplying his or her own marijuana: "Proposition 215 allows patients to cultivate their own marijuana simply because federal laws prevent the sale of marijuana, and a state initiative cannot overrule those laws." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) argument in favor of Prop. 215, p. 60.) But as the focus is on the "seriously and terminally ill" (*ibid.*), logically the Act must offer some alternative for those unable to act in their own behalf; accordingly, the Act allows "'primary caregiver[s]' the same authority to act on behalf of those too ill or bedridden to do so." To exercise that authority, however, one must be a "primary"—principal, lead, central—"caregiver"—one responsible for rendering assistance in the provision of daily life necessities—for a qualifying seriously or terminally ill patient.
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> Fn. 7. The Act is a narrow measure with narrow ends. As we acknowledged only months ago, "'the proponents' ballot arguments reveal a delicate tightrope walk designed to induce voter approval, which we would upset were we to stretch the proposition's limited immunity to cover that which its language does not.'" The Act's drafters took pains to note that "neither relaxation much less evisceration of the state's marijuana laws was envisioned." We must interpret the text with those constraints in mind.

Stated simply, "[t]o qualify as such, however, the primary caregiver must do more than supply marijuana to the patient. He or she must be responsible for "rendering assistance in the provision of daily life necessities—for a qualifying seriously or terminally ill patient."[103]

The court's analysis was also instructive in interpreting the MMP's limited immunities: "As part of its effort to clarify and smooth implementation of the Act, the Program immunizes from prosecution a range of conduct ancillary to the provision of medical marijuana to qualified patients. (§11362.765.)"[104] It does so, however, in a carefully circumscribed manner. In rejecting the defendant's broad interpretation of the MMP and finding that he was not entitled to a defense arising from it, the California Supreme Court explained how the immunities afforded under Section 11362.765 are to be applied:

> While the Program does convey additional immunities against cultivation and possession for sale charges to specific groups of people, it does so only for specific actions; it does not provide globally that the specified groups of people may never be charged with cultivation or possession for sale. That is, the

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[103] *Id.*

[104] *Id.* at 290.

> immunities conveyed by section 11362.765 have three defining characteristics: (1) they each apply only to a specific group of people; (2) they each apply only to a specific range of conduct; and (3) they each apply only against a specific set of laws."[105]

To the extent that a defendant's conduct falls outside of the specifically immunized "range of conduct," he or she subjects himself or herself, like the defendant in *Mentch*, "to the full force of criminal law."[106]

> Finally, as relevant here, subdivision (b)(3) of section 11362.765 grants immunity to a specific group of individuals—those who assist in administering medical marijuana or acquiring the skills necessary to cultivate it—for specific conduct, namely, assistance in the administration of, or teaching how to cultivate, medical marijuana. This immunity is significant; in its absence, those who assist patients or primary caregivers in learning how to cultivate marijuana might themselves be open to prosecution for cultivation. (§ 11358.)
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> Here, this means Mentch, to the extent he assisted in administering, or advised or counseled in the administration or cultivation of, medical marijuana, could not be charged with cultivation or possession for sale "on that sole basis." (§ 11362.765, subd. (a).) It does not mean Mentch could not be charged with cultivation or possession for sale on *any* basis; to the extent he went beyond the immunized range of conduct, *i.e.*, administration, advice, and counseling, he would, once again, subject himself to the full force of the criminal law. As it is undisputed Mentch did much more than administer, advise, and counsel, the Program provides him no defense, and the trial court did not err in failing to instruct on it.[107]

The court's analysis of Section 11362.765, can also be applied to the similar language in Section 11362.775 that specific groups of people (qualified patients, persons with identification cards, and primary caregivers) shall not be subject to criminal sanctions under the enumerated Health and Safety Code sections on the sole basis of the conduct immunized in the statute. As shown below, this issue has arisen in yet another controversial court of appeal decision. This time, with direct consequences for cities.

People v. Kelly

The most recent California Supreme Court decision on medical marijuana is *Kelly*.[108] In that case, the court considered whether it was appropriate for the Legislature to have set limits on the amount of medical marijuana qualified individuals could possess under the MMP. The court held that, to the extent that the quantity limitations in Section 11362.77 restrict a defense under

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[105] *Id.*

[106] *Id.* at 292; see also *Kruse,* 177 Cal.App.4th at 1171.

[107] *Id.* At 291

[108] (2010) 47 Cal.4th 1008.

the CUA to a criminal charge of possessing or cultivating marijuana, the section impermissibly amends the CUA and is invalid. Section 11362.77 is not, however, void in its entirety insofar as it is still enforceable with respect to those who voluntarily participate in the identification card program to provide protection from arrest. Again, the decision illustrates how the court approaches medical marijuana issues by strictly interpreting the statutory scheme.

The California Supreme Court has recently granted review of three new civil medical marijuana cases concerning the scope of the cities' ability to regulate the land uses associated with medical marijuana activities. These cases will be explained in more detail below.

The Scope of Medical Marijuana Law – Attorney General Guidelines and Selected Court of Appeal Decisions

From the beginning, marijuana users have tested the limits of medical marijuana law, and the courts of appeal have sometimes responded with decisions attempting to clarify those laws. Because issues of municipal authority over medicinal marijuana depend, in part, upon decisions on the scope of permissible conduct under the law, we provide a summary of selected cases. We look first at the controversial guidelines issued by the California Attorney General in 2008.

Attorney General Guidelines

In 2008, then Attorney General Jerry Brown published Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use ("Guidelines"). The Guidelines address various issues surrounding medical marijuana, including collective and cooperative operations. The Guidelines:

- Limit lawful distribution activities to true agricultural co-ops and collectives that provide crops to their members;

- Prohibit collectives and cooperatives from profiting from the sale of marijuana;

- Allow members to be reimbursed for certain services (including cultivation), provided that the reimbursement is limited to the amount to cover overhead costs and operating expenses;

- Allow members to reimburse the collective for marijuana that has been allocated to them (See Section 11362.765). Marijuana may be provided free to members, provided in exchange for services, allocated based on fees for reimbursement only, or any combination of these; and

- Declare that distribution of medical marijuana is subject to sales tax and requires a seller's permit from the State Board of Equalization.

Unlike an agricultural cooperative, a "collective" is not defined under state law, but it similarly facilitates agricultural collaboration between members. A co-op, by definition, files articles of incorporation and must abide by certain rules for its organization, elections and distribution of earnings. A co-op's earnings must be used for the general welfare of its members or be distributed equally in the form of cash, property, services, or credit. Both co-ops and collectives are formed for the benefit of their members and must require membership applications and verification of status as a caregiver or qualified patient; they must also refuse membership to those who divert marijuana for non-medical use. Collectives and co-ops must acquire marijuana from and allocate it only to constituent members. Storefront dispensaries that deviate from these Guidelines are likely outside the scope of state law.

The Guidelines have received mixed reviews from advocates and opponents. In 2011, Attorney General Kamala Harris released a draft revision to the Guidelines. Of interest to the Attorney General's office were issues such as collective operations, edible products, profit making businesses, seizure of marijuana, cultivation, delivery/transportation and constitutional issues.

At the League of California Cities and other stakeholders' urgings, the Attorney General has declined to amend the regulations until the Courts and the Legislature take some pointed action to establish clear rules governing access to medical marijuana.[109] The consensus from all the stakeholders is that the law needs to be reformed and simplified to define the scope of the cultivation right, whether dispensaries and edible marijuana products are permissible and how marijuana grown for medicinal use may be lawfully transported.

The Attorney General, in her recent letter to the Legislature, acknowledged that the Guidelines are outdated and that California's medical marijuana laws have created considerable confusion and public safety issues.[110] The Guidelines have been highly criticized by medical marijuana opponents, law enforcement, and others, yet courts have found that they are entitled to great weight and often rely on them to resolve medical marijuana issues.

Despite confusion created by the Guidelines, case law is clear that the voter-passed initiative did not authorize the sale of marijuana, even for medical purposes. Attempts to broaden the law's immunity so as to provide easier access through purely commercial distribution have, for the most part, been rejected. Although some suggest the CUA "must be interpreted to allow 'some manufacture and distribution of marijuana for medicinal purposes' lest the statutory immunity be made impractical," the ballot materials "show that Proposition 215 was narrowly drafted to make it acceptable to voters and to avoid undue conflict with federal law."[111] Access to marijuana under the CUA was limited to individual cultivation by qualified patients for their own medical purposes and by primary caregivers on behalf of the patient(s) they cared for.

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[109]See December 21, 2011 letter from Kamala Harris to Mike Kasperak, President, League of California Cities

[110]<http://ag.ca.gov/cms_attachments/press/pdfs/n2600_letter_1.pdf?>

[111]*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1168.

After the passage of the MMP and in reliance upon the Guidelines, medical marijuana advocates began to argue that Section 11362.775 authorizes collective distribution of medical marijuana in the form of storefront facilities known as dispensaries, collectives, and cooperatives; the opponents continue to assert that the storefront sale of marijuana is patently illegal under federal law, not expressly authorized under state law, and should not be tolerated or permitted.

As the courts worked to interpret the scope of the voters' intent in the CUA, and the scope of MMP cumulatively, two things happened. First, the medical marijuana industry learned to tailor its activities to what was "arguably" within the scope of legal conduct, and these activities quickly evolved into a statewide industry of sorts for growing, transporting and distributing medical marijuana. That is not to say that all medical marijuana activity is part of this larger "industry;" some medical marijuana is cultivated locally by local patients and their caregivers. But there is no denying that the medical marijuana industry has gone far beyond what was originally envisioned under the CUA or MMP. As the industry has proliferated, so have the complexities of the legal issues. An examination of selected appellate decisions in the non-municipal control area provides some understanding and guidance that is often helpful in determining how courts look at medical marijuana issues in the municipal regulation context.

People v. Trippet

In *Trippet*, the defendant was convicted of possession and transportation of more than two pounds of marijuana. The court of appeal held that, even though the CUA did not expressly provide patients and caregivers with a defense to marijuana transportation charges, an implied defense might apply if the "quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs."[112]

Of note, the court's formulation of the quantity standard for possession of marijuana ("reasonably related to the patient's current medical needs") under the CUA was later approved by the California Supreme Court in *Kelly*. The court noted that "both the statute's drafters and the proponents took pains to emphasize that, except as specifically provided in the proposed statute, neither relaxation much less evisceration of the state's marijuana laws was envisioned."[113] This language was later quoted approvingly by the California Supreme Court in *Mentch* in support of its conclusion that "[t]he [Compassionate Use] Act is a narrow measure with narrow ends."[114]

People ex rel. Lungren v. Peron

That same year, the court of appeal decided *Peron*.[115] The court held that defendant operators of the Cannabis Buyers' Club in San Francisco did not qualify as primary caregivers because they did not consistently assume responsibility for the health or safety of the thousands of people to whom the club furnished marijuana. The court rejected the argument that the CUA legalized the

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[112](1997) 56 Cal.App.4th 1532, 1550-1551.

[113]*Id.* at 1546.

[114]45 Cal.4th 274 at 286, fn. 7.

[115](1997) 59 Cal.App.4th 1383.

sale of marijuana, even on a non-profit basis and concluded that a commercial enterprise does not qualify as a primary caregiver.

As had the court in *Trippet,* the *Peron* court relied, in part, on the ballot materials in support of Proposition 215, which included the statement that the police could still arrest those who grow too much or try to sell marijuana.[116] Even after the passage of the MMP, this analysis still resonates with those who question the legality of the commercial dispensary model. Foreshadowing the MMP, the court concluded that a legitimate primary caregiver could care for more than a single patient, provided the consistent caregiving requirement is satisfied and, under the proper circumstances, a qualified patient could reimburse the caregiver for his or her actual expenses incurred in cultivating and furnishing marijuana for the patient's medical treatment.

People v. Galambos

In *Galambos*, the court affirmed the defendant's conviction for marijuana cultivation, rejecting his contention that the CUA immunized his cultivation activities as a "supplier" to an Oakland cooperative.[117] The court, following earlier case law, including *Trippet* and *Peron*, also rejected the assertion that the limited immunity afforded to patients and caregivers "necessarily implies...protection for those who provide medicinal cannabis to patients and/or caregivers."[118] Despite defendant's suggestion that the CUA "must be interpreted to allow 'some manufacture and distribution of marijuana for medicinal purposes' lest the statutory immunity be made impractical," the ballot materials "show that Proposition 215 was narrowly drafted to make it acceptable to voters and to avoid undue conflict with federal law."[119] The court also rejected defendant's medical necessity defense.

People v. Urziceanu

Urziceanu was the first decision to address Section 11362.775 of the MMP, which provides limited immunity related to collective cultivation of marijuana.[120] The case involved a qualified patient defendant who cultivated marijuana and distributed it from his home to the members of his cooperative called "FloraCare." Some of the members, comprised of qualified patients and primary caregivers, participated in the cultivation process. The court of appeal reversed defendant's conviction for conspiracy to sell marijuana and remanded the case for a new trial on that count.

In Part I of the court's discussion, the court held that the defendant had no defense under the CUA: "To the extent that the authors of the initiative wished to include these types of organizations [private enterprises and collectives] in its ambit, they could have expressly authorized their existence in the statute."[121] The court found support for this view in a comprehensive review of relevant case law to date, which had established that the CUA did not

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[116] *Id.* at 1393-1394.
[117] (2002) 104 Cal.App.4th 1147.
[118] *Id.* at 1165-1166.
[119] *Id.* at 1168.
[120] (2005) 132 Cal.App.4th 747.
[121] *Id.* at 769.

authorize a cannabis club to sell or give away marijuana to qualified patients. Though the court held that the defendant had no defense under the CUA, it found, in part II of its discussion, that Section 11362.775 did provide a potential defense:[122]

> [Section 11362.775] represents a dramatic change in the prohibitions on the use, distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers. Its specific itemization of the marijuana sales law indicates it contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana. Contrary to the People's argument, this law did abrogate the limits expressed in the cases we discussed in part IA which took a restrictive view of the activities allowed by the Compassionate Use Act.[123]

It is somewhat difficult to square this analysis with the California Supreme Court's subsequent analysis in *Mentch*, discussed above. The "itemization of the marijuana sales law" in Section 11362.775 is part of the enumeration of other criminal laws related to marijuana (prohibiting possession for sale, transportation, etc.) for which the "specific group of people" (qualified patients, caregivers, and those with identification cards) enjoy immunity based solely on a "specific range of conduct" (associating to collectively or cooperatively cultivate marijuana for medical purposes). Put another way, the criminal activity encompassed by the marijuana sales law and other marijuana laws is not the "immunized range of conduct" in Section 11362.775. Rather, the specified individuals shall not be subject to prosecution under those laws, solely on the basis of associating to collectively or cooperatively cultivate. It is important to note that *Mentch's* three-pronged analytical approach to application of the additional immunities afforded under the MMP arguably compels this conclusion. Subsequent decisions by the appellate courts, however, have not adopted this analytical approach.[124]

People v. Hochanadel

In *Hochanadel*, the court of appeal held that the trial court erred in quashing a search warrant for a storefront dispensary because the officers had probable cause to believe that the defendant owners of the dispensary were not in compliance with the CUA.[125] The court held that a storefront medical marijuana dispensary did not qualify as a primary caregiver within the meaning of the CUA or MMP. The court also noted that defendants might have an affirmative defense under Section 11372.775 if their dispensary ("Hempies") was operated as a cooperative or collective, as such entities were described in the Attorney General Guidelines[126]—but the court "express[ed] no opinion as to whether defendants were in substantial compliance with [S]ection

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[122]The MMP was enacted while this case was pending.

[123]132 Cal.App.4th at 785.

[124]See *People v. Colvin* (2012) 203 Cal.App.4th 1029; *City of Lake Forest v. Evergreen Holistic Collective* (2012) 203 Cal.App.4th 1413.

[125](2009) 176 Cal.App.4th 997.

[126]California Attorney General's Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use, August 2008 (discussed in detail below).

11362.775 and the Guidelines, and whether, as in *Urziceanu*, there is sufficient evidence for defendants to raise [S]ection 11362.775 as a defense at trial."[127]

Although the court did not decide whether the defendants' operation fell under the statute's immunity, it did conclude that Section 11362.775 did not constitute an impermissible amendment of the CUA. Rather, the court reasoned, "it identifies groups that may lawfully distribute medical marijuana to patients under the CUA. Thus, it was designed to implement, not amend the CUA."[128]

Both *Urziceanu* and *Hochanadel* interpret Section 11362.775 as allowing distribution and sales in the form of "reimbursement" or "compensation" to collectives and cooperatives, with the latter decision relying heavily on the Guidelines. The express immunity in the MMP for receipt of compensation is limited, in a different section (§11362.765), to primary caregivers, and the "services" they provide to "an eligible qualified patient or person with identification card to enable that person to use marijuana under this article, or for payment for out-of-pocket expenses incurred or provides those services, or both...."[129] "On the sole basis of that fact," a primary caregiver who receives such compensation shall not be "subject to prosecution or punishment under Section 11359 [possession of marijuana for sale] or 11360 [transportation, sale, giving away, etc. of marijuana]."[130] In allowing compensation to primary caregivers, the Legislature did not intend "this section [to] authorize any individual or group to cultivate or distribute marijuana for profit."[131] A dispensary, regardless of its manner of formation, does not qualify as a primary caregiver. Not only the statutory definition of the term (which refers to an "individual," not entity, with particular caretaking responsibilities) but a long line of case law, culminating in the California Supreme Court's decision *Mentch*, has conclusively established this proposition.

Notably, Section 11362.765 does not permit even individual primary caregivers to sell marijuana to their patients. Rather, in subdivision (b)(2), immunity from prosecution is limited to "a designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana for medical purposes, in amounts not exceeding those established in subdivision (a) of Section 11362.77, only to the qualified patient of the primary caregiver, or to the person with an identification card who has designated the individual as primary caregiver."

Section 11362.775, on the other hand, makes no mention of compensation or distribution relative to associating to collectively or cooperatively cultivate marijuana for medical purposes. Thus, it can be argued that a dispensary or collective engaged in commercial distribution of marijuana to qualified patients is not entitled to immunity under Section 11362.775. Legal analysts have taken this position.[132] Perhaps, the California Supreme Court, in one or more of the three medical

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[127] 176 Cal.App.4th at 1018.

[128] *Hochanadel, supra*, at 1013.

[129] §11362.765(c)

[130] *Id.*

[131] §11362.765(a)

[132] See "Room for Abuse: A Critical Analysis of the Legal Justification for the Marijuana Storefront Dispensary" by Chris Lindberg (2010) *40 Sw. L. Rev.* 59.

marijuana cases under review and discussed below, will decisively address and resolve this critical issue to clarify the scope of permissible distribution of medical marijuana under state law.

People v. Colvin

Except as otherwise provided by law, the transportation of marijuana is illegal under Section 11360. Depending on the amount transported, with 28.5 grams being the dividing line, it can be either a misdemeanor or a felony. The courts have provided clear guidance regarding what it means to "transport" a controlled substance: "Transportation of a controlled substance is established by carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character."[133] "The crux of the crime of transporting is movement of the contraband from one place to another."[134] "The term 'transport' includes moving illegal drugs from one place to another, even by bicycle."[135] Following the passage of the CUA and MMP, the act of transporting marijuana became subject to certain limited defenses under state law.

The CUA expressly provides a defense to prosecution for only two criminal offenses: possession of marijuana and cultivation of marijuana. The MMP provides qualified patients and primary caregivers with additional immunities against prosecution for marijuana offenses, including transportation charges, based on certain conduct. The CUA's "implied defense" to a marijuana transportation charge (§11360), recognized by the court of appeal in *Trippet*, was codified in Section 11362.765. That provision authorizes transportation of marijuana by a qualified patient only for her own personal medical use and by a primary caregiver only for delivery to his own qualified patient(s).[136]

Unlike Section 11362.765, Section 11362.775 does not expressly immunize conduct related to transportation. In *Colvin*, the Second District Court of Appeal reversed the conviction of a defendant on transportation and possession charges based on Section 11362.775.[137]

The defendant owned and operated two dispensaries in Los Angeles with over 5,000 members, and was caught transporting marijuana between the two locations. The defendant, a qualified patient, testified that approximately fourteen of the dispensaries' thousands of members grew marijuana, and the cultivation took place in various locations. The trial court held that Colvin was not entitled to a defense under Section 11362.775 as "the transportation ... had nothing to do with the cultivation process," and convicted him of all counts.

The court of appeal reversed, concluding, based on the trial court's finding that he was a qualified patient and operating a "legitimate" dispensary, that the defendant was entitled a

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[133] *People v. Meza* (1995) 38 Cal.App.4th 1741, 1746.

[134] *People v. Kilborn* (1970) 7 Cal.App.3d 998, 1003.

[135] *People v. LaCross* (2001) 91 Cal.App.4th 182, 185.

[136] §11360(b)(1) -(b)(2).

[137] (2012) 203 Cal.App.4th 1029.

defense under Section 11362.775. The court reviewed the Guidelines which provide that "collectives" and "cooperatives" may be formed under Section 11362.775. In the court's view, the Guidelines contemplated cooperatives like the one operated by defendant and that, as a "cultivator" of marijuana, he could transport marijuana to a cooperative.

In its analysis of Section 11362.775, the *Colvin* court rejected the Attorney General's more narrow reading of the statute and (somewhat ironically) based its interpretation on the Guidelines. The Attorney General argued that Section 11362.775 "does not condone 'a large-scale, wholesale-retail marijuana network' like Holistic," with its 5,000 members. Rather, the cultivation under this statute should entail "some united action or participation among all those involved, as distinct from merely a supplier-consumer relationship," some "'modicum of collaboration' in which qualified patients and caregivers come together in some way."[138]

The court stated that nothing in the statute or its legislative history supported this interpretation and noted there was no dispute that Colvin was a "qualified patient" or that Holistic "is comprised of other qualified patients, persons with valid identification cards or primary caregivers."[139] The dispute involved "what it means to 'collectively or cooperatively' cultivate medical marijuana. Looking at cooperatives in general, the court noted that these organizations "provide services for use primarily by their members." California law also allows for agricultural and consumer cooperatives. The trial court found that Holistic was a "legitimate" dispensary, "which implies that the court believed Holistic was complying with the appropriate laws."[140]

The Attorney General, the court observed, did not claim otherwise. Rather, the Attorney General maintained that to obtain the protection of Section 11362.775, "a medical marijuana cooperative . . . must establish that some number of its members participate in the process in some way. The Attorney General does not specify *how* many members must participate or in *what* way or ways they must do so, except to imply that Holistic, with its 5,000 members and 14 growers, is simply too big to allow any 'meaningful participation in the cooperative process...".[141] The court rejected this interpretation, which "would impose on medical marijuana cooperatives requirements not imposed on other [non-medical marijuana membership-based] cooperatives."[142]

The court noted that Holistic complied with the Guidelines by operating a "closed system," distributing to its members only marijuana grown by its members, and complied with other Guidelines as well: "To the extent these Guidelines have any weight, they contemplate cooperatives like Holistic."[143] The court further observed that if it were to follow the Attorney General's "suggested requirement, "the likely result would be "to limit drastically the size of medical marijuana establishments." That may well have been the Legislature's intent, but

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[138] *Id.* at 1037.

[139] 203 Cal.App.4th at 1039-1041.

[140] *Id.*

[141] *Id.* (emphasis in original).

[142] *Id.* at 1039.

[143] *Id.* at 1040-1041.

"nothing on the face of Section 11362.775, or in the inherent nature of a cooperative or collective, requires some unspecified number of members to engage in unspecified 'united action or participation' to qualify for the protection of section 11362.775."[144] In fact, "imposing the Attorney General's requirement would, it seems to us, contravene the intent of the MMP by limiting patients' access to medical marijuana and leading to inconsistent applications of the law."[145] The court thus concluded that Section 11362.775 applied and reversed the trial court judgment on both the transportation and possession counts accordingly.

Several aspects of the *Colvin* decision are worthy of note. It was decided by the same division of the Second District Court of Appeal that issued the decision in *Pack v. City of Long Beach,* which concluded that a local ordinance which permits and regulates medical marijuana collectives (whether "legitimate" under state law or not) is preempted by federal law. Although the validity of local regulations was not directly before the court in *Colvin*, the court concluded that the defendant's dispensary was "legitimate" although it was not contested by the Attorney General. The complete absence of federal law from the discussion, when the same court had firmly rejected the notion that local regulations can "legitimize" any medical marijuana dispensary in violation of federal law, is striking.

Secondly, the *Colvin* court framed the issue as: "If Colvin, a qualified patient was operating a legitimate medical marijuana cooperative, then he 'shall not solely on the basis of that fact be subject to state criminal sanctions under' section 11360 (transportation of marijuana)." Viewed through the prism of the *Mentch* analysis (see above), this issue framing identifies the operation of a "legitimate medical marijuana cooperative" as the conduct that triggers immunity under Section 11362.775. It can be argued that the "specific range of conduct" " which triggers the statutory immunity is the act of "associat[ing] within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes...".[146]

Finally, *Colvin* is somewhat at odds with a decision issued less than a week later, *City of Lake Forest v. Evergreen Holistic Collective* ("*Evergreen*")[147] (discussed extensively below). *Evergreen* interpreted the immunity conferred by Section 11362.775 to apply only to conduct, including transportation, which occurs at the cultivation site. *Colvin*, on the other hand, did not limit its interpretation of the transportation immunity in such a manner, seeming to hold that unlimited quantities of marijuana may be transported to and from "legitimate" cultivation sites/dispensaries. In this sense, the cases are difficult to reconcile.

People v. Wayman

Another recent court of appeal decision, *Wayman,* found that transportation of medical marijuana by a qualified patient is only lawful when the transportation is reasonably related to the patient's current medical needs.[148] Following *Trippet*, the court held that the amount of marijuana

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[144] *Id.* at 1041.

[145] *Id.*

[146] §11362.775

[147] (2012) 203 Cal.App.4th 1413.

[148] (2010) 189 Cal.App.4th 215.

involved, as well as the method, timing, and distance of the transportation, are determinative factors when deciding whether the transportation of marijuana is consistent with personal medical use and, thus, comports with the CUA.

The court upheld the defendant's conviction on DUI, transportation, and possession for sale charges because the marijuana was found separated in individual labeled baggies inside a backpack in the vehicle's trunk, and the jury was correctly instructed regarding the law governing transportation of marijuana. Although the defendant possessed a physician's recommendation to use marijuana, the court was unsympathetic to his explanation that he kept his supply in his car because he lived with his mother and she didn't want marijuana in the house. "It is one thing to give medical marijuana users the right to transport marijuana from the place they obtain it to the place they intend to use it. [Citation omitted.] But it is quite another to say that qualified users have an unfettered right to take their marijuana with them wherever they go, regardless of their current medical needs. The medical marijuana laws were never intended to be 'a sort of "open Sesame" regarding the possession, transportation and sale of marijuana in this state. (*Trippet*, *supra*, 56 Cal.App.4th at p. 1546, fn. omitted.)'"[149] The *Wayman* court also rejected the argument that Section 11362.765, subdivision (b)(1) immunized the defendant's conduct, stressing that the provision requires the transportation to be for the patient's personal medical use. In summing up, the court declared "nothing in the law allows a user to store his entire marijuana supply in his car and transport it wherever he goes, just to appease his mother."[150]

The Guidelines address transportation briefly, but do not analyze competing views of the scope of permissible conduct, including transportation, under Section 11362.775. For instance, the Guidelines state that collectives and cooperatives "should acquire marijuana only from their constituent members because only marijuana grown by a qualified patient or his/her primary caregiver may lawfully be transported by, or distributed to, other members of the collective."[151] "Collectives may cultivate and transport marijuana in aggregate amounts tied to their membership numbers."[152] "Any patient or caregiver exceeding individual possession guidelines should have supporting records readily available when transporting a group's marijuana."[153] In light of the current Attorney General's views regarding the continuing relevance of the Guidelines, more recent case law interpreting the MMP, and the fact that the Guidelines are not binding, these suggestions should not be relied upon as "the law."

As the *Colvin* case underscores, transportation of marijuana by members of cooperatives and collectives will likely be defended on the grounds that it is "authorized" by Section 11362.775 and the Guidelines. The *Colvin* court embraced this argument to the extent that the transportation was to a "legitimate" cooperative, but the *Evergreen* court recently held that all transportation must occur on site at the cooperative or collective. Thus, while cooperatives and

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[149] 189 Cal.App. 4th at 223

[150] *Id.*

[151] Guidelines, p.10

[152] *Id.*

[153] *Id.*

collectives may argue that they cannot always distribute marijuana to their members at the same location where it is cultivated, making transportation an integral part of their operations, *Evergreen*'s interpretation of Section 11362.775 (and, of course, even stricter readings of the statute) would not allow this conduct.

Another distinct transportation issue related to medical marijuana is the phenomenon of mobile dispensaries. "Mobile dispensary" generally refers to a marijuana delivery service for qualified patients. They typically offer various strains of marijuana and edible products for sale online and deliver to purchasers within a certain geographical area. Like storefront dispensaries, mobile dispensaries are not specifically authorized by state law and, while they may be businesses organized as collectives or cooperatives, they are by and large unregulated. In cities with dispensary bans, they may be viewed by dispensary operators and their clients as a convenient way to circumvent local law, with less overhead costs and risks.

Clearly, the operators of mobile dispensaries are not immunized from prosecution for transportation of marijuana under Section 11362.765. That statute, as stated above, only applies to qualified patients transporting marijuana for their own personal medical use and individual primary caregivers transporting marijuana to the qualified patient(s) they care for. To the extent that these "dispensaries on wheels" claim protection under Section 11362.775, it seems they are on shaky legal ground. A marijuana delivery service is a far cry from "associat[ing]...in order collectively or cooperatively to cultivate marijuana for medical purposes...".[154] Nonetheless, mobile dispensaries continue to operate "under the radar" in many parts of the state where they often manage to elude local regulations and law enforcement.

In sum, the legality of transportation is not a foregone conclusion and depends on a number of factors. In addition to the specific transportation immunities under Section 11362.765, the courts will likely continue to explore the nature and scope of immunity under Section 11362.775.

LAND USE REGULATION AND LOCAL CONTROL

Perhaps the most controversial issue, the one that has received the most judicial attention of late, is how cities should regulate the land uses and activities associated with medical marijuana.[155]

"Land use regulation in California historically has been a function of local government under the grant of police power contained in article XI, section 7 of the California Constitution."[156] Article XI, section 7 provides that, "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." The California Supreme Court "has recognized that a city's or county's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state."[157] "The power of cities and counties to zone land use in accordance with local conditions

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[154]Health and Saf. §11362.775

[155]The authors included more detail on the procedural aspects of these cases, as other City Attorneys may find the information useful in dealing with similar regulation and enforcement issues.

[156]*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151.

[157]38 Cal.4th at p. 1151 (quoting *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782).

is well entrenched."[158] "In enacting zoning ordinances, the municipality performs a legislative function, and every intendment is in favor of the validity of such ordinances."[159]

With those general principals in mind, we review the various decisions concerning medical marijuana regulation at the local level. Looking at the *published* case law as it exists today, cities have a good argument that medical marijuana activities can be regulated (and perhaps banned) using their local land use authority (although not every court has agreed).

City of Corona v. Naulls

The court of appeal in *Naulls*, affirmed the issuance of a preliminary injunction to close Ronald Naulls' marijuana distribution facility, which was operating without a valid zoning designation.[160] The court held that "where a particular use of land is not expressly enumerated in a city's municipal code as constituting a *permissible* use, it follows that such use is *impermissible*." Accordingly, "Naulls, by failing to comply with the City's various procedural requirements, created a nuisance *per se*, subject to abatement in accordance with the City's municipal code."[161]

Naulls had applied for a license to operate his business, the Healing Nations Collective ("HNC") within the City of Corona. The application alerted Naulls that all businesses must comply with applicable city codes. Naulls falsely described his business as a "miscellaneous retail establishment" that would sell "miscellaneous medical supplies." The City issued him a business permit on this basis. He later admitted to Corona city staff that HNC was a marijuana distribution facility.[162]

The City Attorney later informed Naulls on multiple occasions that his business license was invalid because "he had falsified his application, marijuana distribution facilities were not a permitted use under the City's municipal code and Specific Plan, and HNC failed to comply with the procedures required for establishing a 'similar use' zoning designation." Naulls did not comply. [163] The City sued, alleging his operation of HNC was a public nuisance in violation of Civil Code section 3479, "in that Naulls operated HNC in contravention of the City's business license and zoning laws.

The City obtained a preliminary injunction preventing Naulls from operating HNC pending trial. The City's planning director attested that "because a medical marijuana dispensary was not a permitted use in any of the zoning areas within the Specific Plan, any other specific plan, or any of the Code's zoning provisions, Naulls would have been required to amend the Specific Plan to include his requested use."[164] The trial court granted the City's motion, concluding that, because any non-enumerated land use was presumptively prohibited under the City's municipal code,

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[158] *IT Corp. v. Solano County Bd. Of Supervisors* (1991) 1 Cal.4th 81, 89.
[159] *Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 460.
[160] (2008) 166 Cal.App.4th 418.
[161] *Id.* at 433.
[162] *Id.* at 420-21.
[163] *Id.* at 421- 422.
[164] *Id.* at 423.

Naulls falsely procured his license and avoided the available Specific Plan amendment procedure; thus, Naulls' operation of HNC constituted a nuisance *per se.*[165]

The court of appeal upheld the trial court's issuance of the preliminary injunction, opining that "Naulls did not comply with the City's requirements, failing to take any steps to obtain approval before opening his doors for business. As a consequence, operation of HNC violated the City's municipal code and, as such, constituted a nuisance per se."[166] Importantly, the court of appeal rejected Naulls' argument that the trial court erred in finding that any use not enumerated in the City's zoning code was presumptively prohibited. The City's Specific Plan listed all permissible and impermissible uses within each zoning district; neither selling nor distributing medical marijuana was among them. A prospective licensee could apply for a Planning Commission determination of the proper zoning, if any, for such miscellaneous uses. Naulls thus needed to obtain a "similar use" determination or an amendment to the Specific Plan. He did neither. The court concluded:

> [B]y evading the procedures which applied to his situation, and with knowledge – as provided to him by a City representative both verbally and in writing – that a medical marijuana dispensary was not a permitted use, [Naulls] began operating [Healing Nations] in violation of various sections of the City's municipal code ... Naulls and [Healing Nations] created a nuisance per se pursuant to section 1.08.020, subdivision (B).[167]

Thus, traditional zoning prevailed.

City of Claremont v. Kruse

In *Kruse*, the court specifically analyzed whether there was express or implied preemption by the CUA or the MMP that would prevent local regulations, such as zoning laws, from restricting the establishment of marijuana distribution facilities.[168] The court of appeal held:

> Zoning and licensing are not mentioned in the findings and declarations that precede the CUA's operative provisions. Nothing in the text or history of the CUA suggests it was intended to address local land use determinations or business licensing issues. *The CUA accordingly did not expressly preempt the City's enactment of the moratorium or the enforcement of local zoning and business licensing requirements.*[169]

The court's holding was not based solely on the existence of the city's temporary moratorium. Rather, the court plainly based its decision on the city's zoning and licensing authority found in Claremont's municipal code. Further, the court held that:

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[165] *Id.* at 424-25.
[166] *Id.* at 428.
[167] *Id.*at 432.
[168] (2009) 177 Cal.App.4th 1153, 1172-1176.
[169] 177 Cal.App.4th at 1175 (emphasis added).

> Neither the CUA nor the MMP compels the establishment of local regulations to accommodate medical marijuana dispensaries. The City's enforcement of its licensing and zoning laws . . . do not conflict with the CUA or the MMP.[170]

In *Kruse*, the marijuana distribution facility at issue violated Claremont's local municipal code and was therefore held to constitute a nuisance *per se*. The court stated, "[w]e find *Naulls* persuasive here. Kruse's operation of a medical marijuana distribution facility without the City's approval constituted a nuisance per se under section 1.12.010 of the City's municipal code and could properly be enjoined." Interestingly, the court also said that the operation of the marijuana distribution facility was properly enjoined as a nuisance *per se* because, "*notwithstanding California's medical marijuana laws*, the cultivation and distribution of marijuana remains illegal under the federal Controlled Substances Act."[171]

County of Los Angeles v. Hill

The *Hill* decision addressed the local regulation issue.[172] Martin Hill and the Alternative Medicinal Collective of Covina (together, "Hill") appealed from an order granting a preliminary injunction prohibiting them from dispensing marijuana anywhere in the unincorporated area of Los Angeles County without first obtaining the necessary licenses and permits that County ordinances required.[173] Hill contended that the County's ordinances were preempted by state law, inconsistent with state law, and unconstitutionally discriminated against medical marijuana dispensaries ("MMDs"). The court of appeal rejected the contentions and affirmed the injunction.

The court observed that, while the appeal was pending, the Legislature enacted Section 11362.768, "which specifically recognizes and partially regulates medical marijuana 'dispensaries' having 'a storefront or mobile retail outlet which ordinarily requires a local business license.'"[174] The court quoted the provision prohibiting medical marijuana entities or individuals from locating within a 600-foot radius of a school. (*Ibid.*) The court also quoted subdivisions (f) and (g), which provided: "'(f) Nothing in this section shall prohibit a city, county or city and county from adopting ordinances or policies that further restrict the location or

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[170] *Id.* at p. 1176.

[171] *Id.* at p. 1164 (emphasis added).

[172] (2011) 192 Cal.App.4th 861.

[173] The County adopted ordinances regulating medical marijuana dispensaries (MMD) in unincorporated areas of the County in June 2006. Notably, Los Angeles County Code ("LACC") section 22.56.196 provided: "The establishment and operation of any [MMD] requires a conditional use permit in compliance with the requirements of this section." (LACC, § 22.56.196, former subd. B.) *Id.*, at p. 865.) The section also restricted dispensaries from locating within a 1,000 foot radius of "schools, playgrounds, libraries, places of religious worship, child care facilities, and youth facilities. . . ." (LACC, § 22.56.196, former subd. E.1.a.) Also, an MMD needed a business license to lawfully operate. (LACC, § 7.55.020.) The court added: "The County's zoning ordinance, LACC 22.28.110, states that an MMD may operate in a C-1 zone 'subject to the requirements of section 22.56.196' discussed above." 192 Cal.App.4th at 865. Furthermore, "County ordinances applicable to all businesses provide that a use that does not comply with the zoning code is a public nuisance (LACC § 22.60.350) and authorize the County to seek injunctions against businesses operating in violation of the zoning laws. (LACC, §§ 7.04.340, 22.60.350)."

[174] 192 Cal.App.4th at 866.

establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider. (g) Nothing in this section shall preempt local ordinances, adopted prior to January 1, 2011, that regulate the location or *establishment* of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider.'" [175] [176]

The court rejected Hill's argument that the County ordinances were totally preempted by the CUA and MMP because the two acts occupied the field of medical marijuana regulation, "because section 11362.83, a part of the [MMP], specifically states: 'Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article.'" [177] As for Hill's contention that the County's regulations "are invalid because they are inconsistent with state law[,]" the court similarly disagreed. Again, the court relied on section 11362.83 as the Legislature showing "*it expected and intended* that local governments [would] adopt additional ordinances."[178] Rather than impliedly barring the County from placing additional restrictions on the location of dispensaries, subdivision (b) needed to be read together with subdivision (f) as allowing local governments to "add further restrictions on the location and establishment of MMD's."[179]

The court also rejected Hill's contention that the County could not "use its nuisance abatement ordinances to enjoin the operation of MMD's in locations other than within 600 feet of a school because sections 11362.765 and 11362.775 provide that medical marijuana patients and their caregivers are not subject to 'criminal liability under Section 11570,' the 'drug den' abatement law." The court stated that "[t]he limited statutory immunity from prosecution under the 'drug den' abatement law provided by section 11362.775 [did] not prevent the County from applying its nuisance laws to MMD's that do not comply with its valid ordinances." The court explained that "[b]y its terms, the statute exempts qualified patients and their primary caregivers (who collectively or cooperatively cultivate marijuana for medical purposes) from nuisance laws '*solely on the basis* of [the] fact' that they have associated collectively or cooperatively to cultivate marijuana for medical purposes. (Italics added.)"[180] Significantly, "[t]he statute *does not confer on qualified patients and their caregivers the unfettered right to cultivate or dispense marijuana anywhere they choose.*" Section 11362.775 did not affect the County's "constitutional authority to regulate the particular manner and location in which a business may operate (Cal. Const., art. XI, § 7). . . ."[181]

As far as the County's alleged over-restriction of the establishment and location such that it was "practically impossible for such dispensaries to exist anywhere in the unincorporated areas of the

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[175] *Id.* (emphasis added).

[176] The court took judicial notice of the fact that on December 7, 2010, the County Board of Supervisors "banned MMD's in all zones in the County effective January 6, 2011 (L.A. Ord. No. 2010-0062). The ordinance provides that the ban shall remain in effect until and unless it is held 'unlawful' by the Court of Appeal or the California Supreme Court in which case the preexisting ordinances governing MMD's shall again be in effect. . . The validity of that ban is not before us and we do not address it." 192 Cal.App.4th at p. 866, fn. 4.

[177] 192 Cal.App.4th at 867.

[178] *Id.* at 868 (emphasis added).

[179] *Id.*

[180] 192 Cal.App.4th at 869.

[181] *Id.*

County[,]" the court found Hill's evidence did not support the argument. In particular, Hill's declaration contained insufficient facts to show that the County's fee for obtaining a conditional use permit was inconsistent with the CUA or MMP because Hill failed to produce evidence that "the County charges a higher fee to MMD's than it does to other businesses or that the fee applicable to MMD's is unreasonable."[182] Whether there were any locations within the unincorporated sections of the County where a medical marijuana association could exist without running afoul of the ordinance, the court pointed to the County's declaration's reliance on LACC section 22.28.110 "which permits MMD's to operate in C-1 zones. These commercial zones also contain liquor stores, bars and cocktail lounges, car washes, pet grooming businesses, theaters and many other common commercial enterprises."

Concerning the County's lack of approval of any permits for dispensary operation, the court explained that since the ordinances regulating dispensaries were adopted in June 2006, there had only been two applicants: one withdrew his application after being arrested on drug charges elsewhere, and the other was "denied a permit because the proposed MMD would have been adjacent to single-family residences."[183]

Finally, the court was unpersuaded by Hill's contention that the County ordinances violated the Equal Protection Clause of the 14th Amendment to the United States Constitution "by not allowing the dispensaries to operate in the same zones as pharmacies." Dispensaries and pharmacies were "not 'similarly situated' for public health and safety purposes and therefore need not be treated equally."[184] The court cited *Ross v. RagingWire Telecommunications, Inc.*, *supra*, to rebut Hill's contention; the CUA did not give "marijuana the same status as any legal prescription drug . . . because the drug remains illegal under federal law . . . even for medical users . . . ."[185] Thus, the County had a rational basis for zoning dispensaries differently than pharmacies because "similar risks are not associated with the location of pharmacies. . . ."[186] Specifically, the County's expert testimony showed that most dispensaries are "cash only" businesses "and the large amounts of cash and marijuana make MMD's, their employees and qualified patients 'the target of a disproportionate amount of violent crime' including robberies and burglaries." Dispensaries "also attract loitering and marijuana smoking on or near the premises which negatively affect the 'quality of life' in the neighborhood."[187] And the County was justifiably concerned that dispensaries would attract an illegal resale market for marijuana given the use of marijuana for nonmedical purposes. The court thus affirmed the order granting the County's motion for a preliminary injunction.[188]

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[182] *Id.* at 870.

[183] *Id.* at 871.

[184] *Id.*

[185] *Id.*, at fn. 10.

[186] *Id.* at 872.

[187] *Id.* at 871.

[188] *Id.* at 872.

Here is where the decisions become significantly more complicated. Particularly in the last several years, the appellate courts have issued inconsistent opinions, leaving cities to question the scope of their local land use authority with respect to medical marijuana activities.

City of Riverside v. Inland Empire Patient's Health and Wellness Center, Inc. *Inland Empire Center* was decided in late 2011.[189] In this case now before the California Supreme Court (and therefore not citable), the Fourth Appellate District, Division Two, held that a local government could ban medical marijuana dispensaries altogether.[190] Riverside's zoning code expressly prohibits medical marijuana dispensaries.[191] The zoning code also prohibits any use that is prohibited by state or federal law and any violation of Riverside's municipal code is deemed a public nuisance. The court of appeal affirmed the trial court's determination Inland Empire Center's facility violated Riverside's zoning code, and was therefore a public nuisance subject to abatement.[192]

The court of appeal rejected Inland Empire Center's argument that the Riverside dispensary ban is preempted by state law preemption: "Where, as here, there is no clear indication of preemptive intent from the Legislature, we presume that Riverside's zoning regulations, in an area over which local government traditionally has exercised control, are not preempted by state law."[193] The court analyzed California's medical marijuana laws and Riverside's municipal code provisions and concluded that under Riverside's Municipal Code, "Inland Empire Center's

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[189](2011) 200 Cal.App.4th 885, review granted and opinion superseded sub nom. *City of Riverside v. Inland Empire Patient's Health & Wellness Center, Inc.* (Cal. 2012) 136 Cal.Rptr.3d 667.

[190]The California Supreme Court has also granted review of *People of the State of California v. G3 Holistic, Inc.* ("*G3 Holistic*"). The *G3 Holistic* decision was issued by the same Court of Appeal and on the same date (November 9, 2011) as the *Inland Empire Center* decision. The *G3 Holistic* case involved a civil abatement action against the G3 Holistic dispensary which the trial court had found to be a nuisance in violation of the City of Upland's zoning ordinance. The dispensary appealed, contending that the City's ban on medical marijuana dispensaries was preempted by state law. The appellate court upheld Upland's dispensary ban, concluding, as it did in *Inland Empire Center*, that a ban is not preempted by state law. As in *Inland Empire Center*, the court held that zoning and business licensing ordinances prohibiting dispensaries as an unenumerated use, such as Upland's, are not inconsistent with the CUA and MMP.

In all material respects, the court's analysis in *Inland Empire Center* and *G3 Holistic* is the same. The court held that Upland's zoning ordinance does not duplicate, contradict or expressly occupy the field of state law, and squarely rejected appellant's assertion that Section 11362.768 only restricts the location of dispensaries, but does not authorize complete bans. The *Evergreen* decision issued by Division Three of the same appellate district embraced the very contentions that were rejected in *Inland Empire Center* and *G3 Holistic*. Thus, when the California Supreme Court eventually issues its decision in these three medical marijuana cases [perhaps, including *Evergreen*], there should be definitive guidance on these contradictory appellate positions.

[191]200 Cal.App.4th at 892.

[192]200 Cal.App.4th at 892.

[193]*Id.* at 894-895 (citing *Kruse*, *supra*, 177 Cal.App.4th at 1169).

MMD is a zoning violation, constituting a public nuisance which is amenable to abatement and injunctive relief by civil action."[194]

As for state law preemption, the court conducted a thorough analysis of the Riverside ordinance under well-established standards for state law preemption of a municipal ordinance. Specifically, the court concluded that "Riverside's zoning ordinance does not duplicate, contradict, or occupy the field of state law legalizing medical marijuana."[195]

First, Riverside's ban "does not 'mimic' or duplicate state law and can be reconciled with the CUA and MMP." Notably, "[t]he CUA does not create a constitutional right to obtain marijuana, or allow the sale or nonprofit distribution of marijuana cooperatives."[196] Moreover, "[t]he CUA and MMP do not provide individuals with inalienable rights to establish, operate, or use MMD's." And these statutes "do not preclude local governments from regulating MMD's through zoning ordinances." "[T]he CUA and MMP [do not] prohibit cities and counties from banning MMD's."[197] "The operative provisions of the CUA and MMP[A] do not speak to local zoning laws."[198] Indeed, "the MMP does not restrict or usurp in any way the police power of local governments to enact zoning and land use regulations prohibiting MMD's."[199]

The court of appeal rejected Inland Empire Center's argument that "because section 11362.775 exempts an operator of an MMD from liability for nuisance, Riverside's zoning ordinance, a ban against medical marijuana dispensaries and declaring them a nuisance, is preempted by state law." The court held "a municipality can limit *or prohibit* MMD's through zoning regulations and prosecute such violations by bringing a nuisance action and seeking injunctive relief." (Emphasis in original.) As a result, there is no state law preemption because "Riverside's zoning ordinance banning MMD's does not duplicate or contradict the CUA and MMP[A] statutes."[200]

Second, the *Inland Empire Center* court found that "the CUA and MMP do not expressly state an intent to fully occupy the area of regulating, licensing, and zoning MMD's, to the exclusion of all local law."[201] The court noted that, in *Kruse*, Claremont's temporary moratorium on MMD's was permissible because "'[t]he CUA does not authorize the operation of a medical marijuana dispensary [citations], nor does it prohibit local governments from regulating such dispensaries.'" To the contrary, "the CUA expressly states that it does not supersede laws that protect individual and public safety[.]"[202]

As for the claim that the MMP preempts the Riverside ordinance, the court said that "the MMP expressly allows local regulation." The court agreed with the *Kruse* court that neither the text

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[194] *Id.* at 897.
[195] *Id.* at 898.
[196] *Id.* (citing *Kruse, supra,* at 1170-1171).
[197] *Id.*
[198] *Id.* (citing *Kruse, supra,* at 1172-1173, 1175).
[199] *Id.* at 899.
[200] *200 Cal.App.4th* at 899- 900 (emphasis added).
[201] *Ibid.*
[202] *Ibid.*

nor the history of the MMP "'precludes the City's adoption of a temporary moratorium on issuing permits and licenses to medical marijuana dispensaries, *or the City's enforcement of licensing and zoning requirements applicable to such dispensaries.*'" (Emphasis added.)[203] The court also held "the CUA and MMP[A] do not expressly preempt Riverside's zoning ordinance regulating MMD's, including banning them."[204]

Third, the *Inland Empire Center* court concluded that the City's ordinance "does not enter an area of law fully occupied by the CUA and MMP by legislative implication." Recognizing judicial reluctance to find implied preemption, the court, again, turned to *Kruse* to determine that "[t]he subject matter of the Riverside zoning ordinance banning MMD's has not been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern[.]"[205] In fact, "neither the CUA nor MMP[A] 'addresses, much less completely covers, the areas of land use, zoning and business licensing.'" The court concluded that the CUA and MMP[A] did not prevent Riverside "from enacting zoning ordinances prohibiting MMD's in the city."[206] The court further noted that, in any event, immunity under the MMP was only available to lawful dispensaries, and that "[a]n MMD operating in violation of a zoning ordinance prohibiting MMD's is not lawful."[207]

As for "state law tolerating local action," the *Inland Empire Center* court stated that "[t]he CUA and MMP[A] do not provide 'general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action[.]'"[208] The *Kruse* court had noted that each of the two medical marijuana statutory schemes contain language showing that state law would tolerate local action: "The CUA expressly provides that it does not 'supersede legislation prohibiting persons from engaging in conduct that endangers others' (§ 11362.5, subd. (b)(2)); and the MMP[A] states that it does not 'prevent a city or other local governing body from adopting and enforcing laws consistent with this article' (§ 11362.83)."[209]

The court in *Inland Empire Center* also found persuasive a new addition to the MMP, Section 11362.768, enacted in 2010. In quoting *County of Los Angeles v. Hill*, *supra*, the *Inland Empire Center* court observed that the *Hill* court had "noted that 'the Legislature showed it expected and intended that local governments adopt additional ordinances' regulating medical marijuana." Subdivisions (f) and (g), in particular, "made clear that local government may regulate dispensaries." *Hill*, *supra*, 192 Cal.App.4th at p. 868.) Thus, "[p]reemption by implication of legislative intent may not be found here. . . ." [210]

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[203] *Id.* at 901 (quoting *Kruse*, *supra*, at p. 1175). The Court of Appeal, Fourth Appellate District, Division Three, mistakenly distinguished *Kruse*, *supra*, in both *Qualified Patients* and *Evergreen* on the incorrect claim that *Kruse* involved only a moratorium and not zoning or other land use regulation.

[204] *Id.* at 901.

[205] *Id.* (citing *Kruse*, *supra*, at p. 1168-1169 [citations omitted]).

[206] *Id.* at 902- 903 (quoting *Kruse*, *supra*, at p. 1175).

[207] *Id.* at 903.

[208] *Id.* (quoting *Kruse* at 1169, 1176; *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 898).

[209] *Id.* (quoting *Kruse*, *supra*, at p. 1176).

[210] *Inland Empire* at 903-904.

Finally, the *Inland Empire Center* court concluded that Inland Empire Center had not established "the third *indicium* of implied legislative intent to 'fully occupy' the area of regulating MMD's." Specifically, "Inland Empire Center has not shown that any adverse effect on the public from Riverside's ordinance banning MMD's outweighs the possible benefit to the city."[211] The court wrote that "'[n]either the CUA nor the MMP compels the establishment of local regulations to accommodate medical marijuana dispensaries. The City's enforcement of its licensing and zoning laws and its temporary moratorium on medical marijuana dispensaries do not conflict with the CUA or the MMP.'"[212] The court rejected Inland Empire Center's attempt to distinguish *Kruse* and *Naulls* because the cases involved only temporary moratoriums, stating that the *Kruse* court's preemption analysis applied to the *Inland Empire* case.

In response to Inland Empire Center's argument that subdivisions (f) and (g) of section 11362.768 do not authorize local governments to enact ordinances banning dispensaries, the court looked to the ordinary, common meaning of the terms "ban," "restrict," "restriction," "regulate," and "regulation." "Applying these definitions, [the court] conclude[d] Riverside's prohibition of MMD's in Riverside through enacting a zoning ordinance banning MMD's is a lawful method of limiting the use of property by regulating and restricting the location and establishment of MMD's in the city. [Citation] *A ban or prohibition is simply a type or means of restriction or regulation.*"[213]

Concluding that Riverside's ordinance banning MMDs in the City was "valid and enforceable," the court determined that Inland Empire Center's medical marijuana facility constituted a municipal code violation and therefore a "nuisance per se subject to abatement." The *Inland Empire* court stated that "where the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made . . . ."[214] As Inland Empire Center's dispensary constituted a municipal code violation and nuisance per se, "[t]he trial court therefore did not abuse its discretion in granting Riverside injunctive relief . . . ." The court thus affirmed the judgment.

City of Lake Forest v. Evergreen Holistic Collective ("*Evergreen*")
Evergreen is the most recent published decision on the state law preemption issue.[215] The City of Lake Forest had filed a nuisance abatement action against Evergreen Holistic Collective, alleging that it constituted a *per se* public nuisance under Civil Code Section 3480 because medical marijuana dispensaries are not enumerated as a permitted use under the City's zoning code. The trial court granted the City's request for a preliminary injunction on that basis.

The court of appeal reversed, holding that "local governments may not prohibit medical marijuana dispensaries altogether, with the caveat that the Legislature authorized dispensaries only at sites where medical marijuana is 'collectively or cooperatively ... cultivate[d]' (§

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[211] *Id.* at 904, quoting *Kruse*, *supra*, at p. 1169.

[212] *Id.* (quoting *Kruse*, *supra*, at p. 1176; *Sherwin-Williams*, *supra*, at p. 898).

[213] *Id.* at 905-906 (emphasis added).

[214] *Id.*, at 906 (quoting *Kruse*, *supra*, at 1163-1164).

[215] (2012) 203 Cal.App.4th 141 (petition for California Supreme Court review filed on April 9, 2012).

1362.775.)"[216] Relying on a stated purpose of the CUA "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes," and one of the express legislative purposes of the MMP is to "enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects," the court determined that California law allows for dispensaries as a matter of statewide concern and cities cannot ban marijuana dispensaries.[217]

In the *Evergreen* court's view, Section 11362.775 "place[s] such projects beyond the reach of nuisance abatement under section 11570, if predicated solely on the basis that the project involves medical marijuana activities." The court also concluded that this section precludes nuisance abatement claims under the more general nuisance statute, Civil Code Section 3479.[218] In holding that cities may not prohibit dispensaries based on cities' zoning laws, the court determined that such a ban amounts to a "local contradiction of state law on a matter of statewide concern" and is, thus, preempted. The court characterized the contradiction as "[S]ection 11362.775 authorizes lawful MMD's, but the City prohibits them." The court opined that Civil Code Section 3482, which provides that nothing done under statutory authority can be deemed a nuisance, "applies to prevent a nuisance prosecution" of dispensaries at collective or cooperative cultivation sites.[219]

The court further concluded that members of medical marijuana cultivation projects are exempt from criminal sanctions and nuisance abatement in connection with "medical marijuana activities" at the cultivation site, including sales and distribution. The court interpreted Section 11372.775 as "expressly" identifying and immunizing activities which are otherwise prohibited by the statutes enumerated therein: marijuana possession (§11357), cultivation (§11358), possession for sale or distribution (§11359), transportation (§11360), maintaining a place for the sale, use, or distribution of marijuana (§11366), and using property to grow, store, or distribute marijuana (§11366.5).[220] In reaching this holding, the court rejected the City's more narrow reading of Section 11362.775 as immunizing only the specified conduct of associating to collectively or cooperatively cultivate medical marijuana—not distribution or other activities. This more limited reading of the statute would appear to be more consistent with the California Supreme Court's analysis in *Mentch.*[221]

The *Mentch* court considered section 11362.765, containing language similar to that in Section 11362.775. The *Mentch* court rejected the defendant's broad interpretation of Section 11362.765 and emphasized that its immunity provisions applied only to the conduct specified in the statute, not to all of the conduct encompassed in the listed criminal statutes: "[T]o the extent he went beyond the immunized range of conduct...he would, once again, subject himself to the full force of the criminal law."[222] Despite the close similarities between Sections 11362.765 and

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[216] *Id.* at p. 1424.
[217] *Id.* at 1435-1436.
[218] *Id.* at 1436-1437.
[219] *Id.* at 1448- 1449.
[220] *Id.* at 1436.
[221] 45 Cal.4th 274.
[222] 45 Cal.4th at 292.

11362.775, the *Evergreen* decision does not discuss or cite to *Mentch* in its analysis of the scope of immunities afforded under Section 11362.775.

The court further sought to distinguish precedent, specifically *Naulls*, *Kruse*, and *Hill*. These cases affirmed cities' broad authority to use nuisance abatement to enjoin dispensaries established in violation of their local licensing and zoning laws. The court of appeal instead focused on the common underlying principle that "local ordinances that are 'applicable to all businesses' [citation omitted], such as the requirement of a business license, validly apply to medical marijuana dispensaries and furnish grounds for injunctive relief when violated. Such provisions are facially neutral concerning medical marijuana dispensaries and do not purport to bar them, contrary to Section 11362.775, 'solely on the basis' of dispensary activities the Legislature determined are not a nuisance.

In contrast, Lake Forest did not require a business license and instead attempted to rely on its alleged *per se* nuisance bar against dispensaries.[223] The court further attempted to distinguish *Kruse* and *Naulls* on the premise that they involved temporary moratoria on medical marijuana dispensaries only, and *Hill* on the basis that it concerned the dispensary's "code violations," not the county's subsequent ban on dispensaries.

Finally, the *Evergreen* court noted that *Kruse* "did not address Civil Code section 3482 and, like the City here, did not confront the contradiction inherent in a local ordinance that designates as a nuisance dispensary activities the Legislature has determined in section 11362.775 are not, 'solely on the basis' of those activities, a nuisance. We therefore find the analysis in *Kruse* incomplete and unpersuasive on the issue presented here."[224]

The court interpreted the recent amendment to the MMP of Section 11362.768 as making it "clear by its repeated use of the term 'dispensary' that a dispensary function is authorized by state law." Thus, the statute is not "authority for local government to ban medical marijuana dispensaries."[225] The court primarily focused on subdivisions (f) and (g), stressing the Legislature did not use the words "ban" or "prohibit," in addition to "restrict" and "regulate" in the statute. The court, however, did not address the use of the term "establishment," which arguably authorizes cities to restrict the *establishment* of medical marijuana dispensaries by prohibiting them.

People ex rel. Carmen A. Trutanich v. Jeffrey K. Joseph ("*Joseph*")
The most recent published decision is *Joseph*," published on April 18, 2012. *Joseph* involved a dispensary ("Organica") located on the border of Los Angeles and Culver City. In upholding the trial court judgment granting the motion for summary judgment and permanent injunctive relief brought by the City Attorneys of Los Angeles and Culver City, the court affirmed the cities' authority to rely on the Narcotics Abatement Law (Section 11570 *et seq.*) and Public Nuisance Law (Civil Code Section 3479) and the Unfair Competition Law to abate unlawful medical marijuana dispensaries as nuisances *per se*. This holding is in direct contrast to the *Evergreen*

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[223] 203 Cal.App.4th at 1454.
[224] *Id.*
[225] *Id.* at 1450-1451.

decision, which expressly rejected municipal reliance on these two laws to combat illegal dispensaries.

The *Joseph* court also found that the cities met their burden on summary judgment to show violation of the Unfair Competition Law.[226] Moreover, in marked contrast to *Evergreen* and other case law, the court found that Section 11362.775 only immunizes group cultivation, not sales and not distribution, and further held that only primary caregivers may receive reimbursement under Section 11362.765. The League filed a letter in support of publication of the *Joseph* decision because of the opinion's broad support of local governments' authority to utilize a variety of legal remedies under state law to combat dispensaries their communities.[227]

THE CASE FOR REGULATION AND LOCAL CONTROL

Maintaining local control over medical marijuana activities is of utmost importance to California's cities. Thus, we will attempt to explain the arguments supporting local regulation, as the law exists today, including the authority to ban dispensary operations.

One of the MMP's stated goals is to enhance medical marijuana access for patients and caregivers through collective, cooperative cultivation projects; yet, the law itself provides little guidance for how this can be accomplished. No portion of the MMP has garnered more attention, and more controversy, than this objective. Without clear legislative guidance, California cities and counties, medical marijuana advocates, the Attorney General, and the courts have all struggled with defining the scope and limits of "collective, cooperative cultivation."

It is no secret that, since the MMP was adopted in 2003, sophisticated medical marijuana operations have proliferated throughout the state, ranging from retail dispensaries and storefront collectives, to massive cultivation centers. Law enforcement agencies throughout California have identified dispensaries as both hubs and magnets for illegal activity, such as murders, assaults, armed robberies, burglaries, trespassing, and other crimes. Law enforcement agencies have also found that marijuana purchased from retail dispensaries is often re-sold for non-medicinal uses both inside and outside California. In cities where dispensaries or collectives continue to operate, there are increasing citizen complaints about dispensaries including their second-hand marijuana smoke, noise and loitering. Thus, it should be no surprise that marijuana dispensaries require some form of municipal regulation. While each city will need to decide its own regulatory approach, it is worth reviewing various regulatory methods and challenges commonly faced by cities.

Municipal regulation of dispensaries raises two fundamental questions: (1) are cities even authorized to regulate in this area; and (2) if so, how far can those regulations go? Those questions can be handled in turn.

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[226]Bus. & Prof. Code §17200 et seq.

[227]The *Joseph* decision was ordered published on April 18, 2012.

As discussed above, cities and counties that regulate collectives have been met with many challenges from medical marijuana advocates that such regulations are preempted by the CUA and MMP, are inconsistent with these state laws, and otherwise unlawfully interfere with patients' "rights" to obtain their medication. More recently, some advocates contend that municipal regulations are preempted by the federal CSA. These arguments have, for the most part and until recently, been rejected by the courts.

In this constantly evolving area of the law, we look to the remaining *reported* decisions and recent statutory amendments to the MMP to determine the scope of the municipal regulatory authority.[228] Following the California Supreme Court's grant of review of *Pack, G3,* and *Inland Empire* on January 18, 2012, there has been no reported appellate decision precluding local ordinances allowing medical marijuana collectives. There has been one published decision, *Evergreen*, preventing municipalities from enacting outright bans against dispensaries.

As explained above, article XI, section 7 of the California Constitution provides police power authority to make and enforce within a city all local, police, sanitary, and other ordinances and regulations not in conflict with general laws. Clearly, cities have the authority to enact zoning and other regulations for the public safety and welfare. The issue is how can cities can exercise that authority without running afoul of state and federal preemption.

The leading case on federal preemption is *Pack*, discussed extensively above. The earlier reported cases on federal preemption, *Kha*, *San Diego NORML*, *Qualified Patients*, all conclude that various aspects of the CUA and MMP are not preempted under federal law. Cities wishing to regulate collectives should be aware that the California Supreme Court will ultimately decide the limits of municipal regulation and federal preemption in *Pack,* and, perhaps, in *G3 Holistic* and *Inland Empire*. Additionally, cities should remain cautious that the United States Department of Justice will enforce the federal CSA regardless of the outcome of the pending cases before the California Supreme Court.

Additionally, some argue that Government Code Section 37100 precludes local regulation of medical marijuana dispensaries and collectives, as all use of marijuana is illegal under federal law. This section provides that a city's legislative body may pass ordinances not in conflict with the Constitution and laws of California or the United States. In *dicta*, the *Evergreen* court rejected the notion that Section 37100 requires "lockstep local mirroring of federal law," finding that the supremacy of federal law under the United States Constitution does not extend to dictating the contents of state or local law.[229]

Although the *Pack* decision turns on federal preemption, the court also noted Section 11362.83, which states: "Nothing in this article shall prevent a city or other local governing body from

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[228]Within one month of the California Supreme Court granting review of those three cases, two more reported decisions were issued by the courts of appeal in *Evergreen* and *Colvin, supra*.

[229]203 Cal.App.4th at 1444, fn 8.

adopting and enforcing laws consistent with this article."[230] The court observed that the provision "has been interpreted to permit cities and counties to impose greater restrictions on medical marijuana collectives than those imposed by the MMP."[231]

By its terms, Section 11362.83 allows a city or county to regulate the establishment of dispensaries and their location so long as those regulations are consistent with the provisions of the MMP.[232] As noted in *Kruse*, state law "does not create 'a broad right to use marijuana without hindrance or convenience [citation omitted],' or to dispense marijuana without regard to local zoning and business licensing laws."[233] Thus, it is reasonable to argue that the MMP contemplates, rather than precludes, local regulation of dispensaries. The *Hill* court agreed that, by including Section 11362.83 in the MMP, the Legislature showed it expected and intended that local governments can adopt additional ordinances. To hold otherwise would be to attribute to the Legislature the sanctioning of useless and redundant acts by local governments.[234]

Assembly Bill 1300, which amended Section 11362.83, became effective on January 1, 2012. The amendment further clarifies that the MMP in no way limits a local government's power to adopt and enforce its own laws:

> Nothing in [the MMP] shall prevent a city or other local governing body from adopting and enforcing any of the following: (a) Adopting local ordinances that regulate the location, operation, or establishment of a medical marijuana cooperative or collective; (b) The civil and criminal enforcement of local ordinances described in subdivision (a); and (c) Enacting other laws consistent with this article.[235]

On September 20, 2011, the Governor confirmed local control over marijuana dispensaries under A.B. 1300 when he vetoed S.B. 847,[236] stating: "I have already signed AB 1300 that gave cities and counties authority to regulate medical marijuana dispensaries – an authority I believe they already had. [] This bill [S.B. 847] goes in the opposite direction by preempting local control and prescribing the precise locations where dispensaries may not be located. *Decisions of this kind are best made in cities and counties, not the State Capitol.*"[237]

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[230]The court noted the amendment to section 11362.83, which, according to the court "clarifies the state's position regarding local regulation of medical marijuana collectives, [but which] has no effect on our federal preemption analysis." 199 Cal.App.4th at 1081, fn. 9.

[231]*Id.* at 1080 (citing *Hill*, *supra*, 192 Cal.App.4th at 867-868).

[232]177 Cal.App.4th at 1169.

[233]*Id.* at 1176.

[234]192 Cal.App.4th at 867.

[235]§ 11362.83 (as amended by A.B. 1300).

[236]S.B. 847 proposed to amend Section 11362.768 to provide a distance requirement between residential uses and a marijuana cooperative, collective, dispensary, operator, establishment, or provider.

[237]Governor's Veto Message to the Senate on Senate Bill No. 847 (Sept. 20, 2011) <http://gov.ca.gov/docs/SB_0847/Veto_Message.pdf> (emphasis added).

Additionally, the *Pack* court further referenced subdivisions (f) and (g) of Section 11362.768 in support of the same proposition: no state preemption of local control to regulate medical marijuana activities.

If there was ever doubt about the Legislature's intention to allow local regulation, the newly enacted Section 11362.768, made it even more apparent that local government may regulate collectives. Subdivisions (b) and (f) provide that cities and counties must prohibit collectives from operating within 600 feet of a school, and may add further restrictions on the location and establishment of MMD's.[238] Subsection (g) further exempts from preemption all "local ordinances, adopted prior to January 1, 2011, that regulate the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider."

More specifically, Section 11362.768 restricts the location of medical marijuana cooperatives, collectives, dispensaries, operators, establishments, or providers who possess, cultivate, or distribute medical marijuana under the Medical Marijuana Program Act. Specifically, they cannot be located "within a 600-foot radius of a school."[239] The statute further specifies the entities and individuals to which this code section shall apply and which ones are exempt. Notably, it does not apply to "a licensed residential medical or elder care facility."[240] The section applies "only to a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider that is authorized by law to possess, cultivate, or distribute medical marijuana and that has a storefront or mobile retail outlet which ordinarily requires a local business license."[241]

Section 11362.768 also addresses the ability of a city to adopt ordinances. With respect to the Legislature's intention to allow local governments to regulate marijuana distribution facilities, these two subsections of Section 11362.768 are of particular relevance.

Subdivision (f) unequivocally established the Legislature did not preempt cities and counties from exercising their land use authority over marijuana distribution facilities by stating:

> (f) Nothing in this section shall prohibit a city, county, or city and county from adopting ordinances or policies that *further* restrict the location or *establishment* of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider. [Emphasis added.]

The Legislature left little doubt that a local government has the authority to adopt more restrictive ordinances governing the location of marijuana distribution facilities, not just to schools, but in the first instance. Further, by using the word "establishment," there is a strong argument that the Legislature meant to affirm a locality's right not to permit marijuana distribution facilities at all. The plain meaning of subsection (f) is, among other things, to permit local governments to determine whether they wish to allow marijuana distribution facilities in their jurisdiction.

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[238] *Hill, supra*, 192 Cal.App.4th at 868.
[239] See also *Id.* at 866.
[240] § 11362.768, subd. (d).
[241] § 11362.768, subd. (e).

Subdivision (g) also provides:

> (g) Nothing in this section shall preempt local ordinances, adopted prior to January 1, 2011, that regulate the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider.

As in subsection (f), the Legislature made it clear that there is no preemption of local government land use authority. By expressing its intention not to preempt pre-January 1, 2011, ordinances that regulate the establishment of marijuana distribution facilities, the Legislature "grandfathered" in schemes that effectively prohibit the operation of such facilities. Stated simply, Section 11362.768 demonstrates the Legislature's recognition that localities may have already taken different approaches to regulation of marijuana distribution facilities or may wish to do so in the future, and, as to their location or establishment, the Legislature intended no preemption.

The legislative history is also helpful in making the argument for local regulatory authority. When it was first introduced, A.B. 2650 did not expressly address its effect upon local land use ordinances.[242] Its legislative history reflects concerns that the bill might unduly restrict local regulatory authority. For example, the first Assembly Committee report stated that "[s]ince the passage of SB 420 in 2003, much of the medical marijuana regulation has been determined by local jurisdictions better equipped to resolve issues related to the unique nature of its city or county,"[243] and even medical marijuana supporters criticized that "[t]his legislation usurps the authority of local governments to make their own land-use decisions."[244]

> Furthermore, local land use decisions are best made by City Councils and County Boards of Supervisors based on the individual circumstances in the Community. Usurping this local authority with an arbitrary statewide limit will interfere with the ability of local governments to use their discretion in developing the kinds of regulations that are already proven to protect legal patients and the community at large. Land use issues related to these associations should continue to be made at the local level – just like those for other legal businesses or organizations.[245]

The Bill's author responded by clarifying that A.B. 2650's preemptive intent was limited. Notably, it was to "provide local jurisdictions necessary guidance while allowing them to construct a more restrictive ordinance."[246] The author incorporated this intent into the two savings clauses, subdivisions (f) and (g) of proposed Section 11362.768, quoted above, which

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[242]Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 8, 2010.

[243]Assem. Pub. Saf. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 8, 2010.

[244]Assem. Pub. Saf. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 15, 2010, p. 6, quoting Marijuana Policy Project comment letter.

[245]*Id.* at p. 7, quoting Americans for Safe Access comment letter.

[246]Assem. Com. On Appropriations, analysis of Assem. Bill. No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 15, 2010, p. 1.

remain in the statute as adopted.[247] These provisions effectively favor restrictive local regulations by allowing local governments "to construct a more restrictive ordinance" at any time, but "set[ting] a January 1, 2011 deadline for adopting any local ordinance that is less restrictive than AB 2650."[248]

Subsequent committee reports offered detailed discussions of the local police power and questioned whether any state interference with that plenary authority was appropriate in this area.[249] Significantly, it was never suggested during the legislative process that the existing provisions of the MMP preempt local authority to regulate marijuana-related land uses. Rather, the legislative committee reports repeatedly stressed the breadth of the local police power in this area and the desirability of minimizing state interference.[250] The Legislature acted on this understanding, crafting the provisions of A.B. 2650 to preserve local authority to enact more restrictive ordinances. These efforts would have been pointless, and the savings clauses (f) and (g) mere surplusage, if the MMP already preempted more restrictive local regulations upon marijuana-related land uses. A.B. 2650's savings clauses demonstrate the Legislature's unwillingness to intrude upon local government power to more closely regulate marijuana-related land uses.

The *Evergreen* court recently rejected the above statutory interpretations. What does *Evergreen* mean for cities' ability to regulate medical marijuana dispensaries? *Evergreen* stands for (at least) two propositions: (1) Cities may not completely ban medical marijuana dispensaries; and (2) Dispensaries are authorized only at sites where medical marijuana is collectively or cooperatively cultivated. Assuming, then, that *Evergreen* is or even continues to be binding authority, cities whose ordinances either prohibit dispensaries or allow for them in a manner that does not require collective/cooperative cultivation at the dispensary sites may eventually need to revisit those ordinances.

At first glance, the *Evergreen* opinion, *supra*, changes the playing field with respect to local regulation; however, on closer examination, the impact could be more narrow in scope. The reason is most collectives do not cultivate all, or even most, of their marijuana on-site and thus, would not fall under the *Evergreen* court's protection for certain collectives distributing locally-grown medical marijuana.

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[247]Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended May 28, 2010, p. 3; Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010, p. 3.

[248]Sen. Loc. Gov. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess. as amended Jun. 10, 2010, p. 3; Assem. Com. On Appropriations, analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 15, 2010, p. 1. See also Sen. Pub. Saf. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess., as amended Jun. 10, 2010, p. 4.

[249]Sen. Loc. Gov. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010; Sen. Pub. Saf. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010.

[250]See, e.g., Sen. Loc. Gov. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010, p. 3 ("Local land use decisions that strike a delicate balance between protecting school children and ensuring that patients and caregivers can obtain medical marijuana are best made by city and county officials . . . The Committee may wish to consider whether AB 2650 substitutes an arbitrary, one-size-fits-all standard for local officials' informed judgments about their communities.")

The *Evergreen* decision does not rule out all municipal regulation. For example, the *Evergreen* court expressly did "not consider, for example, a municipal regulatory scheme that permits, subject to specified conditions, medical marijuana dispensaries at cooperative or collective cultivation projects *in certain zoning districts but not in others* within the local jurisdiction... Arguably, such a scheme may be consistent with California medical marijuana law because it does not bar dispensary activities authorized by Section 11362.775 'solely on the basis' that they occur at a collective or cooperative, but instead based on their location in a prohibited zoning district when a permissive district in the jurisdiction is available instead."[251] Such a scheme would likely not run afoul of *Evergreen* because permissible dispensaries would be allowed somewhere within the municipality.

Although the *Evergreen* court attempted to distinguish *Kruse*, it notably found the prior decision to be "incomplete" and "unpersuasive" on the issue before the court. Moreover, the court's analysis in *Kruse* is, in many respects, starkly at odds with the *Evergreen* court's analysis.

For instance, in *Kruse*, the court rejected defendant's reliance on the same language from the CUA ("t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes") upon which the *Evergreen* court partially based its finding that California law allows dispensaries as a matter of statewide concern. The *Kruse* court concluded that this language did not support an argument that the CUA granted a broad right to obtain medical marijuana. Citing to *Ross v. RagingWire Telecommunications, Inc.*, *supra*, the *Kruse* court followed the California Supreme Court's "determin[ation] that the 'limited' right granted by the CUA was the right of a patient or primary caregiver to possess or cultivate marijuana for the patient's personal medical use upon the approval of a physician without becoming subject to criminal liability. (*Ross*, at p. 929.)"[252] The statement of voter intent in the CUA "on which defendants rely as the basis for claiming that the availability of medical marijuana is a matter of statewide concern, does not create 'a broad right to use marijuana without hindrance or inconvenience' (*Ross*, *supra*, 42 Cal. 4th at p. 928), or to dispense marijuana without regard to local zoning and business licensing laws."[253]

The *Kruse* decision states that Claremont's zoning and moratorium on medical marijuana dispensaries was not preempted by the CUA or MMP.[254] Medical marijuana dispensaries, as a land use, are not mentioned in the text or history of the CUA or MMP. The CUA decriminalizes possession and cultivation of marijuana for personal medical use. The MMP provides affirmative defenses and arrest immunity for certain use and cultivation of medical marijuana, as well as the possession for sale, transportation or furnishing, maintaining a location for selling, and managing a location for storage or distribution, of marijuana - activities essential to the collective cultivation and distribution of the crop. Neither law addresses the licensing of medical marijuana collectives, nor do they expressly prohibit local governments from regulating such collectives.

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[251] *Evergreen*, *supra*, 203 Cal.App.4th at 1452-1453 (emphasis in decision).

[252] *Kruse*, *supra*, 177 Cal.App.4th at 1174.

[253] *Id.* at 1175.

[254] 177 Cal.App.4th at 1168.

Simply, the *Kruse* court found that nothing in the text or history of the law precluded the City's adoption of a temporary moratorium on issuing permits and licenses to medical marijuana dispensaries, or the City's enforcement of licensing and zoning requirements applicable to such dispensaries. Neither the CUA nor the MMP compel the establishment of local regulations to accommodate medical marijuana dispensaries. Neither statute addresses, much less completely covers the areas of land use, zoning and business licensing. Thus, the City's temporary moratorium on medical marijuana dispensaries and zoning was a valid, local regulation.[255]

The now unpublished decision in *Inland Empire Center* also followed the analysis in *Kruse*, finding that the CUA and MMP do not preclude local governments from regulating collectives through zoning ordinances and business licensing laws. The court also found that the CUA and MMP do not expressly mandate that dispensaries shall be permitted within every city and county, nor do the laws prohibit cities and counties from banning dispensaries. The operative provisions of the CUA and MMP do not directly speak to local zoning laws.[256] Given *Inland Empire Center's* direct analysis of this issue, we expect the Supreme Court to opine on this position.

Another example of the divergent legal analyses of the two courts, which could reasonably be viewed as a "split," can be found in this holding from *Kruse*: "Neither the CUA nor the MMP compels the establishment of local regulations to accommodate medical marijuana dispensaries. The City's enforcement of its licensing and zoning laws and its temporary moratorium on medical marijuana dispensaries do not conflict with the CUA or the MMP."[257] It is difficult to square this holding with that in *Evergreen* requiring cities to accommodate medical marijuana dispensaries at cultivation sites and prohibiting reliance on zoning laws to preclude such uses.

As noted, when opinions of the courts of appeal conflict, the trial court must apply its own wisdom to the matter and choose between the opinions.[258] As a practical matter, a Superior Court ordinarily will follow an appellate opinion emanating from its own district even though it is not bound to do so. Superior courts in other appellate districts may pick and choose between conflicting lines of authority. This dilemma will endure until the Supreme Court resolves the conflict, or the Legislature clears up the uncertainty by legislation.[259] Thus, assuming a split in authority, superior courts throughout the state may choose between the *Kruse* and *Evergreen* opinions.

Another important consideration is the strong likelihood the California Supreme Court will either grant review of the *Evergreen* decision or order its depublication. Given the court's decision to review two other recent published appellate decisions concerning cities' ability to ban or regulate medical marijuana dispensaries (*Pack* and *Inland Empire), and* insofar as the decisions in *Inland Empire* and *G3 Holistic (unpublished)* squarely held that cities can ban collectives, some action by the Supreme Court seems inevitable.

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[255] 177 Cal.App.4th at 1176.

[256] 200 Cal.App.4th 885.

[257] *Id.* at 1176.

[258] *McCallum v. McCallum* (1987) 190 Cal. App. 3d 308, 315, fn. 4.

[259] *Id.*

It has come to the authors' attention that many cities throughout the state that have bans on dispensaries have received a letter from Americans for Safe Access urging cities to rescind their bans in light of the *Evergreen* decision. As cities await the Supreme Court's ruling on pending request for review and/or depublication, it may be prudent to adopt a "wait and see" approach and refrain from taking legislative action premised on an assumption that *Evergreen* is and will remain binding authority.

Another reason many cities want to consider banning the use is the federal government's recent increase in enforcement, discussed below. The federal government has adopted the position that state and local laws which license the large-scale cultivation and manufacture of marijuana stand as an obstacle to federal enforcement efforts. With all of the legal uncertainty and federal enforcement activity, many cities are eager to adopt bans prohibiting the use. For now, cities should wait to see what the California Supreme Court decides on *Evergreen* before changing their regulations as the law is just too uncertain.

Regulation Issues

Cities that allow one or more dispensaries tend to rely upon the Guidelines. A few courts have recognized the Guidelines as allowing for dispensaries that qualify as "cooperatives" or "collectives" and otherwise comply with state law, as interpreted by the Attorney General.[260] For example, *Evergreen*, in *dicta*, discussed the validity of a potential municipal regulatory scheme that would permit, subject to specified conditions, medical marijuana dispensaries at cooperative or collective cultivation projects in certain zoning districts but not in others within the local jurisdiction. Among other factors, *Evergreen* suggests that such a scheme would have to be evaluated against the Legislature's intent to permit locally-grown, locally-accessible medical marijuana for patients, including those whose medical condition may not allow them to travel far, nor allow their primary caregivers to leave their side for long. Again, it is unclear whether the *Evergreen* decision will continue as precedent now that the City of Lake Forest has petitioned the California Supreme Court to review the case.

In the meantime, cities continue implementing various regulatory options. The most obvious methods for regulating the distribution of medical marijuana are through a zoning ordinance or regulatory business license ordinance — or a combination of both. Some cities require that collectives obtain a conditional use permit, while others have found that the business license is the preferred mechanism for local control. For example, after a few years of regulating collectives, the City of West Hollywood wanted to examine a dispensary operator's criminal background and did not want the use to run indefinitely with the land through a conditional use permit. Consequently, the city's medical marijuana collectives are a permitted use in certain commercial zoning districts subject to distancing requirements from sensitive uses and other collectives, with a cap of four facilities operating at one time.

West Hollywood consulted with existing collective operators to draft the operating requirements in its regulatory business license ordinance.[261] The requirements include criminal background

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[260] *People v. Hochanadel* (2009) 176 Cal.App.4th 347, 363.

[261] West Hollywood Municipal Code Chapter 5.70.

checks, compliance with the Guidelines, security requirements, limitations on operating hours, and a requirement that marijuana not be consumed on site. Also, collectives cannot occupy a space larger than 4,000 square feet, may not issue doctor recommendations on-site and are subject to limitations on the source of the collective's marijuana. The city holds bimonthly meetings with law enforcement and collective operators to address any negative impacts associated with the operations.

Other cities effectively regulate collectives by requiring a use permit and imposing strict distancing requirements and operating standards.[262] For example, Arcata also subjects each collective to an annual performance review.

Los Angeles' experience has been unique in many respects. After passing an ordinance to regulate collective cultivation in 2010, the city was hit with over 40 lawsuits filed by approximately 100 dispensaries. While the legal battle played (and continues to play) out, the City Attorney's Office proceeded to try various approaches to shutting down illegal dispensaries, which were multiplying at an alarming rate. These enforcement mechanisms include the Narcotics Abatement Law,[263] which authorizes "the city attorney of any incorporated city," to bring an action "in the name of the people."[264] Remedies under this law include injunctive relief, civil penalties, investigative costs, and attorneys' fees.[265]

The Unfair Competition Law, Business and Professions Code Section 17200 *et seq.*, is another enforcement tool successfully utilized by the Los Angeles City Attorney's Office. The statutory scheme applies to any "unlawful, unfair or fraudulent business act or practice" and can be used, *inter alia*, by a city attorney or city prosecutor under certain circumstances. It provides for both injunctive relief,[266]and a civil penalty of $2500 per violation. Los Angeles has also relied on the "Sherman Law,"[267] which primarily applies to drug labeling violations. For instance, the failure to include a label indicating the manufacturer and quantity of contents constitutes a violation under this law.[268] Finally, Los Angeles recently used Civil Code Section 3486, a narcotics eviction pilot program available to specified cities and counties, including Long Beach, Palmdale, San Diego, Oakland and Sacramento.

Most cities that permit collectives have determined that the distancing requirement and a cap on the number of facilities are an effective ways to prevent an over-concentration of this use. The combination of effective regulatory mechanism and the working relationship with collective

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[262]See e.g., Arcata Municipal Code Section 9.42.105; Santa Cruz Municipal Code Section 24.12.1300; and Malibu Municipal Code Section 17.66.120.

[263]§11570 (providing, in pertinent part, "Every building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance...is a nuisance.")

[264]§11571.

[265]The *Evergreen* court expressly disapproved reliance on Section 11570. Los Angeles, however, has used it successfully on several occasions.

[266]Bus.& Prof. §17204

[267]Sherman Food, Drug & Cosmetics Law, § 109875 *et seq.*

[268]§111340.

operators has also proven to meet the goals of supporting access to medical marijuana while controlling negative impacts and the proliferation of collectives in a city.

Cities must also review business license applications carefully to ensure that dispensaries are not requesting permits under the guise of a pharmacy, plant nursery, retail store, or other similar use. Once operating, it is much more difficult to shut an illicit use down.

DEPARTMENT OF JUSTICE ENFORCEMENT OF THE CSA

While cities fight to preserve local control, the federal government has become increasingly more concerned with California's medical marijuana program. Since the passage of Proposition 215 in 1996, California cities that do not want to allow these establishments have, for the most part, been on their own in their efforts to confront the proliferation of marijuana distribution facilities. Local prosecutors lacked either the support or resources to prosecute commercial operations. Also, the controversial Guidelines are problematic for California's district attorneys as the Guidelines are admittedly outdated and based on the Legislature's vague and incomplete medical marijuana laws.

Moreover, many observers on both sides of the medical marijuana debate, believed that the United States Department of Justice would continue to largely ignore California's burgeoning medical marijuana industry. In October, 2009, United States Attorney General Eric Holder announced the Department of Justice would not focus its resources in states with medical marijuana laws.[269] Indeed, some city law enforcement officials have noted that the explosive growth in marijuana distribution facilities began shortly after Eric Holder made an earlier informal announcement in March, 2009, and that following his formal memorandum in October, 2009, the dispensary numbers accelerated at an even faster pace.

All of that dramatically changed on October 7, 2011, when the four California-based United States Attorneys announced coordinated federal enforcement actions targeting the commercial marijuana industry in California. In a press conference widely reported throughout California and the United States, each of the four United States Attorneys explained their joint announcement:

Benjamin Wagner, United States Attorney for the Eastern District of California, said: "Large commercial operations cloak their moneymaking activities in the guise of helping sick people when in fact they are helping themselves. Our interest is in enforcing federal criminal law, not prosecuting sick people and those who are caring for them. We are making these announcements together today so that the message is absolutely clear that commercial marijuana operations are illegal under federal law, and that we will enforce federal law."[270]

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[269]United States Department of Justice, *Memorandum for Selected United States Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana,* October 19, 2009, http://blogs.justice.gov/main/archives/192

[270]http://www.justice.gov/usao/cae/news/docs/2011/10-07-11CalifMarijuanaEnforcement.html

Andre Birotte Jr., the United States Attorney for the Central District of California, stated: "The federal enforcement actions are aimed at commercial marijuana operations, including marijuana grows, marijuana stores and mobile delivery services - all illegal activities that generate huge profits. The marijuana industry is controlled by profiteers who distribute marijuana to generate massive and illegal profits."[271]

Laura Duffy, the United States Attorney for the Southern District of California, said: "The California marijuana industry is not about providing medicine to the sick. It's a pervasive for-profit industry that violates federal law. In addition to damaging our environment, this industry is creating significant negative consequences, in California and throughout the nation. As the number one marijuana producing state in the country, California is exporting not just marijuana but all the serious repercussions that come with it, including significant public safety issues and perhaps irreparable harm to our youth."[272]

Melinda Haag, the United States Attorney for the Northern District of California, commented: "Marijuana stores operating in proximity to schools, parks, and other areas where children are present send the wrong message to those in our society who are the most impressionable. In addition, the huge profits generated by these stores, and the value of their inventory, present a danger that the stores will become a magnet for crime, which jeopardizes the safety of nearby children. Although our initial efforts in the Northern District focus on only certain marijuana stores, we will almost certainly be taking actions against others. None are immune from action by the federal government."[273]

Immediately preceding the announcement, letters were sent to property owners and lien holders of properties where commercial marijuana stores and grows are located. The letters contained warnings the recipients risk losing their property and any rents received.

In the populous Central District, the enforcement actions focused on the City of Lake Forest and surrounding cities in southern Orange County, as well as upon two other target areas in adjacent Los Angeles and Riverside counties. Months earlier, Lake Forest's City Attorney had written a letter requesting the help of the United States Attorney, Andre Birotte. The letter explained how the City of Lake Forest had commenced civil nuisance abatement actions against all known dispensaries and obtained preliminary injunctions only to have each one immediately stayed by the court of appeal. Indeed, the court of appeal issued stay orders that prevented the city from obtaining preliminary injunctions against two dispensaries operating within 600 feet of a school in violation of Section 11362.768.[274]

In the City of San Diego, federal law enforcement officials issued a 77-count indictment alleging numerous marijuana sales to underage persons. In the joint press conference, Laura Duffy showed photos of packaged marijuana looking like candy and other snack products.

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[271] *Id.*

[272] *Id.*

[273] *Id.*

[274] As of this time, there is still no final resolution by the court of appeal on the two writ proceedings by the dispensaries.

Not only are the four United States Attorneys and their respective offices enforcing the CSA, but the federal DEA and the IRS, too, are increasing their attacks on commercial marijuana operations: "The DEA and our partners are committed to attacking large-scale drug trafficking organizations, including those that attempt to use law to shield their illicit activities from federal law enforcement and prosecution. Congress has determined marijuana is a dangerous drug and that its distribution and sale is a serious crime. It also provides a significant source of revenue for violent gangs and drug organizations. The DEA will not look the other way while these criminal organizations conduct their illicit schemes under the false pretense of legitimate business."[275]

As if to dispel any notion the four United States Attorneys were acting on their own, United States Deputy Attorney General James Cole stated: "The actions taken today in California by our U.S. Attorneys and their law enforcement partners are consistent with the Department's commitment to enforcing the Controlled Substances Act (CSA), in all states. The Department has maintained that we will not focus our investigative and prosecutorial resources on individual patients with serious illnesses like cancer or their immediate caregivers. However, U.S. Attorneys continue to have the authority to prosecute significant violations of the CSA, and related federal laws."

Today the federal enforcement actions continue in the following three main categories:

1. Civil asset forfeiture lawsuits against property owners whose buildings are used for marijuana distribution, which includes, in some cases, marijuana sales in violation of local ordinances;

2. Issuance of warning letters to property owners and "lienholders of properties" where marijuana sales are taking place;[276] and

3. Criminal cases against commercial marijuana operations.

At this time, it is uncertain how far the United States Department of Justice will go in closing medical marijuana operations in California. As the *Pack* court cautions, cities and their officials should be aware of the risks of federal enforcement.

CONCLUSION

No matter where one stands on the issue of medical marijuana, most everyone can agree that California's medical marijuana laws are uncertain. One of the purposes of the CUA was to "encourage the state and federal government to implement a plan to provide for the safe and affordable distribution of medical marijuana." That has not yet happened. While the California Supreme Court can provide needed guidance in *Pack, G3 Holistics*, *Inland Empire* and, possibly,

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[275]Victor Song, Chief, IRS Criminal Investigation, said: "IRS Criminal Investigation is proud to work with our enforcement partners and lend its financial expertise to this effort. We will continue to use the federal asset forfeiture laws to take the profits from criminal enterprises." *Ibid.*

[276]For an example of Department of Justice letters (redacted) to property owners in Colorado see http://www.justice.gov/dea/pubs/states/newsrel/2012/den011212.pdf

Evergreen, the federal government's increased enforcement of the CSA puts the future of California's existing medical marijuana law into question.

Until California and the federal government come to an understanding on medical marijuana, California's cities will continue to be caught in the middle of the conflicting federal and state law and policies. For this reason, cities must be able to fully exercise their own respective police power and land use authority.

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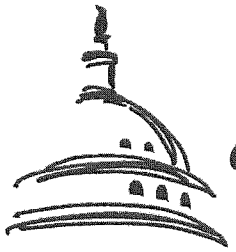

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Marijuana: Medical and Retail—Selected Legal Issues

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April 8, 2015

Congressional Research Service
7-5700
www.crs.gov
R43435

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

The federal Controlled Substances Act (CSA) outlaws the possession, cultivation, and distribution of marijuana except for authorized research. More than 20 states have regulatory schemes that allow possession, cultivation, and distribution of marijuana for medicinal purposes. Four have revenue regimes that allow possession, cultivation, and sale generally. The U.S. Constitution's Supremacy Clause preempts any state law that conflicts with federal law. Although there is some division, the majority of state courts have concluded that the federal-state marijuana law conflict does not require preemption of state medical marijuana laws. The legal consequences of a CSA violation, however, remain in place. Nevertheless, current federal criminal enforcement guidelines counsel confining investigations and prosecutions to the most egregious affront to federal interests.

Legal and ethical considerations limit the extent to which an attorney may advise and assist a client intent on participating in his or her state's medical or recreational marijuana system. Bar associations differ on the precise boundaries of those limitations.

State medical marijuana laws grant registered patients, their doctors, and providers immunity from the consequences of state law. The Washington, Colorado, Oregon, and Alaska retail marijuana regimes authorize the commercial exploitation of the marijuana market in small taxable doses.

The present and potential consequences of a CSA violation can be substantial. Cultivation or sale of marijuana on all but the smallest scale invites a five-year mandatory minimum prison term. Revenues and the property used to generate them may merely be awaiting federal collection under federal forfeiture laws. Federal tax laws deny marijuana entrepreneurs the benefits available to other businesses. Banks may afford marijuana merchants financial services only if the bank files a suspicious activity report (SAR) for every marijuana-related transaction that exceed certain monetary thresholds, and only if it conducts a level of due diligence into its customers' activities sufficient to unearth any affront to federal interests.

Marijuana users may not possess a firearm or ammunition. They may not hold federal security clearances. They may not operate commercial trucks, buses, trains, or planes. Federal contractors and private employers may be free to refuse to hire them and to fire them. If fired, they may be ineligible for unemployment compensation. They may be denied federally assisted housing.

At the heart of the federal-state conflict lies a disagreement over dangers and benefits inherent in marijuana use. The CSA authorizes research on controlled substances, including those in Schedule I such as marijuana, that may address those questions. Members have introduced a number of bills in the 114th Congress that speak to the conflict. Additionally, a few marijuana-related provisions were enacted into law late in the 113th Congress.

This report is available in an abridged form, without footnotes or citations to authority, as CRS Report R43437, *Marijuana: Medical and Retail—An Abbreviated View of Selected Legal Issues*, by Todd Garvey and Charles Doyle. Portions of this report have been borrowed from CRS Report R43034, *State Legalization of Recreational Marijuana: Selected Legal Issues*, by Todd Garvey and Brian T. Yeh.

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Introduction

Federal law classifies marijuana as a Schedule I Controlled Substance.[1] As a result, it is a federal crime to grow, sell, or merely possess the drug. In addition to facing the prospect of a federal criminal prosecution, those who violate the federal Controlled Substances Act (CSA) may suffer a number of additional adverse consequences under federal law. For example, federal authorities may confiscate any property used to grow marijuana or facilitate its sale or use; marijuana users may lose their jobs, their homes, or their right to possess a firearm or ammunition; and sellers of marijuana may lose the tax benefits and banking services that other merchants enjoy, and ultimately their businesses.

Nevertheless, without federal statutory sanction, more than 20 states have established medical marijuana regulatory regimes. Four have gone further and "legalized" marijuana under state recreational marijuana laws.[2] State officials lack the constitutional authority necessary to trump conflicting federal law. Federal officials, however, lack the unlimited resources necessary to trump the impact of conflicting state law.

The following is an analysis of some of the legal issues the situation has generated and some of the proposals to resolve them.

Background

Federal regulation of the drugs, chemicals, and plants now considered controlled substances began with the Harrison Narcotics Act of 1914.[3] Relying upon its constitutional power to tax, regulate commerce, and implement the nation's treaty obligations,[4] Congress used the legislation to establish a system under which it taxed lawful medicinal use and proscribed abuse.[5]

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[1] Section 202(c) of the Controlled Substances Act (21 U.S.C. §812(c), Sch.I(c)(10)).

[2] As of the date of this report, the retail marijuana laws in Alaska and Oregon had been enacted but were not yet operational. The terms "recreational marijuana laws" and "retail marijuana laws" are used interchangeably in this report. Some legislators, advocates, and commentators refer to the laws alternatively as "recreational marijuana laws," "retail marijuana laws," "adult social marijuana laws," or "states' rights marijuana laws." *E.g.*, Malanie, Reid, The Quagmire that Nobody in the Federal Government Wants to Talk About: Marijuana, 44 N.MEX. L.REV. 169, 171 (2014) ("Colorado and Washington have legalized marijuana use for recreational purposes"); Sam Kamin & Eli Wald, Marijuana Lawyers: Outlaws or Crusaders, 91 ORE. L. REV. 869, 878 n.35 (2013)("Many in the marijuana law reform movement dislike the term 'recreational use' and prefer the phrase 'adult use.' ... 'I don't use the term recreational, I prefer adult social use'"); H.R. 964 (Respect States' and Citizens' Rights Act of 2013); Colorado Retail Marijuana Code, COLO. REV. STAT. ANN. §§12-43.4-101, *et seq*.

[3] 38 Stat. 785 (1914).

[4] U.S. Const. Art. I, §8, cls. 1, 3, 18; Art. II, §2, cl.2.

[5] H.Rept. 63-23, at 1 (1913)("... [T]he obligations by which [the United States] is bound by virtue of the international opium convention signed at the Hague January 23, 1912, should be sufficient evidence of the necessity for the passage of Federal legislation to control our foreign and interstate traffic in opium, coca leaves, their salts, derivatives, and preparations.... But there is a real and, one might say, even desperate need of Federal legislation to control our foreign and interstate traffic in habit-forming drugs, and to aid both directly and indirectly the States more effectually to enforce their police laws designed to restrict narcotics to legitimate medical channels"), quoted in accord, S.Rept. 63-258, at 3 (1914).

Little more than two decades later, Congress supplemented the Harrison Act with the Marihuana Tax Act of 1937,[6] explicitly noting reliance on its tax, commerce, and territorial powers.[7] The Marihuana Act replicated the Harrison Act's procedures in large measure[8] and adopted by cross-reference the Harrison Act's penalty structure.[9] It became apparent over time, however, that the Marihuana Act served no real revenue purpose and in fact had "become, in effect, solely a criminal law imposing sanctions upon persons who [sold], acquire[d], or possess[ed] marihuana."[10]

This proved problematic when, in the late 1960s, the Supreme Court pointed out the Fifth Amendment difficulties inherent in a tax-based enforcement structure like that of the Harrison and Marihuana Tax Acts. The Court in *Marchetti* observed that a gambler's "obligations to register and to pay the [federal] occupational tax created ... real and appreciable ... hazards of self-incrimination" under federal and state anti-gambling laws.[11] The same day, in *Haynes,* it held that by the same token "the constitutional privilege against self-incrimination provides a full defense to prosecutions either for failure to register a firearm ... or for possession of an unregistered firearm" under the tax-based structure of the National Firearms Act.[12] Finally, in *Leahy*, it struck closer to home. There, it held that the Fifth Amendment privilege against self-incrimination provided a full defense to a charge of transporting marijuana acquired without paying the Marihuana Tax Act transfer tax.[13]

Within months, the Senate Judiciary Committee reported out a Commerce Clause/treaty-based controlled substances proposal that featured most of the components ultimately found in the Controlled Substances Act.[14] It classified marijuana with the most tightly regulated substances in

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[6] 50 Stat. 551 (1937).

[7] H.Rept. 75-792 at 1-3. (1937)("The purpose of H.R. 6906 is to employ the Federal taxing power to raise revenue from the marihuana drug traffic and to discourage the widespread use of the drug by smokers and drug addicts.... This bill is modeled upon both the Harrison Narcotics Act and the National Firearms Act, which were designed to accomplish these same general objectives with respect to opium and coca leaves, and firearms, respectively.... Your committee has examined the constitutionality of this bill and is satisfied that it is a valid revenue measure. The law is well settled that a revenue measure will not be held invalid as an attempt to regulate, under the guise of the taxing power, a subject matter reserved to the States under the tenth amendment, if it appears on its face to be a revenue measure and contains no regulatory provisions except those reasonably related to the collection of the revenue.... In addition, certain provisions of the bill may be sustained under the power of Congress to regulate commerce and the power of Congress over the District of Columbia and Territories and possessions of the United States"); see also, S.Rept. 75-900, at 2-3 (1937)("The purpose of H.R. 6906 is to employ the Federal taxing power to raise revenue from the marihuana drug traffic and to discourage the widespread use of the drug by smokers an drug addicts.... This bill is modeled upon both the Harrison Narcotics Act and the National Firearms Act, which were designed to accomplish these same general objectives with respect to opium and coca leaves, and firearms, respectively")(but including no other explicit reference to constitutional authority).

[8] Marihuana Tax Act, §§2-14, 50 Stat. 551-56 (1937).

[9] *Id.* at §7(e), 50 Stat. 555 (1937)("All provisions of law (including penalties) applicable in respect of the taxes imposed by the Act of December 17, 1914 (38 Stat. 785; U.S.C. 1934 ed. title 26, §§1040-1061, 1383-1391), as amended, shall, insofar as not inconsistent with this Act, be applicable in respect of the taxes imposed by this Act").

[10] The President's Commission on Law Enforcement and Administration of Justice: Task Force on Narcotics and Drug Abuse, *Task Force Report: Narcotics and Drug Abuse*, 12 (1967).

[11] Marchetti v. United States, 390 U.S. 39, 48 (1968); see also, Grosso v. United States, 390 U.S. 62, 64-6 (1968).

[12] Haynes v. United States, 390 U.S. 85, 100 (1968).

[13] Leahy v. United States, 395 U.S. 6, 29 (1969).

[14] S.Rept. 91-613 (1969). In Gonzales v. Raich, the U.S. Supreme Court ruled that Congress had the constitutional authority under the Commerce Clause to prohibit the wholly intrastate cultivation or possession of marijuana for medical purposes, despite state laws that permit such activity. 545 U.S. 1, 32-33 (2005); for more information about (continued...)

Schedule I, but punished its abuse less severely, explaining in its critique of an earlier proposal that

> [T]o impose the same high mandatory minimum penalties for marihuana-related offenses as for LSD and heroin offenses is inequitable in the face of a considerable amount of evidence that marihuana is significantly less harmful and dangerous than LSD or heroin.
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> It had also become apparent that the severity of penalties including the length of sentences does not affect the extent of drug abuse and other drug-related violations. The basic consideration here was that the increasingly longer sentences that had been legislated in the past had not shown the expected overall reduction in drug law violations. The opposite had been true notably in the case of marihuana. Under Federal law and under many States laws marihuana violations carry the same strict penalties that are applicable to hard narcotics, yet marijuana violations have almost doubled in the last 2 years alone.
>
> In addition, the severe drug laws specifically as applied to marihuana have helped create a serious clash between segments of the youth generation and the Government. These youths consider the marihuana laws hypocritical and unjust. Because of these laws the marihuana issue has contributed to the broader problem of alienation of youth from the general society and to a general feeling of disrespect for the law and judicial process.[15]

Consistent with this view, it called for the establishment of a study commission to examine and make recommendations on the troubling marijuana-related issues.[16] The Commission's final report recommended the legalization of possession of marijuana for private personal use, but that the Controlled Substance Act otherwise remain unchanged.[17]

Controlled Substances Act Today

Congress enacted the Controlled Substances Act (CSA)[18] as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.[19] The purpose of the CSA is to regulate and facilitate the manufacture, distribution, and use of controlled substances for legitimate medical, scientific, research, and industrial purposes, and to prevent these substances from being diverted for illegal purposes. The CSA places various plants, drugs, and chemicals (such as narcotics, stimulants, depressants, hallucinogens, and anabolic steroids) into one of five schedules based on the substance's medical use, potential for abuse, and safety or dependence liability.[20]

(...continued)

this decision, see CRS Report RL32844, *The Power to Regulate Commerce: Limits on Congressional Power*, by Kenneth R. Thomas.

[15] S.Rept. 91-613 at 1-2.

[16] *Id.* at 10 ("The study shall include, but need not be limited to, the following matters: 1. Identification of existing gaps in our knowledge of marihuana. 2. An intensive examination of the important medical and social aspects of marihuana use. 3. Surveys of the extent and nature of marihuana use. 4. Studies of the pharmacology and effects of marihuana. 5. Studies of the relation of marihuana use to crime and juvenile delinquency. 6. Studies of the relation between marihuana and the use of other drugs").

[17] National Commission on Marihuana and Drug Abuse, *Drug Use in America: Problem in Prospective*, 458, 466 (2d Rep. 1973).

[18] 21 U.S.C. §§801, *et seq.*

[19] P.L. 91-513, 84 Stat. 1236 (1970).

[20] 21 U.S.C. §§811-812.

Schedule I substances are deemed to have no currently accepted medical use in treatment and can be used only in very limited circumstances, whereas substances classified in Schedules II, III, IV, and V have recognized medical uses and may be manufactured, distributed, and used in accordance with the CSA. The CSA requires persons who handle controlled substances (such as drug manufacturers, wholesale distributors, doctors, hospitals, pharmacies, and scientific researchers) to register with the Drug Enforcement Administration (DEA) in the U.S. Department of Justice, the federal agency that administers and enforces the CSA.[21] Such registrants are subject to strict requirements regarding drug security, recordkeeping, reporting, and maintaining production quotas, in order to minimize theft and diversion.[22]

Because controlled substances classified as Schedule I drugs have "a high potential for abuse" with "no currently accepted medical use in treatment in the United States" and lack "accepted safety for use of the drug [] under medical supervisions,"[23] they may not be dispensed under a prescription, and such substances may be used only for bona fide, federal government-approved research studies.[24] Under the CSA, only doctors licensed by the Drug Enforcement Administration (DEA) are allowed to prescribe controlled substances listed in Schedules II-V to patients.[25] Federal regulations stipulate that a lawful prescription for a controlled substance may be issued only "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."[26]

The CSA establishes an administrative mechanism for substances to be controlled (added to a schedule); decontrolled (removed from the scheduling framework altogether); and rescheduled or transferred from one schedule to another.[27] Federal rulemaking proceedings to add, delete, or change the schedule of a drug or substance may be initiated by the DEA, the U.S. Department of Health and Human Services (HHS), or by petition by any interested person.[28] Petitions for rescheduling marijuana have been largely unsuccessful.[29] Congress may also change the scheduling status of a drug or substance through legislation.

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[21] The Attorney General delegated his authority under the CSA to the DEA Administrator pursuant to 21 U.S.C. §871(a); 28 C.F.R. §0.100(b).

[22] For more information about these requirements, *see* CRS Report RL34635, *The Controlled Substances Act: Regulatory Requirements*, by Brian T. Yeh.

[23] 21 U.S.C. §812(b)(1).

[24] 21 U.S.C. §823(f).

[25] *See* 21 C.F.R. §1306.03 (persons entitled to issue prescriptions).

[26] 21 C.F.R. §1306.04; United States v. Moore, 423 U.S. 122 (1975).

[27] The procedures for these actions are found at 21 U.S.C. §811.

[28] 21 U.S.C. §811(a).

[29] At one point an administrative law judge did recommend rescheduling, but that represents the high water mark for the petition efforts; *see, generally*, Americans for Safe Access v. DEA, 706 F.3d 438 (D.C. Cir. 2013); and Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131, 1133 (D.C. 1994), citing, National Organization for the Reform of Marijuana Laws v. Ingersoll, 497 F.2d 654 (D.C. Cir. 1974); National Organization for the Reform of Marijuana Laws v Drug Enforcement Admin., 559 F.2d 735 (D.C. Cir. 1977); National Organization for the Reform of Marijuana Laws v. Dept of Health, Ed. and Welfare, No. 79-1660 (D.C. Cir. Oct. 16, 1980); Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 930 F.2d 936 (D.C. Cir. 1991).

Penalties

Federal civil and criminal penalties are available for anyone who manufactures, distributes, imports, or possesses controlled substances in violation of the CSA (both "regulatory" offenses as well as illicit drug trafficking and possession).[30]

When Congress enacted the CSA in 1970, marijuana was classified as a Schedule I drug.[31] Today, marijuana is still categorized as a Schedule I controlled substance and is therefore subject to the most severe restrictions contained within the CSA. Pursuant to the CSA, the unauthorized cultivation, distribution, or possession of marijuana is a federal crime.[32] Although various factors contribute to the ultimate sentence received, the mere possession of marijuana generally constitutes a misdemeanor subject to up to one year imprisonment and a minimum fine of $1,000.[33] A violation of the federal "simple possession" statute that occurs after a single prior conviction under any federal or state drug law triggers a mandatory minimum fine of $2,500 and a minimum imprisonment term of 15 days (up to a maximum of two years); if the defendant has multiple prior drug offense convictions at the time of his or her federal simple possession offense, the sentencing court must impose a mandatory minimum fine of $5,000 and a mandatory minimum imprisonment term of 90 days (up to a maximum term of three years).[34] On the other hand, the cultivation or distribution of marijuana, or the possession of marijuana with the intent to distribute, is subject to more severe penalties, ranging from imprisonment for five years to imprisonment for life.[35] Moreover, property associated with the offense may be confiscated without or with any prior or accompanying criminal conviction.[36]

Forfeiture

Either in addition to, or in lieu of, bringing criminal prosecutions, the Department of Justice (DOJ) may choose to rely more heavily on the civil forfeiture provisions of the CSA in order to disrupt the operation of marijuana dispensaries and production facilities. Forfeiture is a penalty associated with a particular crime in which property is confiscated or otherwise divested from the

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[30] For a detailed description of the CSA's civil and criminal provisions, *see* CRS Report RL30722, *Drug Offenses: Maximum Fines and Terms of Imprisonment for Violation of the Federal Controlled Substances Act and Related Laws*, by Brian T. Yeh.

[31] 21 U.S.C. §812(c).

[32] Very narrow exceptions to the federal prohibition do exist. For example, one may legally use marijuana if participating in a U.S. Federal and Drug Administration-approved study or participating in the Compassionate Investigational New Drug program.

[33] 21 U.S.C. §844(a).

[34] *Id*

[35] The escalating terms of imprisonment for possession of various amounts of marijuana are as follows: (1) *Less than 50 kilograms (110lbs.)/fewer than 50 plants*: imprisonment for not more than 5 years, 21 U.S.C. §841(b)(1)(D); (2) *Less than 100 kilograms (220lbs) or less than 100 plants*: imprisonment for not more than 20 years, 21 U.S.C. §841(b)(1)(C); (3) *100 kilograms (220lbs) or more /100 plants or more*: imprisonment for not less than 5 years or more than 40 years, 21 U.S.C. §841(b)(1)(B); (4) *1000 kilograms or more/1000 plants or more*: imprisonment for not less than 10 years or more than life, 21 U.S.C. §841(b)(1)(A); (5) *Drug kingpin (over 5 or more others & substantial income):* imprisonment for not less than 20 years or more than life, 21 U.S.C. §848(a), (c); and (6) *Drug kingpin involving (a) 30,000 kilograms or more/30,000 plants or more, or (b) $10 million or more in annual gross receipts*: imprisonment for life, 21 U.S.C. §848(b)(2)(emphasis added).

[36] 21 U.S.C. §853 (criminal forfeiture of the proceeds and property derived from a violation as well as property used to facilitate violation); 21 U.S.C. §881 (civil/administrative forfeiture of conveyances and real property used in a violation and the proceeds of a violation and property traceable to the proceeds of a violation).

owner and forfeited to the government, in accordance with constitutionally required due process procedures.[37]

Property forfeiture is used both to enforce criminal laws and to deter crime. Forfeitures are classified as civil or criminal depending on the nature of the judicial procedure which ends in confiscation. Civil forfeiture is ordinarily the product of a civil, *in rem* (against the property) proceeding in which the property is treated as the offender. No criminal charges are necessary against the owner, landlord, or mortgage holder because the guilt or innocence of the property owner, landlord, mortgage holder, or anyone else with a secured interest in the property is irrelevant; it is enough that the property was involved in, or otherwise connected to, an illegal activity (in which forfeiture is authorized).[38] Criminal forfeiture proceedings, on the other hand, are *in personam* (against the person) actions, and confiscation is possible only upon the conviction of the owner of the property and only to the extent of the defendant's interest in the property.[39] Property that is subject to forfeiture includes both the direct and indirect proceeds of illegal activities as well as any property used, or intended to be used, to facilitate that crime.[40]

Section 511 of the CSA (21 U.S.C. §881) makes a wide array of property associated with violations of the CSA subject to seizure by the Attorney General and forfeiture to the United States. Property subject to the CSA's civil forfeiture provision includes any controlled substance that has been manufactured, distributed, dispensed, acquired, or possessed in violation of federal law, as well as any equipment, firearm, money, mode of transportation, or real property *used or intended to be used to facilitate a violation of the CSA*.[41] In order to seize the covered property, the government need only show that the property is subject to forfeiture by a preponderance of the evidence.[42] Once forfeited, the Attorney General may destroy the controlled substances seized, and sell the other property at public auction.[43] After expenses of the forfeiture proceeding are recouped, excess funds are forwarded to the DOJ Asset Forfeiture Fund.[44]

Forfeiture proceedings are generally less resource intensive than a criminal prosecution and have been used in the past against medical marijuana dispensaries.[45] In practice, DOJ would be able to seize and liquidate property, both real and personal, associated with marijuana production,

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[37] U.S. CONST. amend. V ("No person shall ... be deprived of ... property, without due process of law ...").

[38] Calero-Toledo v. Pearson Yacht Leasing Co, 416 U.S. 663, 683-90 (1974)(confiscation of a yacht upon which those to whom it was leased smoke marijuana, because the owners failed to show that they had done all they possibly could to avoid the illegal use of their property). In controlled substances cases, there is a limited statutory innocent owner defense if the owner of an interest in the property can show by a preponderance of the evidence that either he "(i) did not know of the conduct giving rise to the forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property," 18 U.S.C. §983(d).

[39] For a more extensive discussion of forfeiture generally, *see* CRS Report 97-139, *Crime and Forfeiture*, by Charles Doyle.

[40] *See, e.g.,* 21 U.S.C. §881(a)(6)(proceeds), and 21 U.S.C. §881(a)(2)(products and equipment used to facilitate the offense).

[41] 21 U.S.C. §881(a)(emphasis added).

[42] 18 U.S.C. §981(b).

[43] 21 U.S.C. §881(e).

[44] 21 U.S.C. §881(e).

[45] *See, e.g.,* U.S. Dep't of Justice, *Press Release: Federal Authorities Take Enforcement Actions Against Commercial Marijuana Stores in Orange County Cities of Anaheim and La Habra,* August 21, 2012, available at http://www.justice.gov/usao/cac/Pressroom/2012/111.html.

distribution, or retail sale facilities, without bringing any criminal action. As explained above, a civil asset forfeiture proceeding is a civil proceeding against the property in question. Although an interested party may object to the seizure, given that such facilities are in clear violation of federal law, so long as the property is indeed being used for marijuana-related activities, it would appear unlikely that many successful challenges to these actions could be waged.[46]

Developments in the States

Most of the states have legislation modeled after the federal Controlled Substances Act.[47] Over the years, some have reduced possession of small amounts of marijuana to a civil offense under state law,[48] while the District of Columbia went a step further and fully legalized possession of small amounts of marijuana and personal cultivation of a small number of marijuana plants.[49] More than 20 states also have established a state law exception for medical marijuana.[50] Colorado

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[46] *See* David Downs, *City of Oakland Loses Lawsuit Against Department of Justice; Harborside Forfeiture Case Proceeds,* February 15, 2013, EAST BAY EXPRESS, available at http://www.eastbayexpress.com/LegalizationNation/archives/2013/02/15/city-of-oakland-loses-lawsuit-against-department-of-justice-harborside-forfeiture-case-proceeds (describing how a federal magistrate judge dismissed the City of Oakland's lawsuit against Attorney General Eric Holder and U.S. Attorney Melinda Haag, which sought to prevent Haag from seizing the building leased by Harborside Health Center, one of the world's largest medical marijuana dispensaries. The judge held that only the dispensary and its landlords have legal standing to challenge the U.S. government's attempted seizure of the property.).

[47] ALA. CODE §§20-2-1 to 20-2-190; ALASKA STAT. §§11.71.010 to 11.71.900, 17.30.010 to 17.30.900; ARIZ. REV. STAT. ANN. §§36-2501 to 36-2553; ARK. CODE ANN. §§5-64-101 to 5-64-608; CAL. HEALTH & SAFETY CODE §§11000 to 11657; COLO. REV. STAT. ANN. §§18-18-101 to 18-18-605; CONN. GEN. STAT. ANN. §§21a-240 to 21a-283; Del. Code Ann. tit.16 §§4701 to 47696; FLA. STAT. ANN. §§893.01 to 893.165; GA. CODE §§16-13-20 to 16-13-65; HAWAII REV. STAT. §§329-1 to 329-128; IDAHO CODE §§37-2701 to 37-2751; 720 ILL. COMP. STAT. ANN. §§570/100 to 570/603; IND. CODE ANN. §§35-48-1-1 to 35-48-7-15; IOWA CODE ANN. §§124.101 to 124.602; KAN. STAT. ANN. §§65-41-1 to 65-4166; KY. REV. STAT. ANN. §§218A.010 to 218A.993; LA. REV. STAT. ANN. §§40:961 to 40:995; ME. REV. STAT. ANN. tit.17-A §§1101 to 1118; MD. CODE ANN. Crim. Law §§5-101 to 5-1101; MASS. GEN. LAWS ANN. ch. 94C §§1 to 48; Mich. Comp. Laws Ann. §§333.7101 to 333.7545; MINN. STAT. ANN. §§152.01 to 152.20; MISS. CODE ANN. §§41-29-101 to 41-29-185; MO. ANN. STAT. §§195.010 to 195.320; MONT. CODE ANN. §§50-32-101 to 50-32-405; NEB. REV. STAT. §§28-401 to 28-457; NEV. REV. STAT. §§453.011 to 453.740; N.H. REV. STAT. ANN. §§318-B:1 to 318-E:1; N.J. STAT. ANN. §§2C:35-1 to 2C:35-24, 2c:36-1 to 2C:36-10, 24:21-1 to 24-21-54; N.MEX. STAT. ANN. §§30-31-1 to 30-31-41; N.Y. PUBLIC HEALTH LAW §§3300 to 3396; N.C. GEN. STAT. §§90-86 to 90-113.8; N.D. CENT. CODE §§19-03.1-01to 19-03.1-46; OHIO REV. CODE ANN. §§3719.01 to 3719.99; OKLA. STAT. ANN. tit.63 §§2-101 to 2-610; ORE. REV. STAT. §§475.005 to 475.295, 475.940 to 475.999; 35 PA. STAT. ANN. §§780-101 to780-144; R.I. GEN. LAWS §§21-28-1.01 to 21-28-6.02; S.C. CODE ANN. §§44-53-110 to 44-53-590; S.D. COD. LAWS §§34-20B-1 to 34-20B-114; TENN. CODE ANN. §§39-17-401 to 39-17-434, 53-11-301 to 53-11-452; TEX. HEALTH & SAFETY CODE ANN. §§481.001 to 481.005; UTAH CODE ANN. §§58-37-1 to 58-37-21; VA. CODE §§54.1-3400 to 54.1-3472; WASH. REV. CODE ANN. §§69.50.101 to 69.50.609; W.VA. CODE ANN. §§60A-1-101 to 60A-6-605; WIS. STAT. ANN. §§961.001 to 961.62; WYO. STAT. §§35-7-1001 to 35-7-1062. Vermont has a Regulated Drugs Act that roughly corresponds to the Controlled Substances Act, VT. STAT. ANN. tit.18 §§4201 to 4254.

[48] E.g., ALASKA STAT. §§11.71.190, 11.71.060, 12.55.135(j) (max. fine $500/less than 1 oz.); CAL. HEALTH & SAFETY CODE §11357(b) (max. fine $100/28.5 grams or less); CONN. GEN. STAT. ANN. §21a-279a (max. fine $150/ less than .5 oz.); ME. REV. STAT. ANN. tit. 22 §2383[1][A](max. fine $600/1.25 oz. or less); MASS. GEN. LAWS ANN. ch. 94C §32L (max. fine $100/1 oz. or less); MINN. STAT. ANN. §§152.027[subd.4(a)], 152.01 [subd. 16] (max fine $200/42.5 grams or less); MISS. CODE ANN. §41-29-139(c)(2)(A); NEB. REV. STAT. §28-416(13)(a) (max. fine $300/1 oz. or less); NEV. REV. STAT. §453.336[4](max. fine $600/1 oz. or less); N.Y. PENAL LAW §130.35; N.C. GEN. STAT. §§90-95(d)(4)(maxs. $200 fine—10 days imprisonment/.5 oz. or less); OHIO REV. CODE ANN. §§2925.11(C)(3), 2929.28(A)(2)(a)(v)(max. fine $150/100 grams or less); ORE. REV. STAT. §475.864(3)(max. fine $650/1 oz. or less); R.I. GEN. LAWS §21-28-4.01(c)(2)(iii)(max. fine $150/1 oz. or less); VT. STAT. ANN. tit.18 §4230a (max. fine $200/1 oz. or less).

[49] D.C. CODE §48-901.01(a)(1). There is some uncertainty about whether a provision of the 2015 Consolidated Appropriations Act, P.L. 113-235, prohibits the implementation of the measure during FY2015. *See* CRS Legal Sidebar WSLG1182, *The Antideficiency Act as an Impediment to D.C.'s Marijuana Legalization Initiative?*, by Brian T. Yeh.

[50] ALASKA STAT. §§17.37.010 to 17.37.080; ARIZ. REV. STAT. ANN. §§36-2801 to 36-2819; CAL. HEALTH & SAFETY (continued...)

and Washington have enacted legislation authorizing the retail and personal growth, sale, and possession of marijuana under state law.[51] Alaska and Oregon have enacted similar retail marijuana laws; however, they were not fully operational as of the publication date of this report.[52]

Medical Marijuana Laws

State medical marijuana laws follow a general pattern, although most have some individual characteristics and the manner in which they are enforced can differ considerably. Some of their features are attributable to the CSA and a case from the United States Court of Appeals for the Ninth Circuit, *Conant v. Walters*.[53]

Conant, a California physician, sought to enjoin the federal government from revoking his authority to prescribe controlled substances at all in retaliation for his recommending marijuana to some of his patients.[54] Then, as now, the CSA permits the Attorney General, acting through the Drug Enforcement Administration (DEA), to withdraw a physician's authority to prescribe controlled substances upon a failure to comply with the demands of the CSA.[55]

The Ninth Circuit acknowledged the prospect of criminal liability if the doctor were doing more than engaging in an abstract discussion with his patient: "A doctor would aid and abet by acting with the specific intent to provide a patient with the means to acquire marijuana. Similarly, a conspiracy would require that a doctor have knowledge that a patient intends to acquire marijuana, agree to help the patient acquire marijuana, and intend to help the patient acquire marijuana."[56] Yet, "[h]olding doctors responsible for whatever conduct the doctor could anticipate a patient *might* engage in after leaving the doctor's office is simply beyond the scope of either conspiracy or aiding and abetting."[57] On the other hand, such doctor-patient discussions do

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(...continued)

CODE §§11362.5 to 11362.9; COLO. REV. STAT. ANN. §§12-43.3-101 to 12-43.3-1102; CONN. GEN. STAT. ANN. §§21a-408 to 21a-408q; DEL. CODE ANN. tit.16 §§4901A to 4926A; D.C. CODE §§7-1671.01 to 7-1671.13; HAWAII REV. STAT. §329-121 to 329-128; 410 ILL. COMP. STAT. ANN. §§130/10 to 130/140; ME. REV. STAT. ANN. tit. 22 §§2421 to 2430-B; MD. CODE ANN. HEALTH-GEN. §§13-3301 to 13-3316; MASS. GEN. LAWS ANN. ch. 94C App. §§1-1 to 1-17; MICH. COMP. LAWS ANN. §§333.26421 to 333.26430; MONT. CODE ANN. §50-46-301 to 50-46-344; NEV. REV. STAT. §§453A.010 to 453A.810; MINN. STAT. §§125.22 to 152.37; N.H. REV. STAT. ANN. §§126-X:1 to 126-X:11; N.J. STAT. ANN. §§24:61-1 to 24:61-16; N.MEX. STAT. ANN. §§26-2B-1 to 26-2B-7; ORE. REV. STAT. §§475.300 to 475.346; R.I. GEN. LAWS §21-28.6-1 to 21-28.6-13; N.Y. PUB. HEALTH §§3360 to 3369-E.; VT. STAT. ANN. tit.18 §§4471 to 4474*l*; WASH. REV. CODE ANN. §69-51A.005 to 69-51A.903. The Supreme Court in *Oakland Cannabis Buyers' Cooperative* held that the federal Controlled Substances Act does not contain an implicit medical marijuana exception, *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 495 (2001).

[51] COLO. REV. STAT. ANN. §§12-43.3-101 to 12-43.3-1102; WASH. REV. CODE ANN. §§69-50.325 to 69-50.369.

[52] ALASKA STAT. §§17.38.010 to 17.38.900; 43.61.010 to 43.61.030; Oregon Ballot Measure 91, *Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act* (*hereinafter* Oregon Ballot Measure 91).

[53] 309 F.3d 629 (9th Cir. 2002).

[54] *Id.* at 632.

[55] 21 §823(f)("The Attorney General shall register practitioners (including pharmacies ...) to dispense ... controlled substances.... The Attorney General may deny an application for such registration ... [in] the public interest. In determining the public interest, the following factors shall be considered: ... (4) Compliance with applicable State, Federal, or local laws relating to controlled substances....").

[56] *Id.* at 636 (internal citations omitted).

[57] *Id.* (emphasis in the original).

implicate First Amendment free speech principles. The Ninth Circuit therefore affirmed the district court's order which had enjoined any DEA enforcement action.[58]

As a consequence of the CSA and the *Conant* decision, the state medical marijuana laws are predicated upon a doctor's recommendation, rather than a prescription and the medicine is dispensed other than through a pharmacy.[59] In addition, the laws afford registered patients, care givers, cultivators, and distributors immunity from the consequences of state criminal laws.[60]

Patients

Physicians may recommend medical marijuana only for patients suffering from one or more statutorily defined "debilitating," or "qualifying" medical conditions. The typical list would include the following:

> "Debilitating medical condition" means one or more of the following:
>
> (a) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis c, amyotrophic lateral sclerosis, crohn's disease, agitation of alzheimer's disease or the treatment of these conditions.
>
> (b) A chronic or debilitating disease or medical condition or its treatment that produces one or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including those characteristic of epilepsy; or severe and persistent muscle spasms, including those characteristic of multiple sclerosis.
>
> (c) Any other medical condition or its treatment added by the department pursuant to section 36-2801.01.[61]

The list usually includes a condition such as "severe pain," or "chronic pain," or "severe and chronic pain" that is easy to claim, difficult to diagnose, and grounds for potential abuse. Some states seek to limit the scope of the term by statute or by regulation.[62] In many jurisdictions, a

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[58] *Id.* at 636-39.

[59] ALASKA STAT. §§17.37.010 to 17.37.080; ARIZ. REV. STAT. ANN. §§36-2801 to 36-2819; CAL. HEALTH & SAFETY CODE §§11362.5 to 11362.9; CONN. GEN. STAT. ANN. §§21a-408 to 21a-408q; COLO. REV. STAT. ANN. §§12-43.3-101 to 12-43.3-1102; DEL. CODE ANN. tit.16 §§4901A to 4926A; D.C. CODE §§7-1671.01 to 7-1671.13; HAWAII REV. STAT. §§329-121 to 329-128; 410 ILL. COMP. STAT. ANN. §§130/10 to 130/140; MD. CODE ANN. HEALTH-GEN. §§13-3301 to 13-3316; ME. REV. STAT. ANN. tit. 22 §§2421 to 2430-B; MASS. GEN. LAWS ANN. ch. 94C App. §§1-1 to 1-17; MICH. COMP. LAWS ANN. §§333.26421 to 333.26430; MINN. STAT. §§125.22 to 152.37; MONT. CODE ANN. §§50-46-301 to 50-46-344; NEV. REV. STAT. §§453A.010 to 453A.810; N.H. REV. STAT. ANN. §§126-X:1 to 126-X:11; N.J. STAT. ANN. §§24:6I-1 to 24:6I-16; N.MEX. STAT. ANN. §§26-2B-1 to 26-2B-7; N.Y. PUB. HEALTH §§3360 to 3369-E.; ORE. REV. STAT. §§475.300 to 475.346; R.I. GEN. LAWS §§21-28.6-1 to 21-28.6-13; VT. STAT. ANN. tit.18 §§4471 to 4474*l*; WASH. REV. CODE ANN. §§69-51A.005 to 69-51A.903.

[60] ALASKA STAT. §17.37.030; ARIZ. REV. STAT. ANN. §36-2811; CAL. HEALTH & SAFETY CODE §§11362.71(e), 11362.765, 11362.775; CONN. GEN. STAT. ANN. §§21a-408a to 21a-408c; DEL. CODE ANN. tit.16 §4903A; D.C. CODE §7-1671.02; HAWAII REV. STAT. §329-122; 410 ILL. COMP. STAT. ANN. §130/25; MD. CODE ANN. HEALTH-GEN. §13-3313; ME. REV. STAT. ANN. tit. 22 §§2423-A to 2423-D; MASS. GEN. LAWS ANN. ch. 94C App. §§1-4, 1-5; MICH. COMP. LAWS ANN. §333.26424; MINN. STAT. §152.32; MONT. CODE ANN. §50-46-319; NEV. REV. STAT. §453A.310; N.H. REV. STAT. ANN. §126-X:2; N.J. STAT. ANN. §24:6I-6; N.MEX. STAT. ANN. §26-2B-4; N.Y. PUB. HEALTH §3369; ORE. REV. STAT. §§475.316, 475.319; R.I. GEN. LAWS §21-28.6-8; VT. STAT. ANN. tit.18 §4474b; WASH. REV. CODE ANN. §69-51A.030.

[61] ARIZ. REV. STAT. ANN. §36-2801[3].

[62] *E.g.*, DEL. CODE ANN. tit. 16 §4902A(3)[b]("... severe, debilitating pain, that has not responded to previously (continued...)

qualified patient must be a resident of the jurisdiction.[63] Most states and the District of Columbia restrict the amount of marijuana a patient may possess for medical purposes. The limit is usually an amount less than three ounces.[64] Medical marijuana statutes ordinarily do not allow patients to use marijuana in public.[65]

Caregivers

Typically, caregivers must register and be designated by one or more registered medical marijuana patients.[66] Many medical marijuana laws also afford caregivers the same immunity and impose the same limitations upon them as apply to patients.[67]

Dispensaries

Some state medical marijuana laws contemplate cultivation exclusively by the patient or his or her caregiver.[68] Most, however, establish a regulatory scheme for dispensaries.[69]

(...continued)

prescribed medication or surgical measures for more than 3 months or for which other treatment options produced serious side effects....").

[63] *E.g.*, CONN. GEN. STAT. ANN. §21a-408(10); D.C. CODE §7-1671.01(19); MICH. COMP. LAWS ANN. §333.264246(a)(6); MONT. CODE ANN. §50-46-307(1)(d); N.H. REV. STAT. ANN. §126-X:1[X], [XVI]; N.J. STAT. ANN. §24:6I-3; N.MEX. STAT. ANN. §26-2B-3 [G]; R.I. GEN. LAWS §21-28.6-3(10); VT. STAT. ANN. tit.18 §4472(12); *but see* NEV. REV. STAT. §453A.364 (recognition of nonresident cards).

[64] *E.g.*, ALASKA STAT. §17.37.040(a)(4)(1 oz.); DEL. CODE ANN. tit.16 §4903A(a)(6 oz.); D.C. CODE §7-1671.03(a)(2 oz.); 410 ILL. COMP. STAT. ANN. §130/10(a)(1), 130/25(a)(2.5 oz.); ME. REV. STAT. ANN. tit. 22 §§2423-A[1][A](2.5 oz.); MICH. COMP. LAWS ANN. §333.26424(2.5 oz.); MONT. CODE ANN. §50-46-319 (1 oz.); NEV. REV. STAT. §453A.200 (1 oz.); N.H. REV. STAT. ANN. §126-X:2[I](2 oz.); ORE. REV. STAT. §475.320 (24 oz.); R.I. GEN. LAWS §21-28.6-4 (2.5 oz.).

[65] *E.g.*, ALASKA STAT. §17.37.040(a)(2); CONN. GEN. STAT. ANN. §21a-408a(b)(2); DEL. CODE ANN. tit.16 §4904A(3); D.C. CODE §7-1671.03; 410 ILL. COMP. STAT. ANN. §130/30(3)(F); MICH. COMP. LAWS ANN. §333.26427(b)(3)(B); N.H. REV. STAT. ANN. §126-X:3[II](c); N.MEX. STAT. ANN. §26-2B-5[A](3)(d); ORE. REV. STAT. §§475.316(1)(b).

[66] *E.g.*, ALASKA STAT. §17.37.010(e); ARIZ. REV. STAT. ANN. §36-2804.02; CONN. GEN. STAT. ANN. §21a-408b; DEL. CODE ANN. tit.16 §4909A; 410 ILL. COMP. STAT. ANN. §130/55; ME. REV. STAT. ANN. tit. 22 §§2425; MASS. GEN. LAWS ANN. ch. 94C App. §1-1; MONT. CODE ANN. §50-46-308; NEV. REV. STAT. §453A.210; N.H. REV. STAT. ANN. §126-X:4; N.J. STAT. ANN. §24:6I-4; N.MEX. STAT. ANN. §26-2B-7; ORE. REV. STAT. §§475.309, 475.312; R.I. GEN. LAWS §21-28.6-4; VT. STAT. ANN. tit.18 §4474.

[67] *E.g.*, ARIZ. REV. STAT. ANN. §36-2811; CAL. HEALTH & SAFETY CODE §§11362.77, 11362.775; CONN. GEN. STAT. ANN. §21a-408b; DEL. CODE ANN. tit.16 §4903A; 410 ILL. COMP. STAT. ANN. §130/25; MASS. GEN. LAWS ANN. ch. 94C App. §§1-4, 1-5; MICH. COMP. LAWS ANN. §333.26424; MONT. CODE ANN. §50-46-319; NEV. REV. STAT. §453A.200; N.H. REV. STAT. ANN. §126-X:2; N.J. STAT. ANN. §24:6I-6; N.MEX. STAT. ANN. §26-2B-4; ORE. REV. STAT. §§475.316, 475.319; R.I. GEN. LAWS §21-28.6-8; VT. STAT. ANN. tit.18 §4474b.

[68] *E.g.*, ALASKA STAT. §17.37.030; HAWAII REV. STAT. §329-122; MICH. COMP. LAWS ANN. §333.26424; ORE. REV. STAT. §§475.316, 475.319; R.I. GEN. LAWS §21-28.6-8.

[69] *E.g.*, ARIZ. REV. STAT. ANN. §36-2804; CAL. HEALTH & SAFETY CODE §11362.8; CONN. GEN. STAT. ANN. §21a-408h; DEL. CODE ANN. tit.16 §4914A; D.C. CODE §7-1671.06; HAWAII REV. STAT. §329-122; 410 ILL. COMP. STAT. ANN. §§130/85 to 130/130; ME. REV. STAT. ANN. tit. 22 §2428; MASS. GEN. LAWS ANN. ch. 94C App. §§1-9; MONT. CODE ANN. §§50-46-308, 5-46-309; NEV. REV. STAT. §§453A.320 to 453A.344; N.H. REV. STAT. ANN. §126-X:8; N.J. STAT. ANN. §24:6I-7; N.MEX. STAT. ANN. §26-2B-7; ORE. REV. STAT. §475.304; VT. STAT. ANN. tit.18 §4474g.

Retail Marijuana

Four states, Washington, Colorado, Oregon, and Alaska, have established retail marijuana regimes. Each regulates the distribution of marijuana without a necessary medical nexus, but raise many of the same federal-state conflict issues found in the medical marijuana statutes. Much like the medical marijuana regimes, each recreational marijuana regime shares general patterns, but they also each have some unique characteristics. In some instances, for example Washington, the statutory authority establishing the retail regime is fairly specific. In others, such as Colorado, the statute provides only a broad framework while authorizing a state regulatory agency to fill in the details through regulations.

Decriminalization of Personal Possession and Consumption

Each of the retail marijuana laws decriminalizes the consumption and possession of varying amounts and forms of marijuana by individuals at least 21 years of age within the state. The laws, however, prohibit consumption of marijuana in public and maintain a prohibition on driving vehicles under the influence of marijuana, even if it was acquired and consumed in compliance with the state law.[70]

Washington Initiative 502, for example, legalizes marijuana possession by amending state law to provide that the possession of small amounts of marijuana "is not a violation of this section, this chapter, or any other provision of Washington law."[71] Under the Initiative, individuals over the age of 21 may possess up to one ounce of dried marijuana, 16 ounces of marijuana infused product in solid form, or 72 ounces of marijuana infused product in liquid form.[72] However, marijuana must be used in private, as it is unlawful to "open a package containing marijuana ... or consume marijuana ... in view of the general public."[73]

Colorado voters approved an amendment to the Colorado Constitution (Amendment 64) to ensure that it "shall not be an offense under Colorado law or the law of any locality within Colorado" for an individual 21 years of age or older to possess, use, display, purchase, consume, or transport one ounce of marijuana; or possess, grow, process, or transport up to six marijuana plants.[74] Unlike Initiative 502, which permits only state-licensed facilities to grow marijuana, Amendment 64 allows any individual over the age of 21 to grow small amounts of marijuana (up to six plants) for personal use.[75] In similar fashion to Washington's Initiative 502, marijuana may not be consumed "openly and publicly or in a manner that endangers others" under Colorado law.[76]

Oregon Ballot Measure 91 decriminalizes personal possession, for individuals of at least 21 years old, of up to eight ounces of "homegrown marijuana," up to 16 ounces of "homegrown marijuana

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[70] *E.g.*, Washington Initiative 502 §31, amending RCW 69.50.4013 and 2003 c 53 s 334, available at http://sos.wa.gov/_assets/elections/initiatives/i502.pdf (*hereinafter* Washington Initiative 502).

[71] *Id.* at §20

[72] *Id.* at §15.

[73] *Id.* at §21.

[74] Colorado Amendment 64, Amending Colo. Const. Art. XVIII §16(3), available at http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application/pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251834064719&ssbinary=true (*hereinafter* Colorado Amendment 64).

[75] *Id.*

[76] *Id.*

products in solid form," and up to 72 ounces of "homegrown marijuana in liquid form." It also decriminalizes cultivation of up to four marijuana plants.[77] Ballot Measure 91 also explicitly prohibits "the use of marijuana items in a public place,"[78] as well as the production and storage of marijuana or marijuana products where they "can be readily seen by normal unaided vision from a public place."[79]

Alaska law allows individuals of at least 21 years old to possess up to one ounce of marijuana and six (but no more than three that are mature and flowering) marijuana plants.[80] The public consumption and cultivation of marijuana is prohibited under Alaska law.[81]

Licensing Regime for Retail Production, Distribution, and Sale

Another common feature of recreational marijuana laws is the establishment of licensing regimes for the retail production, distribution, and sale of marijuana. Although the specifics vary, each retail marijuana regime establishes license application processes, qualification standards, and license maintenance standards that are to be implemented and overseen by a state regulatory agency.

Washington Initiative 502 provides that the "possession, delivery, distribution, and sale" by a validly licensed producer, processor, or retailer, in accordance with the newly established regulatory scheme administered by the state Liquor Control Board (LCB), "shall not be a criminal or civil offense under Washington state law."[82] The Initiative establishes a three-tiered production, processing, and retail licensing system that permits the state to retain regulatory control over the commercial life cycle of marijuana. Qualified individuals must obtain a producer's license to grow or cultivate marijuana, a processor's license to process, package, and label the drug, or a retail license to sell marijuana to the general public.[83]

Initiative 502 also establishes various restrictions and requirements for obtaining the proper license and directs the state LCB to adopt procedures for the issuance of such licenses. On October 16, 2013,[84] the LCB adopted detailed rules for implementing Initiative 502. These rules describe the marijuana license qualifications and application process, application fees, marijuana packaging and labeling restrictions, recordkeeping and security requirements for marijuana facilities, and reasonable time, place, and manner advertising restrictions.[85]

The licensing standards in Colorado were implemented through a combination of statutes and regulations enacted to supplement Amendment 64. The Colorado General Assembly passed three bills that were signed into law by Governor Hickenlooper on May 28, 2013.[86] On September 9,

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[77] Oregon Ballot Measure 91 §6.

[78] *Id.* at §54.

[79] *Id.* at §56.

[80] ALASKA STAT. §17.38.020.

[81] ALASKA STAT. §17.38.020 and §17.38.030.

[82] Washington Initiative 502 §4.

[83] *Id.*

[84] Joel Millman, *Washington State Sets Pot-Sales Rules,* WALL ST. JOURNAL, October 16, 2013.

[85] Washington State Liquor Control Board, Marijuana Licenses, Application Process, Requirements, and Reporting, available at https://lcb.app.box.com/adopted-rules.

[86] *See* Colorado Dep't of Revenue, *Permanent Rules Related to the Colorado Retail Marijuana Code,* September 9, (continued...)

2013, the Colorado Department of Revenue and State Licensing Authority adopted regulations to implement licensing qualifications and procedures for retail marijuana facilities.[87] The regulations establish procedures for the issuance, renewal, suspension, and revocation of licenses; provide a schedule of licensing and renewal fees; and specify requirements for licensees to follow regarding physical security, video surveillance, labeling, health and safety precautions, and product advertising.[88]

Alaska's recreational marijuana law establishes a licensing and registration regime for cultivation facilities, manufacturing facilities, and retail stores.[89] A state Marijuana Control Board is authorized to issue regulations to implement the licensing and registration regime, including rules that establish license application and renewal processes, qualification standards, labeling requirements, and advertising limitations.[90]

Oregon Ballot Measure 91 empowers the Oregon Liquor Control Commission to issue regulations establishing similar licensing standards.[91]

Taxation Authority

Each of the retail marijuana laws also imposes taxes on recreational marijuana. These taxing measures vary in size and applicability and establish different purposes for which the revenue generated through these taxes will be used.

For example, in accordance with adopted regulations, Washington will impose an excise tax of 25% of the selling price on each marijuana sale within the established distribution system.[92] The state excise tax will, therefore, be imposed on three separate transactions: the sale of marijuana from producer to processor, from processor to retailer, and from retailer to consumer. All collected taxes are deposited into the Dedicated Marijuana Fund and distributed, mostly to social and health services, as outlined in the Initiative.[93]

Similarly, Colorado voters approved a 25% tax on retail marijuana transactions (a 15% excise tax that would raise revenues generally to be used for public school capital construction, and an additional 10% sales tax that predominately would generate revenues to fund the enforcement of the retail marijuana regulations).[94]

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2013, available at https://www.colorado.gov/pacific/sites/default/files/Retail%20Marijuana%20Rules,%20Adopted%20090913,%20Effective%20101513%5B1%5D_0.pdf.

[87] *Id.*

[88] *Id.*

[89] ALASKA STAT. §17.38.70.

[90] ALASKA STAT. §17.38.90.

[91] Oregon Ballot Measure 91 §7.

[92] *See* Colorado Dep't of Revenue, *Permanent Rules Related to the Colorado Retail Marijuana Code,* September 9, 2013, available at https://www.colorado.gov/pacific/sites/default/files/Retail%20Marijuana%20Rules,%20Adopted%20090913,%20Effective%20101513%5B1%5D_0.pdf.at 20-21.

[93] Washington Initiative 502 §26.

[94] Colorado Legislative Council Staff, *Fiscal Impact Statement: Proposition AA, Retail Marijuana Taxes,* September 24, 2013, available at http://www.leg.state.co.us/LCS/Initiative%20Referendum/1314initrefr.nsf/b74b3fc5d676cdc987257ad8005bce6a/e3e37fa33a36873887257b6c0077ac93/$FILE/
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Under Oregon Ballot Measure 91, marijuana producers will be taxed $5 for each immature marijuana plant, $10 for each ounce of marijuana leaves, and $35 for each ounce of flowers.[95] The revenue generated will be used first to offset the costs of implementing the state's marijuana regime and remaining monies will be distributed to a variety of existing state funds, including the state's Common School Fund and the Mental Health Alcoholism and Drug Services Account.[96]

Alaska law imposes an excise tax of $50 per ounce marijuana for each transaction between a marijuana cultivation center and either a processor or retail store.[97]

Local Control

Another issue relevant to each retail marijuana law is the question of whether local governments within the state are permitted to ban or otherwise regulate marijuana businesses within their local jurisdictions. Colorado Amendment 64 expressly permits local governments within Colorado to regulate or prohibit the operation of such facilities.[98] The Alaska recreational marijuana law also expressly provides local governments with certain authority to ban recreational marijuana businesses from operating and otherwise restrict "the time, place, manner, and number of marijuana establishment operations" with their respective jurisdictions.[99] Oregon Ballot Measure 91 also expressly authorizes localities to impose "reasonable time, place, and manner" restrictions on marijuana businesses.[100] Washington's Initiative 502, on the other hand, does not expressly allow Washington cities to ban marijuana stores from opening within their borders, and there is uncertainty about the degree to which such local prohibitions or moratoriums on the operation of recreational marijuana businesses may be enforced.[101]

Justice Department Memoranda

The Department of Justice is not required, and realistically lacks the resources, to prosecute every single violation of the CSA. Indeed, pursuant to the doctrine of "prosecutorial discretion," federal

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Retail%20Marijuana%20Taxes_FN.pdf. A provision of the Colorado Constitution may affect the disbursements of marijuana-related tax revenue. *See* Jack Healy, *In Colorado, Marijuana Taxes May Have to Be Passed Back*, N.Y. TIMES, April 1, 2015, available at http://www.nytimes.com/2015/04/02/us/colorado-lawmakers-scramble-to-keep-millions-in-marijuana-taxes.html?_r=0.

[95] Oregon Ballot Measure 91 §33.

[96] *Id.* §44.

[97] ALASKA STAT. §43.61.010.

[98] Colorado Amendment 64 §16(5)(f). *See also* Dan Frosch, *Colorado Localities Make Own Rules Before Final Decision on Marijuana Sales,* N.Y. TIMES, June 12, 2013; John Ingold, *Colorado Marijuana Stores Likely to be Concentrated in Few Cities,* THE DENVER POST, July 25, 2013.

[99] ALASKA STAT. §17.38.110.

[100] Oregon Ballot Measure 91 §58.

[101] *See Chelan County Judge Agrees with Attorney General's Opinion, Holds that Local Governments Can Ban Marijuana Businesses*, Wash. State Off. of the Attorney Gen. Press Release, Oct. 17, 2014, available at http://www.atg.wa.gov/news/news-releases/chelan-county-judge-agrees-attorney-general-s-opinion-holds-local-governments-can; Jake Ellison, *City/County Bans, Moratoriums, and Zoning Approvals for Marijuana Businesses in Washington,* SEATTLE POST INTELLIGENCER, December 12, 2013, available at http://blog.seattlepi.com/marijuana/2013/12/12/bans-moratoriums-and-zoning-approvals-for-marijuana-businesses-as-far-as-we-know/#18853101=0&18413103=0; Gene Johnson, *No Welcome Yet for Pot Shops in Many Wash. Cities,* SEATTLE POST INTELLIGENCER, January 1, 2014.

law enforcement officials have "broad discretion" as to when, whom, and whether to prosecute for violations of the CSA.[102] Courts have recognized that the "decision to prosecute is particularly ill-suited to judicial review," as it involves the consideration of factors, such as the strength of evidence, deterrence value, and existing enforcement priorities, "not readily susceptible to the kind of analysis the courts are competent to undertake."[103]

Through the exercise of prosecutorial discretion, DOJ is able to develop a policy outlining what marijuana-related activities will receive the most attention from federal authorities. Indeed, DOJ has issued four memoranda since 2009 that explain the Obama Administration's position regarding state-authorized marijuana activities, as described in the following sections.

The 2009 Ogden Memorandum

In 2009, Deputy Attorney General David W. Ogden provided guidance to federal prosecutors in states that have authorized the use of medical marijuana.[104] Citing a desire to make "efficient and rational use of its limited investigative and prosecutorial resources," the memorandum stated that while the "prosecution of significant traffickers of illegal drugs, including marijuana ... continues to be a core priority," federal prosecutors "should not focus federal resources [] on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[105] The memorandum made clear, however, that "this guidance [does not] preclude investigation or prosecution, even where there is clear and unambiguous compliance with existing state law, in particular circumstances where investigation or prosecution otherwise serves important federal interests."[106] Nevertheless, the Ogden Memorandum was widely considered an assurance that DOJ would not prosecute any marijuana cultivation, distribution, or possession, as long as those activities complied with state law.[107]

At about the same time, it became apparent the state medical marijuana programs had consequences that were perhaps unintended. In some states, the affliction most easily claimed and most difficult to diagnose—chronic pain—accounted for 90% of all physicians'

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[102] United States v. Goodwin, 457 U.S. 368, 380 (1982).

[103] Wayte v. United States, 470 U.S. 598, 607 (1985).

[104] Memorandum for selected U.S. Attorneys from David W. Ogden, Deputy Attorney General, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, October 19, 2009 (hereinafter Ogden Memorandum) available at http://www.justice.gov/opa/documents/medical-marijuana.pdf.

[105] *Id.* at 1-2.

[106] *Id.* at 3.

[107] Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W.VA. L. REV. 1, 3 (2013)("While the Ogden Memo reaffirmed the illegality of all forms of medical marijuana at the federal level, it made clear that the federal executive policy with regards to medical marijuana permissible at the state level would be for the most part hands-off."); Karen O'Keefe, *State Medical Marijuana Implementation and Federal Policy*, 16 J. HEALTH CARE L & POL'Y 39, 51 (2013)("On October 19, 2009, Deputy Attorney General David Ogden issued a memorandum memorializing the new federal policy.... This memo was widely interpreted as meaning that the federal government would not be targeting medical marijuana providers."); Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?* 91 ORE. L. REV. 869, 881 (2013)("In states that had adopted [Medical Marijuana] provisions, the memo was seen as a green light to the open sale of marijuana."); Alex Kreit, *Reflections on Medical Marijuana Prosecutions and the Duty to Seek Justice*, 89 DENV. U. L. REV. 1027, 1037 (2012)("The *New York Times* ran a front-page article about the memo under the headline U.S. Won't Prosecute in States That Allow Medical Marijuana reporting that '[p]eople who use marijuana for medical purposes and those who distribute it to them should not face federal prosecution, provided they act according to state law, the Justice Department said Monday in a directive with far-reaching political and legal implications.'").

recommendations.[108] It was said that Los Angeles alone had somewhere between 500 and 1000 medical marijuana dispensaries.[109] No one knew how many for sure, but all agreed there were more dispensaries than there were Starbucks coffee shops.[110] Rather than the old and infirm, "[r]emarkably the age distribution of medical marijuana users seem[ed] to mimic that of recreational users in its concentration of young persons."[111]

The 2011 Cole Memorandum

DOJ reiterated and clarified its position in a subsequent memorandum in 2011 drawing a clear distinction between the potential prosecutions of individual patients who require marijuana in the course of medical treatment and "commercial" dispensaries.[112] After noting that several jurisdictions had recently "enacted legislation to authorize multiple large-scale, privately operated industrial marijuana cultivation centers," DOJ stated that

> The Ogden memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the [CSA] regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution.[113]

The surge in enforcement activity proximate to the release of the 2011 Cole Memorandum[114] caught unawares many of those who considered the Ogden Memorandum a green light for marijuana entrepreneurship.[115]

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[108] Gerald Caplan, *Medical Marijuana: A Study of Unintended Consequences*, 43 MCGEORGE L. REV. 127, 130, 136-37 (2012)("Statewide, more than 70% of doctors recommendations were written by fewer than 15 physicians in Colorado, and severe or chronic pain, a catchall category, accounted for ninety-four percent of all reported conditions.... [In] Oregon, fewer than ten percent of the roughly 35,000 patients holding cards suffered from cancer, multiple sclerosis, glaucoma, or the other specific debilitating conditions cited in the legislation. Ninety percent of registered cardholders cited chronic pain as their qualifying debilitating disease. Nevada's percentages are nearly identical. Montana's are slightly lower, with seventy-one percent of all medical marijuana users suffering from chronic pain.").

[109] Alex Kreit, *The Federal Response to State Marijuana Legalization: Room for Compromise*, 91 ORE. L. REV. 1029, 1036 n.33 (2013).

[110] *Id.*

[111] Id. at 135.

[112] Memorandum for U.S. Attorneys from James M. Cole, Deputy Attorney General, *Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use*, June 29, 2011 (hereinafter Cole 2011 Memorandum), available at http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf.

[113] *Id.* at 2.

[114] Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?* 91 ORE. L. REV. 869, 881-83 (2013)("In the fall of 2011, California's four Untied States Attorneys announced that a federal grand jury had returned indictments against several marijuana cooperative owners throughout the state, charging them with violations of the CSA. In addition, the United States Attorneys sent cease and desist letters to both dispensary owners and their landlords, giving them forty-five days to move their operations or else face arrest. In addition to the clear threat of criminal prosecution, this action made clear that the threat of civil enforcement—explicit in the Cole memo—was not an empty one. For a federal government with limited enforcement resources, the specter of civil forfeiture is an incredibly powerful tool. Similar crackdowns have since taken place in Washington state, Colorado, and Montana.").

[115] *See, e.g.*, Montana Caregivers Association, LLC v. United States, 841 F.Supp.2d 1147, 1148 (D.Mont. 2012)("The plaintiffs describe themselves as 'caregivers: growers and distributors of medical marijuana to qualified patients within the State of Montana.' They filed their complaint after federal authorities raided their facilities in March 2011 and (continued...)

The 2013 Cole Memorandum

The Obama Administration's official response to the Colorado and Washington initiatives was provided on August 29, 2013, when Deputy Attorney General James M. Cole sent a memorandum to all U.S. Attorneys intended to guide the "exercise of investigative and prosecutorial discretion" when it comes to civil and criminal enforcement of the federal Controlled Substances Act within all states, including those that have legalized marijuana for medicinal or recreational use.[116] The memorandum expresses DOJ's position that, although marijuana is a dangerous drug that remains illegal under federal law, the federal government will not pursue legal challenges against jurisdictions that authorize marijuana in some fashion, assuming those state and local governments maintain strict regulatory and enforcement controls on marijuana cultivation, distribution, sale, and possession that limit the risks to "public safety, public health, and other law enforcement interests." This DOJ decision has received both praise[117] and criticism.[118]

The memorandum instructs federal prosecutors to prioritize their "limited investigative and prosecutorial resources to address the most significant [marijuana-related] threats" and identified the following eight activities as those that the federal government wants most to prevent: (1) distributing marijuana to children; (2) revenue from the sale of marijuana going to criminal enterprises, gangs, and cartels; (3) diverting marijuana from states that have legalized its possession to other states that prohibit it; (4) using state-authorized marijuana activity as a pretext for the trafficking of other illegal drugs; (5) using firearms or violent behavior in the cultivation and distribution of marijuana; (6) exacerbating adverse public health and safety consequences due to marijuana use, including driving while under the influence of marijuana; (7) growing marijuana on the nation's public lands; and (8) possessing or using marijuana on federal property.[119] The memorandum advises U.S. Attorneys and federal law enforcement to devote their resources and efforts toward any individual or organization involved in any of these activities, regardless of state law. Furthermore, the memorandum recommends that jurisdictions that have legalized some form of marijuana activity "provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities."[120] However, the memorandum cautions that, to the extent that state enforcement efforts fail to sufficiently protect against the eight harms listed above, the federal government retains the right to challenge those states' marijuana laws.

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seized live marijuana plants, dried marijuana, and related equipment. The plaintiffs claim the raids were unlawful because (1) Montana law allowed them to grow and produce marijuana for medical consumption and (2) the United States Department of Justice represented that they would not actively prosecute medical marijuana caregivers."); United States v. Washington, 887 F.Supp.2d 1077, 1090-91 (D. Mont. 2012)("All of the pending motions to dismiss on estoppel grounds rely on the common underlying principle that the federal government, having stated several times that it would not initiate federal drug prosecutions of sellers or users of medical marijuana acting in compliance with the laws of their respective states, should now be estopped from pursuing this federal prosecution in contradiction of those statements. The most prominent of the federal government's various pronouncements on the topic of medical marijuana is what has become known as the 'Ogden memo.'").

[116] Memorandum for U.S. Attorneys from James M. Cole, Deputy Attorney General, *Guidance Regarding Marijuana Enforcement*, August 29, 2013 (*hereinafter* 2013 Cole Memorandum), available at http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

[117] *See, e.g.,* New York Times Editorial, *A Saner Approach on Drug Laws,* N.Y. TIMES, September 1, 2013.

[118] *See, e.g.,* Wall Street Journal Editorial, *The Beltway Choom Gang,* WALL ST. J., September 5, 2013.

[119] 2013 Cole Memorandum, at 1-2.

[120] *Id.* at 2-3.

Two additional points made in the memorandum are worth highlighting. First, the memorandum acknowledges a change in Administration policy with respect to "large scale, for-profit commercial enterprises" that may ease the concerns of potential state-licensed marijuana distributors and retailers in Colorado and Washington.[121] In previous guidance issued to U.S. Attorneys in states with medical marijuana laws, DOJ had suggested that large-scale marijuana enterprises were more likely to be involved in marijuana trafficking, and thus could be appropriate targets for federal enforcement actions.[122] In the guidance, DOJ directs prosecutors "not to consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities ..."[123]

The memorandum suggests that a state with a robust regulatory system for the control of recreational marijuana "is less likely to threaten [] federal priorities ..." than a state that lacks such controls. This statement may inform the long-running debate over the extent to which state marijuana regulatory and licensing laws (as opposed to mere penalty exemptions) conflict with federal law. Some courts have suggested, for example, that whereas a state is generally free to remove state penalties for marijuana use, the more robust a state's licensing and regulatory program, the more likely the law is to be preempted by federal law.[124] The Oregon Supreme Court, for instance, has suggested that states may not "affirmatively authorize" an individual to participate in conduct prohibited by federal law.[125]

The memorandum makes no statements with regard to the application of various federal money laundering and banking laws that have hampered the ability of commercial marijuana establishments to obtain the necessary financing and financial services to establish and grow their businesses.[126]

The 2014 Cole Memorandum

The 2014 Cole memorandum, however, did address banking and money laundering laws.[127] It recited eight priority points listed in the 2013 memorandum and explained that the same considerations should guide the allocation of investigation and prosecution resources to marijuana-related offenses involving financial transactions—money laundering, money transfers, and Bank Secrecy Act transgressions, discussed later in this report.

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[121] *Id.* at 3.

[122] 2011 Cole Memorandum, at 1-2.

[123] 2013 Cole Memorandum, at 3.

[124] *See* discussion *supra* pp. 14-19.

[125] Emerald Steel Fabricators, Inc., v. Bureau of Labor and Indus., 348 Ore. 159, 230 P.3d 518 (2010).

[126] For more information about this topic, *see* CRS Legal Sidebar WSLG682, *Banking Difficulties for State-Legalized Marijuana Dispensaries*, by M. Maureen Murphy; *see also* Reuters, *Easier Pot Policy Won't Relieve Dispensaries' Banking Woes,* CNBC.com, September 5, 2013, available at http://www.cnbc.com/id/101011966; Serge F. Kovaleski, *Banks Say No to Marijuana Money, Legal or Not,* N.Y. TIMES, January 11, 2014.

[127] Memorandum for U.S. Attorneys from James M. Cole, Deputy Attorney General, *Guidance Regarding Marijuana Related Financial Crimes*, February 14, 2014 (*hereinafter* 2014 Cole Memorandum), available at http://www.justice.gov/usao/wae/news/2014/2014-02-14-FinCin.html.

Preemption

To what extent does the CSA trump or preempt state medical and recreational marijuana laws? The preemption doctrine stands at the threshold of the federal-state marijuana debate. The preemption doctrine is grounded in the Supremacy Clause of Article VI, cl. 2, which states that "[t]he Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made ... under the Authority of the United States, shall be the supreme Law of the Land."[128] The Supremacy Clause, therefore, "elevates" the U.S. Constitution, federal statutes, federal regulations, and treaties[129] above the laws of the states.[130] As a result, where federal and state law are in conflict, the state law is generally preempted, leaving it void and without effect.[131]

Preemption is a matter of Congress's choice when it operates within its constitutionally enumerated powers. In some instances, Congress has exercised its authority so pervasively as to preclude the possibility of state activity within the same legislative field.[132] On the other hand, where Congress prefers the co-existence of state and federal law, state law must give way only when it conflicts with federal law in either of two ways: (1) if it is "physically impossible" to comply with both the state and federal law ("impossibility preemption"); or (2) if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" ("obstacle preemption").[133]

What constitutes an obstacle for preemption purposes is a matter "to be informed by examining the federal statute as a whole and identifying its purpose and intended effects."[134] When Congress acts within an area traditionally within the purview of the states, it will be assumed not to have intended to give its words preemptive force unless a contrary purpose is manifestly clear.[135]

The Controlled Substances Act contains an explicit statement of the extent of Congress's preemptive intent. Section 903 provides that

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.[136]

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[128] U.S. CONST., Art. VI, cl. 2.

[129] See discussion of preemptive effect of treaties *infra*.

[130] Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1145 (8th Cir. 1971).

[131] *See, e.g.*, Mutual Pharmaceutical Co., Inc. v. Bartlett, 133 S.Ct. 2466, 2473 (2013)("Under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.").

[132] Arizona v. United States, 132 S.Ct. 2492, 2501 (2012)("[T]he States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. The intent may be inferred from a framework of regulation so pervasive ... that Congress has left no room for the states to supplement it or where there is a federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.").

[133] Hillman v. Maretta, 133 S.Ct. 1943, 1950 (2013).

[134] Arizona v. United States, 132 S.Ct. at 2501.

[135] Hillman v. Maretta, 133 S.Ct. 1943, 1950 (2013).

[136] 21 U.S.C. §903.

Several state courts have addressed the preemption challenges to state medical marijuana laws with mixed results. For example, appellate courts in Colorado, California, and Michigan have concluded that at least some aspects of the medical marijuana laws in those states survive both impossibility and obstacle preemption analysis. In two instances, they have held that the language in Section 903 evidences an intent to preempt state laws only under impossibility preemption and *not* under obstacle preemption.[137]

The Colorado case, *People v. Crouse*, arose when a defendant, acquitted of cultivation charges on the basis of immunity under the state medical marijuana law, petitioned the trial court to order police to return of the marijuana plants they had seized in connection with his prosecution.[138] The state questioned whether the CSA precluded such an action. The Court of Appeals of Colorado determined that a state marijuana law is only in "positive conflict" with the CSA when it is "physically impossible" to simultaneously comply with the state and federal law. It held that in order to preempt the CSA Section 903 "demands more than that the state law 'stands as an obstacle to the accomplishment and execution' of the federal law.'"[139] Thus, the language of the CSA "cannot be used to preempt a state law under the obstacle preemption doctrine."[140] The decision in *Crouse* adopted[141] the reasoning of *County of San Diego v. San Diego NORML*, a California state court decision that also determined that obstacle preemption should not be applied in determining whether a state marijuana law is preempted by the CSA.[142]

In both instances, however, the court supplied an alternative, obstacle preemption explanation. In *Crouse*, the court noted Section 885(d) of the CSA "carves out a specific exemption for distribution of controlled substances by law enforcement officers."[143] Thus, if the officers returned ("distributed") the marijuana to Crouse they would not be obstructing the CSA but acting in a manner which it authorized.[144]

In *San Diego NORML*, the California law required local governments to issue medical marijuana cards to qualified applicants.[145] In the eyes of the California appellate court, the medical marijuana statute posed no obstacle to the CSA, because "[t]he purpose of the CSA is to combat recreational drug use, not to regulate a state's medical practices."[146]

The Michigan case, *Beek v. City of Wyoming*, involved a Wyoming City property owner and medical marijuana registrant who sought a declarative judgment against a city ordinance which proscribed the use of his property in a manner contrary to federal law including the CSA.[147] Beek

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[137] *See, e.g.,* County of San Diego v. San Diego NORML, 165 Cal.App. 4th 798 (2008)(holding that a state law conflicts with the CSA only where it is impossible to comply with both the state and federal law).

[138] 2013 Colo.App. LEXIS 1971 (December 19, 2013).

[139] *Id.* at *4.

[140] *Id.* at *11.

[141] *Id.* at *4 ("We consider County of San Diego well-reasoned and follow it here.")

[142] Cnty. of San Diego v. San Diego NORML, 165 Cal.App. 4th 798 (2008).

[143] 2013 Colo.App. LEXIS 1971 at *4.

[144] *Id.* at *5.

[145] Cnty. of San Diego v. San Diego NORML, 165 Cal.App.4th at 808.

[146] *Id.* at 826. The court also found that the California law was not vulnerable to impossibility preemption since the CSA did not outlaw the issuance of the medical marijuana cards that the California law required. Thus, it was not impossible for an individual to honor both the CSA and the California card law. *Id.* at 819-21.

[147] 495 Mich. 1, 24-25 (Mich. 2014).

argued that the Michigan Medical Marihuana Act (MMMA), which immunized an individual's cultivation of marijuana for medical purposes, invalidated the city ordinance. The City argued that the CSA preempted the MMMA. The Michigan Supreme Court held that the CSA did not preempt the MMMA, but also that the ordinance must yield to the MMMA.[148] As understood by the court, the MMMA escaped impossibility preemption because it was permissive and therefore did not command the performance of an act prohibited by federal law: "impossibility results when state law requires what federal law forbids, or vice versa."[149] The MMMA escaped obstacle preemption because it merely conveyed immunity from the consequences of state law: "the MMMA's limited state-law immunity for [medical marijuana] use does not frustrate the CSA's operation nor refuse its provisions their natural effect, such that its purpose cannot otherwise be accomplished.... [T]his immunity does not purport to alter the CSA's federal criminalization of marijuana, or to interfere with or undermine federal enforcement of that prohibition."[150]

The Oregon Supreme Court understood obstacle preemption a little differently in *Emerald Steel*.[151] State regulators had charged Emerald Steel with disability discrimination for firing an employee for medical marijuana use. The Oregon court concluded, based on its interpretation of U.S. Supreme Court precedent, that "[a]ffirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act."[152] Thus, "[t]o the extent that [the Oregon statute] affirmatively authorizes the use of medical marijuana, federal law preempts that subsection leaving it without effect."[153]

The continued viability of *Emerald Steel* may be open to question. While the Oregon Supreme Court has not overturned its earlier decision, it has observed in *Willis* that *Emerald Steel*'s "affirmative authorization" obstacle preemption test may have been an overgeneralization: "*Emerald Steel* should not be construed as announcing a stand-alone rule that any state law that can be viewed as 'affirmatively authorizing' what federal law prohibits is preempted. Rather it reflects this court's attempt to apply the federal rule and the logic of the most relevant federal cases to the particular preemption problem that was before it. And particularly where, as here, the issue of whether the statute contains an affirmative authorization is not straightforward, the analysis in *Emerald Steel* cannot operate as a simple stand-in for the more general federal rule."[154]

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[148] *Id.* at 24.

[149] *Id.* at 12.

[150] *Id.* at 14-15.

[151] Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus., 230 P.3d 518 (2010).

[152] *Id.* at 529 ("To be sure, state law does not prevent the federal government from enforcing its marijuana laws against medical marijuana users in Oregon if the federal government chooses to do so. But the state law at issue in Michigan Canners did not prevent the federal government from seeking injunctive and other relief to enforce the federal prohibition in that case. Rather, state law stood as an obstacle to the enforcement of federal law in Michigan Canners because state law affirmatively authorized the very conduct that federal law prohibited, as it does in this case"), *citing*, Michigan Canners & Freezers Assoc. v. Agricultural Marketing and Bargaining Bd., 467 U.S. 461, 478 (1984).

[153] *Id.* at 529.

[154] Willis v. Winters, 253 P.3d 1058, 1064 n.6 (2011). In *Willis*, the court held that the federal statute that outlawed firearm possession by a user of controlled substances did not preempt the Oregon statute that authorizes sheriffs to issue "concealed carry" permits to otherwise qualified applications who were users of medical marijuana. *Id.* at 1065-66.

Finally, in what is one of the few reported statements by a federal court relating to preemption of state marijuana laws, in *In re: Rent-Rite Super Kegs West LTD*,[155] a bankruptcy court noted (in what was clearly dicta) that "conflict preemption is not an issue here. Colorado constitutional amendments for both medical marijuana, and the more recent amendment legalizing marijuana possession and usage generally, both make it clear that their provisions apply to state law only. Absent from either enactment is any effort to impede the enforcement of federal law."[156]

Other Constitutional Considerations

Other colorable constitutional issues involving the CSA and state medical or recreational marijuana statutes have arisen on a number of occasions. The Supreme Court resolved one of them when it found that Congress's constitutional authority to regulate interstate and foreign commerce enabled it to craft the CSA so as to categorically outlaw the cultivation and possession of marijuana.[157]

Congress's Commerce Clause authority, however, does not include the power to compel a state legislature to act at its bidding or a state official to enforce its will.[158] From time to time, medical marijuana litigants have invoked this limitation in an effort to shield themselves from the CSA. Because the CSA makes no demands of state legislatures or officials, those efforts have been to no avail.[159] The related Tenth Amendment argument that the CSA intrudes upon those police powers reserved to the states has enjoyed no greater success.[160]

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[155] *In re:* Rent-Rite Super Kegs West Ltd., 484 B.R. 799 (December 19, 2012). Whether the debtor was engaged in criminal activity was an issue in the case because "a federal court cannot be asked to enforce the protections of the Bankruptcy Code in aid of a Debtor whose activities constitute a continuing federal crime." *Id.* at 805.

[156] *Id.* at 805 ("The fact that there is a difference in legislative philosophy creates no conflict that requires an analysis of federal preemption under the Supremacy Clause."). Part of the confusion over the proper application of obstacle preemption to state marijuana laws may stem from an apparent disagreement over the nature of the obstacle that is required to trigger preemption. As previously noted, the Supreme Court has held that a state law is preempted when it "stands as an obstacle *to the accomplishment and execution of the full purposes and objectives of Congress*." Hillman v. Maretta, 133 S.Ct. at 1950 (emphasis added). Most courts that have rejected preemption challenges to state medical marijuana laws have interpreted "the full purposes and objectives of Congress" in relation to the federal government's ability to enforce federal law. As such, these courts have generally held that because the state law does not create a shield or otherwise immunize state residents from federal criminal prosecutions, the law does not constitute an obstacle to "the enforcement of federal law." To the contrary, the Oregon Supreme Court reasoned that the fact that the state law in no way inhibited federal prosecutions did not mean that the law did not otherwise create an obstacle to the Congress's chief objective in enacting the CSA; that of curtailing drug use. Emerald Steel Fabricators, Inc. v. Bureau of Labor Indus., 230 P.3d at 529.

[157] Gonzales v. Raich, 545 U.S. 1, 5, 22 (2005)(The question presented in this case is whether the power vested in Congress by Article I, §8, of the Constitution, '[t]o make all Laws which shall be necessary and proper for carrying into Execution' its authority to 'regulate Commerce with foreign Nations, and among the several States' includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.... Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, ... we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, ... Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce ... among the several States.'").

[158] New York v. United States, 505 U.S. 144, 161 (1981)("Congress may not commandeer the legislative process of the States by directly compelling them to enact and enforce a regulatory program."). Printz v. United States, 521 U.S. 898, 935 (1997)("The Federal Government may [not] ... command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

[159] United States v. Washington, 887 F.Supp.2d 1077, 1101 (D.Mont. 2012); United States v. Stacy, 696 F.Supp.2d (continued...)

Of course, the purported exercise of an explicit constitutional power such as the Commerce Clause will be defeated, if the exercise is beyond the scope of the asserted power or is contrary to some other explicit or implicit constitutional limitation. In the case of the fundamental rights of the people, the Tenth Amendment, the Ninth Amendment, and the substantive due process components of the Fifth and Fourteenth Amendments all impose limits on the federal or state legislative powers.[161] Here too, litigants generally have been unable to convince the courts that the limitations entitle them to relief. Tenth Amendment reservations with respect to the rights of the people disappear once it is established that the Constitution has expressly delegated a power to the United States, as in the case of the Necessary and Proper Clause and the CSA.[162] A limitation on intrusion upon the rights of the people, however, may flow from the Ninth Amendment and the Due Process Clauses' implicit prohibition on governmental encroachment on a fundamental right.

Fundamental rights are those "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[163] The courts have thus far declined to find such a fundamental right in the possession, use, or cultivation of marijuana, even for medicinal purposes.[164]

Due process and equal protection challenges have surfaced both in cases questioning the CSA and those contesting application of the various state marijuana laws. At the federal level, several courts have rejected the suggestion that the government is estopped from enforcing the CSA by virtue of misleading or inconsistent statements in the Ogden Memorandum and elsewhere.[165]

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1141, 1145 (S.D.Cal. 2010); Raich v. Gonzales, 500 F.3d 850, 867 n.17 (9th Cir. 2007).

[160] Sacramento Nonprofit Collective v. Holder, 855 F.Supp.2d 1100 (E.D.Cal. 2012)("[I]t is well established under United States Supreme Court authority that if a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States. Since the power to regulate the intrastate possession, manufacturing, and distribution of marijuana is delegated to Congress through the Commerce Clause, Raich I, 545 U.S. at 15, [the] allegation that the power to regulate marijuana in California was reserved to California through the Tenth Amendment is foreclosed by United States Supreme Court precedent."). Montana Caregivers Association, LLC v. United States, 841 F.Supp.2d 1147, 1149-150 (D.Mont. 2012)(to the same effect).

[161] U.S. Const. amend. X (emphasis added)("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*."); amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); amend. V ("No person shall ... be deprived of life, liberty, or property without due process of law...."); amend. XIV, §1 ("... No State shall ... deprive any person of life, liberty, or property without due process of law....").

[162] Cf., Raich v. Gonzales, 500 F.3d 850, (9th Cir. 2007)("The Supreme Court held in *Gonzales v. Raich* that Congress acted within the bounds of its Commerce Clause authority when it criminalized the purely intrastate manufacture, distribution, or possession of marijuana in the Controlled Substances Act, *See* 125 S.Ct. at 2215. Thus, after *Gonzales v. Raich*, it would seem that there can be no Tenth Amendment violation in this case.").

[163] Washington v. Glucksberg, 521 U.S. 702, 721 (1997)(internal citations omitted).

[164] Raich v. Gonzales, 500 F.3d at 861-66; United States v. Fry, 787 F.2d 903, 905 (4th Cir. 1986); United States v. Fogarty, 692 F.2d 542, 547 (8th Cir. 1982); Marin Alliance for Medical Marijuana v. Holder, 866 F.Supp.2d 1142, 1156-157 (N.D.Cal. 2011); Kuromiya v. United States, 37 F.Supp.2d 717, 725-27 (E.D.Pa. 1999).

[165] United States v. Washington, 887 F.Supp.2d 1077 (D.Mont. 2012)("Estoppel by official misleading statement ... applies where the defendant had a reasonable belief that his conduct was sanctioned by the government. [It] requires the accused to show that (1) an authorized government official, empowered to render the claimed erroneous advice, (2) who has been made aware of all the relevant historical facts, (3) affirmatively told him the proscribed conduct was permissible, (4) that he relied on the false information, and (5) that his reliance was reasonable. The Defendants assert the defense of estoppel by official misleading statement based on the Ogden memo; statements made to the press or to Congress by then-presidential-candidate Barack Obama, his campaign spokesman, his White House spokesman, and United States Attorney General Eric Holder; the characterizations of those statements in news media; the government's (continued...)

Some of these same cases have rejected the contention that placement of marijuana in Schedule I of the CSA is irrational and consequently constitutes a violation of equal protection.[166]

Municipal zoning or land use ordinances set the stage for most of the state marijuana-related due process cases. State laws vary as to whether municipalities may ban or restrict marijuana-related activities within their jurisdictions.[167] Where they may do so, the regulatory scheme must comply with due process requirements.[168]

Banking

The federal banking laws are designed to shield financial institutions from individuals and entities that deal in controlled substances. In fact, Congress has crafted several of them to enlist financial institutions in the investigation and prosecution of those who violate the CSA. As a consequence, medical marijuana providers have experienced difficulty securing banking services.[169] On

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entry into the stipulation in Santa Cruz; and statements made to at least one Defendant by Flathead Tribal Police drug investigator Arlen Auld. None of these statements justifies dismissal on a theory of estoppel by official misleading statement."); Marin Alliance for Medical Marijuana v. Holder, 866 F.Supp.2d at 1155-156; Sacramento Nonprofit Collective v. Holder, 855 F.Supp.2d at 1111; United States v. Stacy, 696 F.Supp.2d at1146-148; United States v. Schafer, 625 F.3d 629, 637-38 (9th Cir. 2010).

The Second Circuit has rejected the contention that the Ogden memo constituted a rescheduling of marijuana. United States v. Canori, 737 F.3d 181, 184-85 (2d Cir. 2013).

[166] United States v. Washington, 887 F.Supp.2d at 1102-103 ("The Ninth Circuit squarely rejected a rational basis challenge to the classification of marijuana as a schedule I substance in United States v. Miroyan, 577 F.2d 489, 495 (9th Cir. 1978). Although Fleming argues that since Miroyan, additional studies and changes in state law have called into question the rationality of Congress' policy, there remains sufficient debate regarding the public benefits and potential for harmful consequences of marijuana use to find a rational basis to uphold the continued classification of marijuana as a schedule I controlled substance."); Marin Alliance for Medical Marijuana v. Holder, 866 F.Supp.2d at 1146-147 ("There is no right under the Constitution to have a law go unenforced against you, even if you are the first person against whom it is enforced, and even if you think (or can prove) you are not as culpable as some others who have gone unpunished. The law does not need to be enforced everywhere to be legitimately enforced somewhere")(responding to plaintiffs' equal protection challenge that prosecutors' threatened to take legal action against them as the landlords of marijuana dispensaries' but visited no similar threats upon the landlords of Colorado dispensaries); Sacramento Nonprofit Collective v. Holder, 855 F.Supp.2d at 1109-110 (same equal protection challenge; same result).

[167] Beek v. City of Wyoming, 2014 Mich. LEXIS 194 (Mich. 2014)(Michigan Medical Marihuana Act precludes any absolute municipal ban on cultivating marijuana within city limits); City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc., 300 P.3d 494, 499 (Cal. 2013)(City may use its municipal powers to ban marijuana dispensaries within the city); Giuliani v. Jefferson County Board of County Commissioners, 303 P.3d 131, 135 (Colo.App. 2012)(municipal officials may ban the cultivation or sale of marijuana within the county).

[168] Santa Barbara Patients' Collective Health Coop. v. City of Santa Barbara, 911 F.Supp. 884, 892-93 (C.D.Cal. 2012)(pre-ordinance permit holder enjoyed a vested right to operate a marijuana dispensary that could not be curtailed without due process of law); Conejo Wellness Center, Inc. v. City of Agoura Hills, 214 Cal.App.4th 1534, 1562 (2013) (pre-ordinance dispensary operator had no vested liberty right requiring procedural due process to extinguish).

[169] *See, e.g.*, Deirdre Fernandes, *Banks Shun Fledgling Marijuana Firms in Mass*, THE BOSTON GLOBE ("Elsewhere in the country, legal marijuana businesses have run into the same problems ... Some marijuana businesses have found ways to get a bank account by, for example, setting up separate holding companies that avoid any reference in the names to marijuana. Even then, once banks get a whiff of where the money comes from, they close the accounts"), available at http://www.bostonglobe.com/business/2014/01/29/medical-marijuana-firms-face-cash-economy-banks-steer-clear/88ftUTUbcaYvZfA7fpuENN/story.htm; *Legal Marijuana Market Exceeds Tax Hopes, Creating Opportunities*, MARKETWATCH ("The Denver Post reported Wednesday that banks holding commercial loans on properties that lease to Colorado marijuana businesses say they don't plan to refinance those loans when they come (continued...)

February 14, 2014, the Department of Justice and the Treasury Department's Financial Crimes Enforcement Network (FinCEN) issued guidance with respect to marijuana-related financial crimes.[170] FinCEN's guidance specifically addresses the obligations to file suspicious activity reports (SARs).

Banks must file SARs with FinCEN relating to any transaction involving $5,000 or more that they have reason to suspect are derived from illegal activity.[171] Willful failure to do so is punishable by imprisonment for not more than five years (not more than 10 years in cases of a substantial pattern of violations or transactions involving other illegal activity).[172] Breaking up a transaction into two or more transactions to avoid the reporting requirement subjects the offender to the same 5/10 year maximum terms of imprisonment.[173] Banks must also establish and maintain anti-money laundering programs,[174] designed to ensure that bank officers and employees will have sufficient knowledge of the banks' customers and of the business of those customers to identify the circumstances under which filing SARs is appropriate.[175]

Suspicion aside, banks must file currency transaction reports (CTRs) with FinCEN relating to transactions involving $10,000 or more in cash.[176] Willful failure to do so is punishable by imprisonment for not more than five years (not more than 10 years in cases of a substantial pattern of violations or transactions involving other illegal activity).[177] Again, structuring a transaction to avoid the reporting requirement exposes the offender to the same 5/10 year maximum terms of imprisonment.[178]

Banks, their officers, employees, and customers may also face criminal liability under the money laundering statutes for marijuana-related financial transactions. Section 1957 makes it a federal crime to deposit or withdraw $10,000 or more in proceeds derived from the distribution of marijuana and any other controlled substances.[179] Section 1956 makes it a federal crime to engage in a financial transaction involving such proceeds conducted with an eye to promoting further offenses, for example, by withdrawing marijuana-generated funds in order to pay the salaries of medical marijuana dispensary employees.[180]

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due. Banks say property used as collateral for those loans theoretically is subject to federal drug-seizure laws, which makes the loans a risk. Colorado's two largest banks, Wells Fargo Bank and First Bank, say they won't offer new loans to landowners with preexisting leases with pot businesses. And Wells Fargo and Vestra Bank have told commercial loan clients they either have to evict marijuana business or seek refinancing elsewhere."), available at http://www.marketwatch.com/story/legal-marijuana-market-exceeds-tax-hopes-creating-opportunities-2014-02-27?/reflink=MW-news-stmp.

[170] 2014 Cole Memorandum; Department of the Treasury, *Financial Crimes Enforcement Network, BSA Expectations Regarding Marijuana-Related Business*, FIN-2014-G001 (Feb. 14, 2014)(herein after FinCEN guidance), available at http://www.fincen/gov/sstatutes_regs/guidance/pdf/FIN-2014-G002.pdf.

[171] 21 U.S.C. §5318(g); 31 C.F.R. §1020.320.

[172] 31 U.S.C. §5322.

[173] 31 U.S.C. §5324(d).

[174] 31 U.S.C. §5318(h); 12 U.S.C. §1818(s); 12 U.S.C. §1786(q)(1).

[175] 31 C.F.R. §§1020.200-1020.220.

[176] 31 U.S.C. §5313; 31 C.F.R. subpt.1020C; 31 C.F.R. subpt.1010 C.

[177] 31 U.S.C. §5322.

[178] 31 U.S.C. §5324(d).

[179] 18 U.S.C. §§1957(a), (d).

[180] 18 U.S.C. §1956(a)(1)(A)(i).

Section 1956 violations are punishable by imprisonment for not more than 20 years.[181] Section 1957 violations are punishable by imprisonment for not more than 10 years.[182] Conspiracy to violate either section carries the same maximum penalties,[183] as does aiding and abetting the commission of either offense.[184] Moreover, any real or personal property involved in, or traceable to, a transaction proscribed by either statute is subject to confiscation under either civil or criminal forfeiture.[185]

Federally insured state- and federally chartered depository institutions that engage in illegal or unsafe banking practices also run the risk of being assessed civil money penalties and even losing deposit insurance coverage, which would result in the termination of their status as an insured depository institution.[186]

In its recent guidance, FinCEN addressed banks' SAR reporting requirements. FinCEN began its guidance by emphasizing the point made in the accompanying 2014 Cole Memorandum, that the Justice Department's investigation and prosecution of financial crimes would be focused on activities that conflict with any of several federal priorities:

- preventing the distribution of marijuana to minors;
- preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;[187]
- preventing the diversion of marijuana from states where it is legal under state law in some form to other states;[188]
- preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- preventing violence and the use of firearms in cultivation and distribution of marijuana;[189]
- preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;

[181] 18 U.S.C. §1956(a)(1).

[182] 18 U.S.C. §1957(a).

[183] 18 U.S.C. §1956(h).

[184] 18 U.S.C. §2. *E.g.*, United States v. Lyons, 740 F.3d 702, 715 (1st Cir. 2014)(internal citations omitted)("An aider and abettor is punishable as a principal if, first, someone else actually committed the offense and, second, the aider and abettor became associated with the endeavor and took part in it, intending to ensure its success. The central requirement for the second element is a showing that the defendant consciously shared the principal's knowledge of the underlying criminal act, and intended to help the principal.").

[185] 18 U.S.C. §§981(a)(1)(A), 982(a)(1).

[186] 12 U.S.C. §1818.

[187] This presumably does not include enterprises, gangs, or cartels that possess or distribute marijuana in violation of the CSA but in compliance with applicable state law.

[188] This would seem to serve as a warning to interstate marijuana tourists and the businesses that serve them.

[189] Given the value of the product, violence may be an inescapable attribute of marijuana cultivation and sale, *see e.g.*, Benjamin B. Wagner & Jared C. Dolan, *Medical Marijuana and Federal Narcotics Enforcement in the Eastern District of California*, 43 McGeorge L. Rev. 109, 121 (2012).

- preventing the growing of marijuana on public lands and attendant public safety and environmental dangers posed by marijuana production on public lands;[190] and
- preventing marijuana possession or use on federal property.[191]

FinCEN advised financial institutions that in providing services to a marijuana-related business they must file one of three forms of special SARs: a marijuana limited SAR, a marijuana priority SAR; or a marijuana termination SAR. The marijuana limited SAR is appropriate when the bank determines, after the exercise of due diligence, that its customer is not engaged in any of the activities that violate state law or that would implicate any of the Justice Department investigation and prosecution priorities listed in the 2014 Cole Memorandum.[192] A marijuana priority SAR must be filed when the bank believes its customer is engaged in such activities.[193] A bank files a marijuana termination SAR when it finds it necessary to sever its relationship with a customer in order to maintain an effective anti-money laundering program.[194]

FinCEN also provides examples of "red flags" that may indicate that a marijuana priority SAR is appropriate:

- The business is unable to produce satisfactory documentation or evidence to demonstrate that it is duly licensed and operating consistently with state law.
- The business is unable to demonstrate the legitimate source of significant outside investments.
- A customer seeks to conceal or disguise involvement in marijuana-related business activity. For example, the customer may be using a business with a non-descript name (e.g., a "consulting," "holding," or "management" company) that purports to engage in commercial activity unrelated to marijuana, but is depositing cash that smells like marijuana.
- Review of publicly available sources and databases about the business, its owner(s), manager(s), or other related parties, reveal negative information, such as a criminal record, involvement in the illegal purchase or sale of drugs, violence, or other potential connections to illicit activity.
- The business, its owner(s), manager(s), or other related parties are, or have been, subject to an enforcement action by the state or local authorities responsible for administering or enforcing marijuana-related laws or regulations.
- A marijuana-related business engages in international or interstate activity, including by receiving cash deposits from locations outside the state in which the business operates, making or receiving frequent or large interstate transfers, or

[190] *Id.* at 122 ("About seventy percent or more of marijuana eradicated in California every year comes from public lands."); Marijuana Crops in California Threaten Forests and Wildlife, The New York Times, available at http://www.nytimes.com/2013/06/21/us/marijuana-crops-in-california-threaten-forests-and-wildlife.html.

[191] FinCEN guidance, at 2.

[192] *Id.* at 3-4.

[193] *Id.* at 4.

[194] *Id.* at 4-5.

otherwise transacting with persons or entities located in different states or countries.

- The owner(s) or manager(s) of a marijuana-related business reside outside the state in which the business is located.
- A marijuana-related business is located on federal property or the marijuana sold by the business was grown on federal property.
- A marijuana-related business's proximity to a school is not compliant with state law.
- A marijuana-related business purporting to be a "non-profit" is engaged in commercial activity inconsistent with that classification, or is making excessive payments to its manager(s) or employee(s).
- A customer appears to be using a state-licensed marijuana-related business as a front or pretext to launder money derived from other criminal activity (i.e., not related to marijuana) or derived from marijuana-related activity not permitted under state law. Relevant indicia could include the following:
  - The business receives substantially more revenue than may reasonably be expected given the relevant limitations imposed by the state in which it operates.
  - The business receives substantially more revenue than its local competitors or than might be expected given the population demographics.
  - The business is depositing more cash than is commensurate with the amount of marijuana-related revenue it is reporting for federal and state tax purposes.
  - The business is unable to demonstrate that its revenue is derived exclusively from the sale of marijuana in compliance with state law, as opposed to revenue derived from (i) the sale of other illicit drugs, (ii) the sale of marijuana not in compliance with state law, or (iii) other illegal activity.
  - The business makes cash deposits or withdrawals over a short period of time that are excessive relative to local competitors or the expected activity of the business.
  - Deposits apparently structured to avoid Currency Transaction Report ("CTR") requirements.
  - Rapid movement of funds, such as cash deposits followed by immediate cash withdrawals.
  - Deposits by third parties with no apparent connection to the account holder.
  - Excessive commingling of funds with the personal account of the business's owner(s) or manager(s), or with accounts of seemingly unrelated businesses.
  - Individuals conducting transactions for the business appear to be acting on behalf of other, undisclosed parties of interest.
  - Financial statements provided by the business to the financial institution are inconsistent with actual account activity.

- A surge in activity by third parties offering goods or services to marijuana-related businesses, such as equipment suppliers or shipping servicers."[195]

The FinCEN guidance ends with the observation that a bank is not absolved of its obligation to file a currency transaction report for any financial transaction involving more than $10,000 in cash, regardless of how it resolves its marijuana SAR obligations.[196]

Other Federal Law Consequences

Employment

The use of marijuana, medicinal or otherwise, may have adverse employment consequences.[197] Both state and federal courts have upheld firing an employee for medical marijuana use.[198] Employee challenges have cited in vain state medical marijuana laws as well as federal and state anti-discrimination laws. The state medical marijuana laws ordinarily immunize medical marijuana users from the adverse consequences of the law, but do not give them a right that can be used affirmatively against a private entity.[199] The Americans with Disabilities Act (ADA) and similar state anti-discrimination in employment statutes are predicated upon discrimination based on *lawful* activity and the CSA has consequently proven to be an insurmountable obstacle.[200]

They differ somewhat in the case of nongovernment employees, because, among other things, federal, state, and local government employees enjoy Fourth Amendment protections. The Fourth Amendment, binding on government employers, does not give employees the right to use marijuana, medical or otherwise, but it limits the likelihood that their employers will discover their use. The Fourth Amendment's proscription on unreasonable governmental searches means

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[195] *Id.* at 5-7.

[196] *Id.* at 7.

[197] *See, generally*, Matthew D. Macy, *Employment Law and Medical Marijuana*, 41 COLORADO LAWYER 57 (2012).

[198] Coats v. Dish Network, LLC, 303 P.3d 147 (Colo.App. 2013); Casias v. Wal-Mart Stores, Inc., 695 F.3d 428 (6th Cir. 2012); Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus., 230 P.3d at 518; Ross v. RagingWire Telecomm., Inc., 42 Cal.4th 920 (2008).

[199] Casias v. Wal-Mart Stores, Inc., 695 F.3d at 435 (internal citations omitted)(emphasis in the original)("[T]he MMMA [Michigan Medical Marihuana Act] does not regulate private employment; [r]ather the Act provides a potential defense to criminal prosecution or other adverse action *by the state*.... MMMA contains no language stating that it repeals the general rule of at-will employment in Michigan or that it otherwise limits the range of allowable private decisions by Michigan businesses"); Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus., 230 P.3d at 169 n.7, citing, Roe v. TeleTech Customer Car Management, 152 Wash.App. 388, 216 P.3d 1055 (2009); Ross v. RagingWire Telecommunications, 42 Cal.4th 920 (2008) ("Both the California and Washington courts have held that, in enacting their states' medical marijuana laws, the voters did not intend to affect an employer's ability to take adverse employment actions based on the use of medical marijuana.").

[200] Coats v. Dish Network, LLC, 303 P.3d at 149-53 (The Colorado Civil Rights Act (CCRA) outlaws firing employees for "lawful" out of work activities. Use of marijuana as permitted by the Colorado medical marijuana but in violation of the CSA was not a lawful activity for purposes of the CCRA); Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus., 230 P.3d at 535 (Because the employee was fired for illegal use of marijuana under the CSA, the state employment discrimination statute, modelled after the ADA, does not apply); *see also* James v. City of Lake Forest, 700 F.3d 394, 397 n.3 (9th Cir. 2012)("[T]he ADA does not protect medical marijuana users who claim to face discrimination on the basis of their marijuana use.").

that federal, state, or local entities must have either reasonable suspicion or a constitutionally recognized special need in order to conduct employee drug testing.[201]

Government

A significant number of government employees, however, must undergo random drug testing because the nature of their duties places them in a "special needs" category. For example, random drug testing is a fact of life and continued condition of employment for anyone with access to classified or similarly sensitive information.[202]

In the case of employees of state or local governmental entities, the "lower courts have allowed drug testing in other safety-sensitive occupation" such as "aviation personnel, railroad safety inspectors, highway and motor carrier safety specialists, lock and dam operators, forklift operators, tractor operators, engineering operators, and crane operators."[203]

More generally, federal contractors may face the loss of federal funding or could be subject to administrative fines if they do not maintain and enforce policies aimed at achieving a drug-free, safe workplace. The federal Drug-Free Workplace Act of 1988 (DFWA)[204] imposes a drug-free workplace requirement on any entity that receives federal contracts with a value of more than $150,000 or that receives any federal grant.[205] DFWA requires these entities to make ongoing,

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[201] Maryland v. King, 133 S.Ct. 1958, 1969 (2013)(internal citations and quotation marks omitted)("In giving content to the inquiry whether an intrusion is reasonable, the Court has preferred some quantum of individualized suspicion ... as a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion. In some circumstances, such as when faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual circumstances may render a warrantless search or seizure reasonable."). *See, generally*, CRS Report R42326, *Constitutional Analysis of Suspicionless Drug Testing Requirements for the Receipt of Governmental Benefits*, by David H. Carpenter.

[202] 50 U.S.C. §3343(b)("After January 1, 2008, the head of a Federal agency may not grant or renew a security clearance for a covered person who is an unlawful user of a controlled substance ...."); 50 U.S.C. §3343(a)(2)("The term covered person means: (A) an officer or employee of a Federal Agency; (B) a member of the Army, Navy, Air Force, or Marine Corps who is on active duty or is in an active status; and (C) an officer or employee of a contractor of a Federal Agency"); *e.g.*, 51 U.S.C. §31102(b)("(1) Employees of administration.-The Administrator shall establish a program applicable to employees of the Administration whose duties include responsibility for safety-sensitive, security, or national security functions. Such program shall provide for preemployment, reasonable suspicion, random, and post-accident testing for use, in violation of applicable law or Federal regulation, of alcohol or a controlled substance.... (2) Employees of contractors.-The Administrator shall, in the interest of safety, security, and national security, prescribe regulations. Such regulations shall establish a program that requires Administration contractors to conduct preemployment, reasonable suspicion, random, and post-accident testing of contractor employees responsible for safety-sensitive, security, or national security functions (as determined by the Administrator) for use, in violation of applicable law or Federal regulation, of alcohol or a controlled substance.... (3) Suspension, disqualification, or dismissal.-In prescribing regulations under the programs required by this subsection, the Administrator shall require, as the Administrator considers appropriate, the suspension, disqualification, or dismissal of any employee to which paragraph (1) or (2) applies, in accordance with the provisions of this section, in any instance where a test conducted and confirmed under this section indicates that such employee has used, in violation of applicable law or Federal regulation, alcohol or a controlled substance."). *See also* 49 U.S.C. §20140(Program of required preemployment, reasonable suspicion, random, and post-accident testing of all railroad employees responsible for safety-sensitive functions).

[203] Barrett v. Claycomb, 705 F.3d 315, 322 (8th Cir. 2013), referring to cases collected in Kreig v. Seybold, 481 F.3d 512, 518 (7th Cir. 2007).

[204] 41 U.S.C. §§8101, *et seq.*

[205] 41 U.S.C. §§8102, 8103; 2 C.F.R. pt.182; 48 C.F.R. §§23.500, *et seq.*; 48 C.F.R. §2.101 (simplified acquisition threshold). U.S. Dept. of Labor, *Drug-Free Workplace Act of 1988 Requirements,* available at http://www.dol.gov/ (continued...)

good faith efforts to comply with the drug-free workplace requirement in order to qualify, and remain eligible, for federal funds.[206]

Private

Absent status as a federal contractor and grantee status or some other federal influence,[207] employers are relatively free to establish their own drug free workplaces and to fire employees who test positive for marijuana use, medical or otherwise.[208] Although an occasional medical marijuana statute will shield employees,[209] more often the statute is silent and thought not to cabin at will employment status, as noted earlier.[210] Moreover, depending upon the factual

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elaws/asp/drugfree/screenr.htm.

[206] 41 U.S.C. §§8102, 8103. There are slightly different requirements for individuals and organizations that receive federal contracts or grants. 41 U.S.C. §§8102, 8103. *See* U.S. Dept. of Labor, *Drug-Free Workplace Act of 1988 Requirements for Individuals,* available at http://www.dol.gov/elaws/asp/drugfree/req_ind.htm ("Any individual who receives a contract or grant from the Federal government, regardless of dollar value, must agree not to engage in the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance in the performance of this contract/grant."), and U.S. Dept. of Labor, *Drug-Free Workplace Act of 1988 Requirements for Organizations,* available at http://www.dol.gov/elaws/asp/drugfree/require.htm ("All organizations covered by the Drug-Free Workplace Act of 1988 are required to provide a drug-free workplace by ... [publishing] and [giving] a policy statement to all covered employees informing them that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the covered workplace and specifying the actions that will be taken against employees who violate the policy).

[207] Due to their potential impact on public safety, commercial pilots, truckers, bus drivers and the like are subject to periodic drug testing which the United States Department of Transportation has recently made clear does not excuse a positive drug test for either medical or recreational marijuana use, U.S. Dep't of Transp., *Fact Sheet: DOT 'Medical" Marijuana Notice* (Feb. 23, 2013), citing 49 C.F.R. 40.151, available at http://www.dot.gov/sites/dot.gov/files/docs/ODAPC_medicalmarijuananotice.pdf ("The Department of Justice (DOJ) issued guidelines for Federal prosecutors in states that have enacted laws authorizing the use of 'medical marijuana.' We have had several inquiries about whether the DOJ advice to Federal prosecutors regarding pursing criminal cases will have an impact upon the Department of Transportation's longstanding regulation about the use of marijuana by safety-sensitive transportation employees—pilots, school bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit fire-armed security personnel, ship captains, and pipeline emergency response personnel, among others. We want to make it perfectly clear that the DOJ guidelines will have no bearing on the Department of Transportation's regulated drug testing program. We will not change our regulated drug testing program based upon these guidelines to Federal prosecutors."). DOT issued a similar notice with regard to recreational marijuana, U.S. Deprtment of Transportation, *DOT 'Recreational' Marijuana Notice* (Feb. 22, 2013), available at http://www.dot.gov/odapc/dot-recreational-marijuana-notice.

[208] *See, generally, A Cruel Choice: Patients Forced to Decide Between Medical Marijuana and Employment*, 26 HOFSTRA LAB. & EMP. L.J. 619 (2008).

[209] *E.g.*, R.I. GEN. LAWS §22-28.6-4(c)("No school, employer or landlord may refuse to enroll, employ or lease to or otherwise penalize a person solely for his or her status as a cardholder."); ARIZ. REV. STAT. ANN. §36-2813[B]("Unless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon either: 1. The person's status as a cardholder. 2. A registered qualified patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment.").

[210] Casias v. Wal-Mart Stores, Inc., 695 F.3d at 435; Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus., 230 P.3d at 169 n.7, citing, Roe v. TeleTech Customer Car Management, 152 Wash.App. 388, 216 P.3d 1055 (2009); Ross v. RagingWire Telecommunications, 42 Cal.4th 920 (2008).

situation and the state unemployment statute in play, employees fired for marijuana use may also be ineligible for unemployment benefits.[211]

Taxation

Income from any source is ordinarily subject to federal taxation.[212] This is so even when the activity that generates the income is unlawful.[213] Marijuana merchants, however, operate under a special federal tax disadvantage.[214] Section 280E of the Internal Revenue Code provides:

> No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.[215]

As a result of this provision, marijuana merchants, unlike most businesses,[216] may not deduct their operating expenses (e.g., general labor, rent, and utilities) when computing their federal income tax liability. Section 280E does not, however, apply to the cost of goods sold (COGS), which means marijuana sellers may subtract COGS when determining gross income.[217] Courts and the IRS have interpreted Section 280E to apply to marijuana so long as it is a controlled substance under the CSA, regardless of whether the purchase and use are allowed under state law.[218] Moreover, the customers of a medical marijuana merchant cannot deduct the amounts spent on marijuana as medical expenses.[219]

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[211] Under some state laws, eligibility for unemployment compensation turns on proof the marijuana use occurred on the job or had job-related consequences, *Compare*, Peace River Distributing, Inc. v. Florida Unemployment Appeals Commission, 80 So.3d 461, 464 (Fla.App. 2012)(discharged employee who tested positive for marijuana use was not entitled to unemployment compensation); Virginia Employment Commission v. Comty. Alternatives, Inc., 705 S.E.2d 530, (Va.App. 2011)(same); Maskerines v. Unemployment Comp. Bd. of Review, 13 A.3d 553, 560 (Pa.Comm. 2011)(employer need not show job nexus where discharged employee had agreed to comply with employer's drug free policy); Div. of Emp. Sec. v. Comer, 199 S.W.3d 915, 921 (Mo.App. 2006); *with*, Johnson v. So Others Might Eat, Inc., 53 A.3d 323, (D.C.App. 2012); Cusack v. Williams, 286 S.W.3d 180, 182 (Ark.App. 2008)(employer need not show job nexus where bus driver's off duty marijuana use made him ineligible for the commercial driver's license, a reasonable condition of employment). *See also* Desilet v. Glass Doctor, 132 P.3d 412, 415-16 (Idaho 2006)(off-duty marijuana use is presumed job-related if the employer followed state approved testing guidelines; otherwise the employer must show a job nexus).

[212] 26 U.S.C. §61.

[213] James v. United States, 366 U.S. 213, 218-20 (1961).

[214] For more information on this subject, *see* CRS Report WSLG1101, *Federal Taxation of Marijuana Sellers*, by Erika K. Lunder.

[215] 26 U.S.C. §280E. *See also* Californians Helping to Alleviate Med. Problems, Inc. v. Comm'r, 128 T.C. 173 (2007); Olive v. Comm'r, 139 T.C. 19 (2012).

[216] Taxpayers are generally allowed to deduct all "ordinary and necessary" business expenses. *See* 26 U.S.C. §162(a).

[217] *See CHAMP*, 128 T.C. at 178 n.4; *Olive*, 139 T.C. at 20 n.2; Peyton v. Comm'r, T.C. Memo 2003-146, *15 (2003); Franklin v. Comm'r, T.C. Memo. 1993-184, *28 n.3 (1993).

[218] *See CHAMP*, 128 T.C. at 182; *Olive*, 139 T.C. at 38.; I.R.S. Information Letter 2011-0005 (Mar. 25, 2011), available at http://www.irs.gov/pub/irs-wd/11-0005.pdf.

[219] *See* Rev. Rul. 97-9, 1997-1 C.B. 77. In this ruling, the IRS held that an amount paid to obtain marijuana for medical care was not a deductible medical expense even though the purchase and use was allowed under state law. This is because Treasury regulations deny a deduction for illegally procured drugs and illegal treatments. *See* 26 C.F.R. §1.213-1(e)(1)(ii) and (2). The IRS reasoned that marijuana obtained in violation of the CSA is not legally procured (continued...)

Possession of Firearms

It is a federal crime punishable by imprisonment for not more than 10 years for an unlawful user of a controlled substance to possess a firearm or ammunition.[220] Federal regulations define an "unlawful user" to include "any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician."[221] The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has made it clear that "any person who uses ... marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of ... a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition."[222]

Moreover, those associated with a marijuana-cultivation or -sales operation may incur additional firearm-related criminal liability. In addition to the penalties for growing or selling, anyone who provides security for the operation and possesses a firearm in furtherance of that enterprise is subject to a series of mandatory terms of imprisonment.[223] The offender and any accomplices face an additional five-year mandatory minimum term of imprisonment for possession of a firearm; a seven-year mandatory term if he brandishes the firearm; and a 10-year mandatory term if discharges it.[224]

Federally Assisted Housing

"Illegal drug users" are ineligible for federally assisted housing.[225] Public housing agencies and owners of federally assisted housing must establish standards that would allow the agency or owner to prohibit admission to, or terminate the tenancy or assistance of, any applicant or tenant who is an illegal drug user.[226] An agency or an owner can take these actions if a determination is made, pursuant to the standards established, that an individual is "illegally using a controlled substance," or if there is reasonable cause to believe that an individual has a "pattern of illegal use" of a controlled substance that could "interfere with the health, safety, or right to a peaceful enjoyment of the premises by other residents."[227] Thus, any individual whom the housing authority reasonably believes is using marijuana could be denied access to, or evicted from, federally assisted housing.

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and constitutes an illegal treatment, regardless of how the purchase and use may be treated under state law, and therefore the amounts could not be deducted as medical expenses.

[220] 18 U.S.C. §§922(g)(3), 924(a)(2).

[221] 27 C.F.R. §478.11.

[222] *See* Open Letter to All Federal Firearm Licensers, September 21, 2011, available at http://www.atf.gov/files/press/releases/2011/09/092611-atf-open-letter-to-all-ffls-marijuana-for-medicinal-purposes.pdf.

[223] 18 U.S.C. §924(c), 21 U.S.C. §841.

[224] 18 U.S.C. §§924(c)(1)(A)(i) to (iii), 2. Co-conspirators are subject to imprisonment for not more than 20 years, 18 U.S.C. §924(*o*).

[225] 42 U.S.C. §§13661-13662. *See, generally, Medical Marijuana and the Effect of State Laws on Federally Subsidized Housing*, 57 WAYNE L. REV. 1437 (2011).

[226] 42 U.S.C. §§13661-13662.

[227] *Id.*

With respect to medical marijuana, the Department of Housing and Urban Development previously concluded that public housing agencies or owners "must deny *admission*" to applicants who are using medical marijuana, but "have statutorily-authorized discretion with respect to evicting or refraining from evicting *current residents* on account of their use of medical marijuana."[228]

The question of whether marijuana users may be excluded from federally assisted housing is not the same as whether applicants for such housing may be required to undergo drug testing. The Eleventh Circuit's *Lebron* decision, decided in another context, would seem to preclude such preliminary testing in the absence of some individualized suspicion.[229]

Ethical Considerations

Rule 1.2(d) of the American Bar Association's Model Rules of Professional Conduct, adopted in virtually every jurisdiction, states that "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law."[230]

Bar officials in several states—Arizona, Colorado, Connecticut, Maine, and Washington, among them—have issued ethics opinions addressing ethical constraints arising out of the conflict between state and federal marijuana laws.[231]

The Arizona State Bar concluded in Opinion 11-01that the Ogden Memorandum had created a "safe harbor" for those that operated within the confines of the state's medical marijuana statute.[232] In its view, Arizona lawyers may counsel and assist their clients in any activity permitted under the Arizona medical marijuana law as long as their clients were made fully aware of the consequences under federal law.[233]

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[228] Memorandum from Helen R. Kanoovsky, *Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing,* January 20, 2011, available at http://www.scribd.com/doc/47657807/HUD-policy-Memo-on-Medical-Marijuana-in-Public-Housing. *See also* Assenberg v. Anacortes Hou. Auth., 268 Fed.Appx. 643 (9th Cir. 2008)(Under the Fair Housing Act, tenant in publicly assisted housing is not entitled to medical necessity defense and termination of lease based on tenant's drug use did not violate HUD policy).

[229] In Lebron v. Sec. of the Fla. Dep't of Children and Families, 772 F.3d 1352 (11th Cir. 2014), the U.S. Court of Appeals upheld, on Fourth Amendment grounds, a challenge to a state requirement that applicants for Temporary Assistance for Needy Families (TANF) benefits submit to drug testing. *See* CRS Report R42326, *Constitutional Analysis of Suspicionless Drug Testing Requirements for the Receipt of Governmental Benefits*, by David H. Carpenter.

[230] A second Rule, Rule 8.4(b) provides that, "it is professional misconduct for a lawyer to ... (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." *See, generally*, Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?* 91 OR. L. REV. 869 (2013).

[231] A sample of ethics opinions was chosen for illustrative purposes. This report does not provide an exhaustive analysis of *all* state bar association ethics opinions on the issue.

[232] State Bar of Arizona Ethics Opinion 11-01 (Feb. 2011), available at http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710.

[233] "• If a client or potential client requests an Arizona lawyer's assistance to undertake the specific actions that the [Arizona medical marijuana] Act expressly permits; and • The lawyer advises the client with respect to the potential federal law implications and consequences thereof or, if the lawyer is not qualified to do so, advises the client to seek other legal counsel regarding those issues and limits the scope of his or her representation; and • The client, having (continued...)

In contrast, Opinion 199 of the Maine Professional Ethics Commission advised attorneys that, absent an amendment to either the Rules of Professional Conduct or the CSA, a member of the Maine bar "may counsel or assist a client in making good faith efforts to determine the validity, scope, meaning or application of the law," but "the Rule forbids attorneys from counseling a client to engage in the [marijuana] business or to assist a client in doing so."[234] The Commission declined to provide more specific advice, but warned that significant risks attended practice in the area.

The Connecticut Bar Association offered much the same advice.[235] Lawyers may advise their clients about the features of the state medical marijuana statute, but they may not assist clients in a violation of the CSA.

While the Arizona, Maine, and Connecticut opinions are relatively general and relatively terse, the Colorado opinion provides far more examples of its view of the permissible and impermissible.[236] It concluded that, consistent with Rule 1.2(d) and the CSA, a Colorado attorney might (1) represent and advise a client concerning the consequences of marijuana-related activities for purposes of criminal law, family law, or labor law; (2) as a government attorney advise a client in a matter involving the establishing, interpreting, enforcing, or amending zoning relations, local ordinances, or legislation;[237] or (3) advise a client on the tax obligations incurred when cultivating or selling marijuana.

It concluded, on the other hand, that a Colorado attorney may not (1) draft or negotiate contracts, leases, or other agreements to facilitate the cultivation, distribution, or consumption of marijuana; or (2) provide tax planning assistance with an eye to violating federal law. Moreover, the Opinion points out that providing such assistance while aware of a client's intent is "likely to constitute aiding and abetting the violation of or conspiracy to violate federal law."

Washington State attorneys have the advantage of not one, but two bar advisories. Both take a position similar to the Arizona opinion: attorneys transgress no ethical boundaries if their professional conduct is consistent with state law and perhaps with federal enforcement priorities. The Bar Association of King County (Seattle and environs) opined that an attorney who advises and assists a client to establish and maintain a marijuana dispensary is not subject to discipline, as long as his client's conduct is permitted under state marijuana law and as long as he makes his client aware of the provisions of the CSA including the Cole Memorandum.[238]

(...continued)

received full disclosure of the risks of proceeding under the state law, wishes to proceed with a course of action specifically authorized by the Act; then • The lawyer ethically may perform such legal acts as are necessary or desirable to assist the client to engage in the conduct that is expressly permissible under the Act."

[234] Maine Professional Ethics Commission, Opinion #199 (July 7, 2010), available at http://www.mebaroverseers.org/attorney_services/opinion.html?id=110134.

[235] Connecticut Bar Association, Professional Ethics Committee, Informal Opinion 2013-02 (Jan. 16, 2003), available at http://c.ymcdn.com/sites/ctbar.site-ym.com/resource/resmgr/Ethics_Opinions/Informal_Opinion_2013-02.pdf.

[236] Colorado Bar Association Ethics Committee, Formal Opinion 125 (Oct. 21, 2013), 42 COLO. LAWYER 19 (Dec. 2013).

[237] Here, the Opinion finds support in 21 U.S.C. §885(d) which affords federal, state, and local law enforcement officers immunity for enforcement of federal, state, and local controlled substance laws.

[238] King County Bar Association, *KCBA Ethics Advisory Opinion on I-502 & Rules of Professional Conduct* (Oct. 2013), available at http://www.kcba.org/judicial/legislative/pdf/i502_ethics_advisory_opinion_october_2013.pdf.

Moreover, in the opinion of the King County Bar Association, an attorney is likewise not subject to discipline merely because he owns an interest in a marijuana dispensary. Although such activity may constitute a crime under the CSA, it is not "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer," in the eyes of the County Bar Association.

The second Washington opinion is a proposed advisory opinion which the Washington State Bar Association submitted to the Washington Supreme Court along with a proposal to add a comment to Rule 1.2 of the Washington Rules of Professional Conduct.[239] In its proposed opinion, a lawyer would be free to advise a client as to the nuances of state marijuana law as long as he did not do so in furtherance of an effort to violate or mask a violation of state marijuana law. A lawyer would also be free to advise and assist a client to establish and maintain a dispensary within the bounds of state law at least until such time as federal enforcement policies change. Finally, under the proposed opinion and accompanying proposed comment, a lawyer would be free to engage in a marijuana business without offending the Rule that condemns criminal conduct that reflects adversely on a lawyer's fitness to practice.[240]

Marijuana Research Under Federal Law

The federal government retains strict controls over the use of marijuana for research purposes. Under the CSA, the Attorney General, as delegated to the Drug Enforcement Agency (DEA), is authorized to register "practitioners" to "dispense, or conduct research with" controlled substances.[241] In instances where the practitioner seeks to conduct research on a schedule I drug, such as marijuana, that application is forwarded to the Secretary of Health and Human Services "who shall determine the qualifications and competency of each practitioner requesting registration, as well as the merits of the research protocol."[242] The Secretary is also directed to "consult" with the Attorney General to ensure "effective procedures to adequately safeguard against diversion of such controlled substances from legitimate medical or scientific use."[243] As of May 2014, the DEA has registered approximately 237 practitioners to conduct marijuana

[239] Washington State Bar Association, Committee on Professional Ethics, *Proposed Advisory Opinion 2232* (Jan. 8, 2014), available at http://www.wsba.org/~/media/Files/Legal%20Community/Committees_Boards_Panels/Committee%20on%20Professional%20Ethics/CPE%20Report%201-8-14_Attachmts.ashx (The proposed comment would state: "Since the passage of I-502 by Washington voters in November 2012, both the federal and state government have devoted considerable resources to allowing I-502 [relating to recreational marijuana] to come into effect without regard to federal controlled substances laws, as long as certain stated federal concerns regarding matters such as sales to minors and other unlawful conduct are addressed. *See, e.g.*, Washington State Bar Association Advisory Opinion 2232 and sources cited. At least until there is a subsequent change of federal enforcement policy, a lawyer who counsels or assists a client regarding conduct permitted under I-502 does not, without more, violate RPC 1.2(d). *See also* Washington Comment [7] to RPC 8.4 [related criminal acts committed by attorneys].").

[240] *Proposed Advisory Opinion 2232*. The proposed comment to accompany Rule 8.4 would state: "A unique circumstance was presented by the November 2012 passage by Washington voters of I-502, which allows for the creation of a state-regulated system for the production and sale of marijuana for recreational purposes. At least until there is a subsequent change of federal enforcement policy, a lawyer who engages in conduct permitted under I-502, does not, without more, violate RPC 8.4(g), (i), (k), or (n). *See also* Washington Comment [18] at RPC 1.2."

[241] 21 U.S.C. §823(f).

[242] *Id.*

[243] *Id.*

research, including 16 "approved to conduct research with smoked marijuana on human subjects."[244]

Practitioners obtain marijuana for approved research through the National Institute on Drug Abuse (NIDA) drug supply program. Under the CSA, the Attorney General is authorized to register applicants to manufacture or grow marijuana "if he determines that such registration is consistent with the public interest and with United States obligations under international treaties ..."[245] Currently, the National Center for Natural Products Research (NCNPR) at the University of Mississippi is the only organization registered to manufacture marijuana.[246] The NIDA administers the federal contract with the NCNPR and therefore acts as the "single official source" through which researchers may obtain marijuana for research purposes.[247]

Congressional Response

Several statutory provisions were enacted late in the 113th Congress and a number of legislative proposals have been introduced in the 114th concerning marijuana and state legalization initiatives.

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[244] *See The Dangers and Consequences of Marijuana Abuse*, U.S. Dept. of Justice, Drug Enforcement Admin., at p. 4, May 2014, available at http://www.dea.gov/docs/dangers-consequences-marijuana-abuse.pdf. Researchers have reportedly encountered difficulties obtaining the marijuana necessary for their research. *See, e.g.*, Gardiner Harris, *Researchers Find Study of Medical Marijuana Discouraged*, N.Y. Times, January 18, 2010.

[245] 21 U.S.C. §823(a). In evaluating whether granting a registration is in the "public interest" the Attorney General must consider:

> (1) maintenance of effective controls against diversion of particular controlled substances and any controlled substance in schedule I or II compounded therefrom into other than legitimate medical, scientific, research, or industrial channels, by limiting the importation and bulk manufacture of such controlled substances to a number of establishments which can produce an adequate and uninterrupted supply of these substances under adequately competitive conditions for legitimate medical, scientific, research, and industrial purposes;
>
> (2) compliance with applicable State and local law;
>
> (3) promotion of technical advances in the art of manufacturing these substances and the development of new substances;
>
> (4) prior conviction record of applicant under Federal and State laws relating to the manufacture, distribution, or dispensing of such substances;
>
> (5) past experience in the manufacture of controlled substances, and the existence in the establishment of effective control against diversion; and
>
> (6) such other factors as may be relevant to and consistent with the public health and safety.

Id. With respect to the CSA's reference to the nation's "obligations under international treaties," the Single Convention on Narcotic Drugs establishes that "any signatory nation that 'permits the cultivation of [marijuana or opium]' must designate one or more agencies to: license cultivators and designate where plants may be grown; purchase and take physical possession of each year's crops; and have the exclusive right of importing, exporting, wholesale trading and maintaining stocks other than those held by manufacturers of opium alkaloids, medicinal opium or opium preparations." Craker v. Drug Enforcement Admin., 714 F.3d 17, 20 (1st Cir. 2013).

[246] Craker v. Drug Enforcement Admin., 714 F.3d 17, 20 (1st Cir. 2013).

[247] *See* NIDA's Role in Providing Marijuana for Research, available at http://www.drugabuse.gov/drugs-abuse/marijuana/nidas-role-in-providing-marijuana-research.

Enacted Marijuana-Related Measures

P.L. 113-235 §809(b), 2015 Consolidated and Further Continuing Appropriations Act. This provision was enacted with the apparent attempt of preventing the implementation of Initiative 71, D.C.'s recreational marijuana law. However, there is some uncertainty regarding the legal effect of the provision.¬ It states: "[n]one of the funds contained in this Act may be used to enact any law, rule, or regulation to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance under the Controlled Substances Act (21 U.S.C. 801, et seq.) or any tetrahydrocannabinols derivative for recreational purposes." Some argue that this provision bars D.C. employees from using FY2015 appropriated funds to implement Initiative 71 and that any employee who takes official acts to implement the law could be subject to civil or criminal liability under the Antideficiency Act.¬ Others, including D.C.'s attorney general, argue that the provision does "not prevent the District from using FY15 appropriated local funds to implement Initiative 71" because the marijuana law was enacted before the enactment of the 2015 Consolidated and Further Continuing Appropriations Act.¬

P.L. 113-79 (H.R. 2642), Agricultural Act of 2014. This public law has two marijuana related sections. One relates to the Supplemental Nutrition Assistance Program (SNAP) (formerly, food stamps), and the other relates to industrial hemp. Eligibility for the receipt of SNAP benefits is governed in part by a means test. Only individuals below a certain income level are eligible. Section 4005 of P.L. 113-79 (7 U.S.C. §2014(e)(5)(C)) instructs the Secretary of Agriculture to promulgate rules to ensure that the costs of medical marijuana are not treated as a deduction in that calculation. Section 7606 of P.L. 113-79 authorizes institutions of higher education and state departments of agriculture to grow and cultivate industrial hemp for research purposes.

Legislative Proposals in the 114th Congress

S. 683/H.R. 1538, Compassionate Access, Research Expansion, and Respect of States Act of 2015. This bill, also referred to as the CARERS Act, would exempt from the CSA "any person acting in compliance with State law relating to the production, possession, distribution, dispensation, administration, laboratory testing, or delivery of medical marihuana."[248] It also would reclassify marijuana as a Schedule II substance, meaning that marijuana would be recognized under federal law as having medical benefits and could be prescribed to patients for legitimate medical reasons in accordance with the CSA.[249] The CARERS Act also would provide legal protections to depository institutions (i.e., banks, thrifts, and credit unions) that provide financial services to marijuana businesses, including by adding a provision stating that "[a] Federal banking regulator may not prohibit, penalize, or otherwise discourage a depository institution from providing financial services to a marijuana-related legitimate business" (i.e., one that is in compliance with a state or local marijuana regulatory regime).[250] The bill also would attempt to further alleviate BSA reporting burdens beyond that which is provided by the February 2014 FinCEN guidance discussed above.[251]

[248] S. 683/H.R. 1538 §2.

[249] *Id.* §3.

[250] *Id.* §6.

[251] *Id.* §6(d).

The bill also would attempt to make it easier for individuals to be able to conduct research on marijuana and for entities to obtain approval from the Drug Enforcement Agency to cultivate marijuana for medical research use.[252] Finally, Section 8 of the CARERS Act would authorize Department of Veterans Affairs health care providers to offer recommendations and opinions regarding veterans' use of marijuana in compliance with state medical and recreational marijuana regimes.[253]

S. 134/H.R. 525, Industrial Hemp Farming Act of 2015. This bill would remove industrial hemp from the definition of "marihuana" under the CSA.

H.R. 262, States' Medical Marijuana Property Rights Protection Act. This bill would amend the civil forfeiture provisions of the CSA[254] to provide that no real property may be subject to civil forfeiture to the United States due to medical marijuana-related activities that are performed in compliance with state law.[255]

H.R. 667, Veterans Equal Access Act. This bill would authorize Department of Veterans Affairs health care providers to offer recommendations and opinions regarding veterans' use of marijuana in compliance with state medical and recreational marijuana regimes.[256]

H.R. 1013, Regulate Marijuana Like Alcohol Act. This bill, among other things, would require the Attorney General to remove marijuana from all schedules of the CSA and would amend other federal laws to regulate marijuana like alcohol.[257]

H.R. 1014, Marijuana Tax Revenue Act of 2015. This bill would amend the Internal Revenue Code to impose an excise tax on the sale of marijuana by the producer or importer of the drug, at a rate of 10% for the first two years after the law goes into effect and increasing by 5% each year until maxing out at 25% from the fifth year on.[258] The bill would provide certain exemptions to the taxation, including "on the distribution or sale of marijuana for medical use in accordance with State law."[259] In addition, the bill would require anyone engaged in a "marijuana enterprise"[260] to pay an occupational tax of $1,000 per year for marijuana producers, manufacturers and importers, and $500 per year for other marijuana enterprisers.[261] The bill would require all marijuana enterprises to obtain a permit from the Secretary of the Treasury.[262] Finally, the bill would impose civil and criminal penalties for violation of the duty to pay the new marijuana-related taxes, engaging in business as a marijuana enterprise without obtaining the

[252] *Id.* §7.

[253] *Id.* §8.

[254] 21 U.S.C. §881.

[255] H.R. 262 §3, amending 21 U.S.C. §881(a)(7).

[256] H.R. 667 §2.

[257] H.R. 1013 §101, amending 21 U.S.C. §§801, et seq. and §201, amending 27 U.S.C. §§201, et seq..

[258] H.R. 1014 §2(a), adding new 26 U.S.C. §5901.

[259] *Id.* §2(a), adding new 26 U.S.C. §5902.

[260] The bill defines "marijuana enterprise" as "a producer, importer, manufacturer, distributor, retailer, or any person who transports, stores, displays, or otherwise participates in any business activity that handles marijuana or marijuana products." *Id.* §2(a), adding new 26 U.S.C. §5904(8).

[261] *Id.* §2(a), adding new 26 U.S.C. §5911.

[262] *Id.* §2(a), adding new 26 U.S.C. §5912.

requisite permit, and for otherwise violating the provisions of the bill.[263] The bill does not amend the CSA, thus its provisions would remain in effect.

H.R. 1635, Charlotte's Web Medical Access Act of 2015. This bill would remove cannibidiol and cannabidiol-rich plants from coverage under the CSA and the Federal Food, Drug, and Cosmetic Act, subject to a three-year sunset date from the date of enactment.

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[263] *Id.* §2(a), adding new 26 U.S.C. §§5921, 5922.