Volume 2, Number 3
July 2020

CANNABIS LAW™

& REGULATION REPORTER

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Subscription Rate: 1 year (11 issues) $595.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60150-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

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FEATURE ARTICLE

COMBATING STATES WHICH BAN HEMP— THE HOME RULE ARGUMENT AND 'DILLON'S RULE'

By Thomas Howard

Farming cannabis as hemp has many hurdles. One of which is the general prejudice against the cannabis plant. People think it smells like a skunk, or that people will steal the crops, or that law enforcement will be confused. Practically any reason to be against the cannabis plant will be raised by a local authority that simply does not like it. Despite the Farm Bill, many people's minds have already been made up when it comes to cannabis—it is just bad. This stigma rears its head practically anywhere you look in the cannabis industry. But what do you do in your jurisdiction when the local authority deems hemp the same as cannabis and tries to ban it? This article addresses this issue and offers some hope in that fight for the grower and retailer seller.

The Federal Legalization of Hemp

The federal government has legalized farming hemp and created U.S. Department of Agriculture (USDA) guidelines to facilitate the interstate market that become effective for the 2021 crop year. State governments have their own hemp programs, and/or have gotten in line with the coming USDA regulations for the 2021 crop year. Issues of both federal and state preemption arise when a municipality wants to ban hemp farming because it harbors a general stigma against the plant. Further, issues of jurisdiction arise in the 40 states that allow some form of Dillion's Rule.

'Dillon's Rule' and Home Rule

Dillon's Rule arose from a treatise on municipal law by 19th Century Jurist John Forrest Dillion, who was an Iowa Supreme Court Justice before President Grant appointed him to the Eighth Circuit Court in 1869. Dillon's Rule is the principle of law that a municipal unit of government owes its origin to, and derives its powers from, its state's legislature. Dillion's Rule means that a municipality can only do something if the state laws authorize it.

The opposite of Dillion's Rule is the Cooley Doctrine, which states local governments are a matter of absolute right and the state cannot take it away from the municipality. The Cooley Doctrine is more commonly known as Home Rule. Under Home Rule, a municipality may pass any law unless it is specifically prohibited from doing so from state statute. 40 states allow for Home Rule. Some states allow both rules in a complex and somewhat confusing dual system.

Dillon's Rule and Illinois

For example, in Illinois, a municipality must elect to become home rule, or else Dillon's Rule applies. Often, the smaller communities operate as non-home rule, while larger cities adopt home rule. State hemp statutes should be crafted to prohibit home rule units of government from banning hemp farming unreasonably. When a state legalizes cannabis, the statute authorizing it frequently prohibits home rule communities from overriding the state law. In theory, a state could legalize cannabis, but not put prohibition language on the legislation that reigns in home rule municipalities and leave open the possibility that a community in a legal state could vote to stay prohibited. Issues of preemption would then arise because a state has an interest in setting its own crimes on a state level and any legalization was meant to occupy the field. That being the hypothetical case, Illinois expressly included the prohibition language in its new cannabis regulation and tax law, the Cannabis Regulation and Tax Act (CRTA).

Non-home rule communities cannot ban hemp farming in Illinois because they do not have the authority to do so, but perhaps a home rule community could ban, or greatly restrict, hemp farming. So, when evaluating any local ordinance banning hemp, for example a local prohibition on its smokable flower, review the status of the local authority and compare it to the state's hemp law to determine if the municipality has overstepped its grant of power.

The Oakland, Illinois Example

If a non-home rule community scoured the statutes to find any basis to ban hemp farming, then you would find the fact pattern of Oakland, Illinois. The City of Oakland (City) is very rural and is a non-home rule municipality. It relied upon a new portion of the Illinois Municipal Code that enabled a city to limit practices inside an urban agricultural area that are directly related to the public health safety or welfare. The new law created a legal term of art, the "urban agricultural area." It became law in 2019. Oakland has no such area in its city limits. It still used this purported grant of authority to ban hemp farming inside its bounds. While the litigation to stop the City won at the Summary Judgment phase, perhaps had the municipality been a home rule community the matter could have gone to trial.

Oakland had no statutory authority to ban hemp as a non-home rule unit of government, but what if it had the full police powers that home-rule units enjoy? What if to regulate the health, safety and welfare of its people, it banned hemp farming from its city? This is why hemp laws should include express prohibitions to the home rule units. The Illinois hemp law was very plain and is perhaps the easiest state to operate in for the 2020 crop year, which will have to change with the new USDA regulations. It contains no express override of home rule authority to further restrict the practice of hemp farming. The farmer trying to exercise its state licensed right to farm hemp may face additional questions of law and fact on any ban on hemp farming passed by a home rule unit of government.

When Federal Preemption Comes into Play

In cases where a home rule unit of government has purportedly banned hemp by exercising its police power, the state law granting the license of the hemp farming must pre-exempt any interference by the local governments. Hemp farming, like all agriculture, is a commercial activity regulated by the USDA, and department of agriculture at the state levels. Unreasonable local restrictions should be preempted by the higher levels of government. However, that concept depends on how the state in question has set up its home rule laws. In Illinois, they are specific, so the legislature must weigh in on if any variance from the statute is allowed. Courts will only step in in the clearest cases of oppression, injustice, or interference by local ordinances. Other states may be similar and case law in the relevant jurisdiction should be reviewed before attacking the unreasonable hemp farming ban.

Conclusion and Implications

A plaintiff cannot merely rely on the Supremacy Clause of the U.S. Constitution and believe that because hemp farming is legal at the federal level that their state or local municipality must toe the line of federal policy. Usually, the state hemp laws create licensing from the state level, and even map the area of the farm itself, which weigh toward the state wanting to create a comprehensive legislative framework to regulate its hemp industry and occupy the field. However, in some home rule states, a municipality that has an overt stigma toward the cannabis plant may still roll the dice and ban its farming. That's when a farmer like the one in Oakland, Illinois has to stand up and fight back. They have proven successful in Indiana, Illinois and Oregon, but the prejudice against the cannabis plant may lead to more legal challenges against the unreasonable restrictions of hemp farming.

Thomas Howard leads the team of attorneys at Collateral Base where his practice group focuses on business and business litigation, real estate law, commercial banking law, and serving the needs of the cannabis and hemp industries. Thomas is part of small but fast-growing group of lawyers trailblazing through the burgeoning maze that is cannabis law. He has combined his knowledge of business, banking and bankruptcy law with the developing laws and regulation that govern cannabis and hemp to become a highly effective advocate. Thomas sits on the Editorial Board of the *Cannabis Law & Regulation Reporter*.

CANNABIS NEWS

WHISTLEBLOWER CLAIMS U.S. ATTORNEY GENERAL FALSELY TARGETED CANNABIS COMPANIES THROUGH IMPROPER ANTITRUST CLAIMS

Recently Congress heard the testimony of whistleblower who has alleged impropriety by the U.S. Attorney General's office (AG) in terms of antitrust investigations launched by the AG allegedly targeting cannabis business operating in legal states.

Background

On June 24, 2020, a whistleblower testified during an hour-long Congressional hearing after he reported several antitrust investigations launched under Attorney General William Barr to the Department of Justice Inspector General to determine whether the investigations "constituted an abuse of authority, a gross waste of funds, and gross mismanagement." The report was made by John W. Elias, a career department employee.

Allegations Made by John Elias

Elias testified to the House Judiciary Committee as to two specific types of antitrust investigations that occurred under Barr. The first was an agreement between President Donald Trump and four automakers in California over fuel emissions and the second was related to the cannabis industry. Elias testified that Barr directed the Department of Justice Antitrust Division to launch ten "full-scale reviews of merger activity" underway in the cannabis industry.

Major deals often require clearance from the DOJ and the Federal Trade Commission in accordance with the Hart-Scott-Rodino Antitrust Improvements Act.

In October 2019, MedMen and PharmaCann ended a $682 million merger deal signed on December 2018, citing that they wanted to focus on California, the biggest market in the U.S., the underperformance of cannabis stocks in the U.S. and Canada, and delays caused by "regulatory hurdles at the federal and state level."

Elias testified that career attorneys examined the deal and concluded that the transaction "called for no further antitrust review." However, on March 5, 2019, Barr "called the Antitrust Division leadership to his office and ordered the Division to proceed with a full investigation." Elias said the Division issued "burdensome" subpoenas that resulted in 1.3 million documents being produced by 40 employees "all at great expense to the companies."

"Although the Division ultimately found no evidence of antitrust problems, the companies abandoned the merger, citing delays in regulatory approval," said Elias.

Thereafter, the Division launched investigations of nine other mergers of cannabis companies. Elias said some "companies operated in completely different geographies and did not compete at all." Elias stated:

> These mergers were not even close to meeting established criteria for these kinds of investigations. And yet, these cannabis investigations accounted for a full 29 percent of the Division's full review investigations last fiscal year…These kinds of investigations are rare.

According to Elias, roughly 1 percent or 2 percent of thousands of transactions brought before the Antitrust Division are selected for a full review.

"It is unacceptable that he would order the Antitrust Division to initiate pretextual investigations into industries that he and the president do not like simply because they do not like them," House Judiciary Committee Chair Jerry Nadler said in his opening statement:

> It is dangerously misguided for him to threaten frivolous litigation against state and local officials doing their best to contain the COVID-19 epidemic in their communities.

Elias noted that the investigations appeared to be a result of animus toward the cannabis industry. Assistant Attorney General Makan Delrahim acknowledged during an all-staff meeting that the cannabis

industry is unpopular with the DOJ. "Personal dislike of an industry is not a valid basis upon which to ground any antitrust investigation," Elias said.

Rep. Steve Cohen of Tennessee noted, "Barr doesn't like marijuana." Cohen highlighted the disparity in arrest rates between Black and white Americans stating:

> Marijuana is seven times more likely to be enforced against young African Americans, breeding discontent with police, breeding interactions with police. And Barr doesn't care about that type of stuff because he doesn't like marijuana, so that's okay. That's one of the breeding grounds of distrust of African Americans and police.

Conclusion and Implications

It is unclear whether Attorney General Barr's antitrust investigations were actually illegal. The only legal restraint is found in the Rohrabacher Farr Amendment, which prevents the DOJ from spending funds to interfere with the implementation of state medical cannabis laws. While the amendment has been applied in U.S. courts in cases relating to Department of Justice funds used to interfere with state-regulated, compliance medical marijuana businesses, it is presently unclear if the amendment prevents the use of DOJ resources as such resources pertain to antitrust, IRS, or securities violations.
(Brittany Ortiz)

LEGISLATIVE DEVELOPMENTS

COLORADO GOVERNOR SIGNS CANNABIS SOCIAL EQUITY BILL INTO LAW

As recreational cannabis increasingly moves into the mainstream, a growing number of jurisdictions are looking to the past at the long-term impacts of illegal cannabis and to the future assessing strategies to ensure that the growing industry does not further compound inequality. Colorado, the first state to legalize recreational marijuana for adult use, has just enacted a social equity program to provide specific support for business owners who were disproportionately impacted by cannabis prohibition.

Background

The bill, known as HB20-1424 and signed into law by Colorado Governor Jared Polis at the end of June, creates criteria for social equity applicants seeking licenses in the state's cannabis economy and provides access to incentives and benefits as Colorado develops its social equity program. The state plans to begin accepting applications for all forms of cannabis licenses from social equity applicants on January 1, 2021.

The law also allows the governor to issue pardons to people convicted of possessing up to two ounces of cannabis, the amount medical marijuana patients can legally possess. The pardons could begin in as soon as 90 days. The signing of the bill comes in the wake of a nationwide reckoning on race and policing, and as a variety of institutions grapple with their role in systemic discrimination and perpetuating inequality. Colorado joins several other jurisdictions nationwide—including the Cities of San Francisco, Oakland, and Los Angeles—in building a social equity component into the cannabis licensing process.

Colorado's Proposed Modifications

The bill, introduced in early June, modifies Colorado's "accelerator licensing program." The program, which was initially intended to go into effect on July 1, 2020, gave entrepreneurs from low-income communities the opportunity to partner with an existing marijuana business and receive technical and capital support to start their business. The bill extends the availability of accelerator licenses to social equity applicants.

The bill moved swiftly through the Colorado Legislature, as protests over police treatment of African-Americans sparked a global reckoning with racial inequality. It would also work to redress the growing inequality in the cannabis industry. Although the majority of people in prison for cannabis are people of color, the majority of people profiting from legalized cannabis are white.

The bill's criteria to be deemed a social equity applicant tracks closely with programs in other jurisdictions. A social equity license must be majority-owned by a person or group that has lived in an area impacted by the war on drugs, has been themselves or has a family member arrested or convicted of a cannabis-related crime, or has a household income below a certain threshold. The bill is not the final word, however, as the social equity program will be further fleshed out through the regulatory rulemaking process, to include reductions in application and license fees, as well as other incentives for qualified applicants.

The goal of the program is to offer not only priority processing for social equity applicants, but to provide them with technical and legal assistance to open their businesses in a successful manner and in full compliance with Colorado's regulatory regime. The rulemaking process will be crucial to build out the practical aspects of the program, and members of the public will have opportunities to be heard during public comment periods and public hearings as the rules are drafted and finalized.

Too Little, Too Late?

This bill comes over six years after Colorado began legalized recreational cannabis sales. As a result, there are not many retail licenses left for newly minted social equity applicants. The bill comes alongside a push for cities to lift their caps on retail licenses to provide more opportunities for social equity applicants to open retail cannabis businesses.

Representative Jonathan Singer, who worked on the bill, has pointed to Colorado as a cautionary tale that shows other states what not to do when legalizing cannabis. Singer said:

> The way that cannabis legalization started in Colorado should not be the way that any other state thinking about this should do this . . .Take the people disproportionately affected by our drug laws, wipe the slate clean for them first and allow those who have never had a first chance to get a first crack at this.

Conclusion and Implications

Social equity programs attempt to redress decades of discriminatory practices (and the impacts of past convictions) and to ensure that those most harmed by cannabis prohibition and the war on drugs are able to benefit from the new trend of legalization. Even the best of these programs is deeply imperfect, and many jurisdictions have reported issues ensuring that social equity licenses go to bona fide social equity applicants, and that those applicants ultimately maintain control and benefit financially from those licenses. However, social equity programs are an important step in working to make the cannabis industry more equitable, and to ensure that inherent inequities are balanced out as the industry becomes increasingly mainstream and increasingly profitable for those with licenses to operate. The full text of HB20-1424 is available online at: https://leg.colorado.gov/bills/hb20-1424
(Jordan Ferguson)

REGULATORY DEVELOPMENTS

CALIFORNIA DEPARTMENT OF TAX AND FEE ADMINISTRATION SERVES TAX WARRANTS ON ILLEGAL CANNABIS RETAILERS

The California Department of Tax and Fee Administration (CDTFA) issued a press release on July 8, 2020 asserting that 12 illegal cannabis retailers were served with tax warrants in the greater Los Angeles and San Bernardino areas. The counties were served with the assistance of the California Highway Patrol (CHP).

More on the Tax Warrants

According to the CDTFA:

> . . .the CDTFA seized nearly a million dollars in illegal cannabis products that will be destroyed and approximately one hundred thousand dollars in cash that will be applied to tax liabilities…Under the California Revenue and Taxation Code, any person who willfully evades or attempts to evade the reporting, assessment or payment of the cultivation tax, the cannabis excise tax, or the sales tax that would otherwise be due is guilty of cannabis and sales tax evasion. Violators are subject to fines and/or jail time. The CDTFA Investigations Bureau administers the tax enforcement and criminal investigations program. The Bureau plans, organizes, directs, and controls all criminal investigative activities for the various tax programs administered by the CDTFA. Its goals are to deter tax evasion, identify new tax fraud schemes, and actively investigate and assist in the prosecution of crimes committed by individuals violating the laws administered by the CDTFA.

CDTFA Director Nick Maduros stated:

> The CDTFA's collaboration with the CHP is an important deterrent to tax evasion. Tax evasion unfairly shifts the burden onto all other taxpayers and makes it tough for those businesses that are playing by the rules to survive.

The CDTFA did not release the names of the 12 retailers that were served.

A tax warrant functions as a lien, allowing the government to seize the personal property or assets of illegal cannabis retailers to satisfy unpaid taxes. California's illegal marijuana market thrives primarily because unlicensed retailers do not typically pay state or local taxes. Because of this, they are able to provide cheaper prices to consumers than that of their legal counterparts.

The State Has Demonstrated It Means Business When it Comes to Illegal Operations of Any Business

The CDTFA has also recently reminded illegal cannabis operations, as a shot across the bow, of the state's willingness to prosecute illegal substance operations and tax evasion—in this case, in the realm of illegal *tobacco sales*. The DCTFA and California Attorney General Xavier Beccera jointly announced in June 2020:

> . . . the sentencing of Hazem Saba for operating as an unlicensed tobacco distributor and failing to pay nearly $400,000 in taxes to the California Department of Tax and Fee Administration. Mr. Saba was sentenced to five years felony probation and required to pay the full restitution prior to sentencing. In February 2019, the Tax Recovery and Criminal Enforcement (TRaCE) Task Force executed search warrants at a residence and multiple storage facilities belonging to Mr. Saba, resulting in the seizure of over $1.5 million worth of untaxed tobacco and more than $115,000 cash. (https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-sentencing-unlicensed-tobacco-distributor)

The announcement went on to state:

> On September 11, 2019, Attorney General Becerra filed a felony complaint and arrest warrant in the San Bernardino Superior Court. In March 2020, Mr. Saba pleaded guilty to engaging in business as a distributor without a li-

cense, in violation of Revenue and Taxation Code sections 30149/30480. Mr. Saba paid full restitution of more than $460,000 prior to sentencing and will be placed on five years felony probation, including a 120-day prison sentence and 60 days of community service. (Ibid)

California Taxation of Cannabis

The taxes associated with legal cannabis businesses in California are steep. California levies a 15 percent excise tax on recreational cannabis sales. This is in addition to the state's 7.25 percent sales tax and local taxes of up to 1 percent. Municipalities can tax businesses anywhere from 0 percent to 15 percent. California also imposes a cultivation tax of $9.65 per ounce. The revenue from these taxes have been substantial. As of March 10, 2020, California has received $1.03 billion in revenue from cannabis taxes since January 2018. The cannabis taxes are used for childcare for low-income family, cannabis research, public safety grants and environmental remediation for lands harmed by illegal cannabis growth.

It is expected that the state's cannabis excise tax revenue will decrease from $479 million to $443 million for the fiscal year starting on July 1, 2020, according to Governor Gavin Newsom.

Cannabis in the Era of Covid-19

Governor Newsom cited the Covid-19 pandemic and related recession as the contributing factor to the lowered estimates. This is in spite of California declaring cannabis businesses "essential" as part of its response to the pandemic. Governor Newsom has relaxed some industry regulations, including deferral of license renewal fees and extending filing deadlines for first quarter tax returns in order to ease the financial burden that legal cannabis industries are currently facing.

Conclusion and Implications

As to illegal marijuana businesses, the state expects to ramp up enforcement in the near future and it is expected that the CDTFA will serve more tax warrants. In fact, the California Bureau of Cannabis Control, which oversees all sectors of the legal marijuana industry, with the exception of cultivators and manufacturers, has requested more funding to greatly expand its enforcement capabilities. This request included a request for an 87-member police force to ensure operators are properly following regulations. Many of the investigators that are currently on staff with the Bureau of Cannabis Control are not sworn peace officers, meaning they cannot arrest lawbreaking individuals, write search warrants, or assess criminal databases or perform similar key functions in investigations. For more information, *see:* https://www.cdtfa.ca.gov/news/20-10.htm.

CALIFORNIA JUDICIAL COUNCIL AMENDS EMERGENCY RULE TOLLING STATUTES OF LIMITATIONS AS THEY RELATE TO CALIFORNIA ENVIRONMENTAL QUALITY ACT ACTIONS

Back in early April, the California Judicial Council first adopted Emergency Rule No. 9 to suspend statutes of limitation on all civil cases until 90 days after Governor Newsom lifts the state of emergency related to the COVID-19 pandemic. However, the Council has amended the emergency rule so that it is no longer tied to the state of emergency declaration. The new rule will restart statutes of limitations on set dates—either August 3 or October 1, 2020. Under the amended Emergency Rule 9, the tolling period for actions brought under the California Environmental Quality Act (CEQA) and planning and zoning law expires on August 3, 2020.

Judicial Council Emergency Rule No. 9

On April 6, 2020, the Judicial Council adopted 11 temporary emergency rules in response to the COVID-19 pandemic. The Judicial Council's Emergency Rule No. 9 tolled statutes of limitations for all civil causes of action "until 90 days after Governor [Newsom] declares that the state of emergency related to the COVID-19 pandemic is lifted." Although it was unclear at the time, many worried that the rule would also apply to toll the deadline for filing a writ petition under CEQA because writs of mandate are considered special proceedings of a civil nature and are governed by the same rules in Part II of the Code of Civil Procedure that apply to ordinary civil actions. (Code Civ. Proc., § 1109.)

Because Emergency Rule No. 9 was so broad in scope, developers and anti-NIMBY groups were up in arms because this extended tolling period goes against the legislative intent behind having short statutes of limitations for CEQA and other land use-related legal challenges. For example, the time for filing certain initial pleadings under CEQA is 30, 35, or 180 days (Pub. Resources Code, § 21167); 60 days for claims under the California Coastal Act (Pub. Resources Code, § 30802) and validation actions (Code Civ. Proc., § 860); and 90 days for cases challenging governmental actions for which a shorter statute of limitations has not been set.

COVID-19's Ongoing Impacts in California

Although the Governor proclaimed a state of emergency on March 4, 2020, the state of emergency has not yet ended, and there is no indication when the emergency proclamation will be lifted. The uncertainty surrounding when the Governor's state of emergency order will be lifted put the deadline to file a CEQA challenge in flux, giving would-be challengers significantly more time to file an action. Under Emergency Rule 9, as it was originally drafted, the time in which to bring such actions could be tripled beyond the statutory time even after the state of emergency is lifted. This was problematic because a long tolling is inconsistent with the short limitation periods in statute and the legislature's intent that such causes of action be brought expeditiously. Various interested groups requested the Judicial Council to clarify how Emergency Rule No. 9 would affect CEQA actions. Up until the recent clarification, this was an evolving situation, with no clear answer regarding whether the rule applied to CEQA actions.

Amendments to the Emergency Rule

On May 29, 2020, the Judicial Council adopted amendments to Emergency Rule No. 9 to provide fixed dates for the tolling of civil statutes of limitations. The amendment suspends from April 6 to October 1 the statutes of limitations for civil causes of action that exceed 180 days, and suspends from April 6 to August 3 the statutes of limitations for civil causes of action that are 180 days or less. Causes of action with short-term statutes of limitation, such as CEQA actions, have the more immediate deadline of August 3 because those deadlines are designed to ensure that any challenges are raised more quickly.

The Judicial Council proposed August 3, 2020, as the earlier end date to ensure that courts will be able to process the civil actions and provide certainty and reasonable notice to litigants of the end of the tolling period, without overly impacting the construction and homebuilding industry or other areas in which the legislature has mandated short statutes of limita-

tion. All said, the amended tolling rule results in a total tolling period of approximately four months for those actions that have a statute of limitations under 180 days.

Conclusion and Implications

CEQA comes into play in many industries and the cannabis and hemp industries are no different. As California begins a phased re-opening and courts restore services shuttered due to the COVID-19 pandemic, we are likely to see an end to certain emergency measures that were adopted to address the global health hazard. However, because the pandemic presents an unprecedented crisis, the Judicial Council may re-institute certain emergency measures if health conditions worsen or change. Therefore, it is important to check court websites frequently to keep up to date with changes to critical filing deadlines.

The Judicial Council's Circulating Order Memorandum relating to the Emergency Rule No. 9 amendment is accessible at the following link: https://jcc.legistar.com/View.ashx?M=A&ID=790621&GUID=A0ED0998-D827-4792-9BD1-A3A4FCF939AA

(Nedda Mahrou)

LAWSUITS FILED OR PENDING

TRIAL IS SET TO BEGIN IN CALIFORNIA OVER ISSUE OF MUNICIPAL AUTHORITY TO DENY CANNABIS DELIVERIES UNDER STATE LAW

On August 6, 2020, trial is set to begin in *County of Santa Cruz et al. v. California Bureau of Cannabis Control* (Fresno County Superior Court Case No. 19CECG01224). This dispute arises from a complaint filed last year by the County of Santa Cruz and 24 cities (collectively Plaintiffs) throughout the state against the California Bureau of Cannabis Control (Bureau) to challenge the Bureau's regulations on cannabis delivery.

Background

Under California's cannabis statutes and the regulations adopted to implement the state's licensing scheme, delivery operators may legally deliver cannabis anywhere within the state. This power is described in § 5416 of Title 16 of the California Code of Regulations. Section 5416(d) states in relevant part that:

> . . .a delivery employee may deliver to any jurisdiction within the State of California provided that such delivery is conducted in compliance with all delivery provisions of this division.

In other words, § 5416(d) allows delivery licensees to deliver cannabis into jurisdictions that have not adopted local ordinances regarding cannabis or even those that have affirmatively prohibited such delivery activity. Section 5416(d) is promulgated by the Bureau under its authority to adopt regulations governing cannabis licensees found in § 26013 of the Business and Professions Code.

Plaintiffs are the County of Santa Cruz and the cities of Agoura Hills, Angels Camp, Arcadia, Atwater, Beverly Hills, Ceres, Clovis, Covina, Dixon, Downey, McFarland, Newman, Oakdale, Palmdale, Patterson, Riverbank, Riverside, San Pablo, Sonora, Tehachapi, Temecula, Tracy, Turlock, and Vacaville. Each Plaintiff is a jurisdiction that has either banned cannabis deliveries within its borders or not expressly permitted it as part of its local cannabis ordinance. As such, Plaintiffs take issue with § 5416(d) as it purports to legalize cannabis activity within their jurisdictions despite their local regulations that do not permit cannabis deliveries.

When Proposition 64 was passed by the voters in 2016 legalizing cannabis activity in California, much was made of the promise to maintain local control over this hot button issue. This broad authority granted to delivery licensees under § 5416(d), the arguments of the Plaintiffs goes, runs counter to that promise of local control. In their complaint, Plaintiffs argue that in thwarting local control with respect to deliveries, the Bureau is preventing local jurisdictions from protecting the health and welfare of their communities. In sum this case is one about preemption and whether state cannabis regulations on cannabis delivery preempt the ability of local jurisdictions to regulate or ban cannabis deliveries within their borders.

The Complaint and Key Legal Issues Raised

In their complaint, the Plaintiffs are seeking to have § 5416(d) declared invalid and prevent the state from enforcing § 5416(d)'s provisions with respect to statewide cannabis delivery. The reason Plaintiffs seek this relief is rooted in issue of preemption and the alleged inconsistencies the between the Bureau's regulations and Proposition 64. Under the state's interpretation of § 5416(d), local authority to regulate cannabis deliveries is essentially preempted by its broad phrasing allowing delivery anywhere within the state. Plaintiffs, however, see this right to deliver anywhere within the state as being in direct conflict with §§ 26090(e) and 26200(a)(1) of the Business and Professions Code, added to state law by Prop. 64.

Business and Professions Code § 26200(a)(1) provides in relevant part that:

> This division *shall not be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate businesses licensed under this division*, including, but not lim-

> ited to, local zoning and land use requirements, business license requirements, and requirements related to reducing exposure to secondhand smoke, or to completely prohibit the establishment or operation of one or more types of businesses licensed under this division within the local jurisdiction.

Business and Professions Code § 26090(e) provides that:

> [a] local jurisdiction shall not prevent delivery of cannabis or cannabis products on public roads by a licensee acting in compliance with this division and local law as adopted under Section 26200.

Plaintiffs argue that § 5416(d) necessarily conflicts with the express lack of preemption of local cannabis regulations provided by Prop. 64. Furthermore, Plaintiffs argue § 5416(d) should be invalidated because by effectively preempting local regulation of cannabis deliveries, the state is preventing local jurisdictions from providing for the health and safety of their residents.

The State of California, on the other hand contends that this case ought to be dismissed on procedural grounds. Namely the state is arguing that this dispute is not ripe for judicial review because there is no specific dispute between one of the Plaintiffs and the state and therefore no "actual controversy" as is required under § 1060 of the California Code of Civil Procedure. The state also argues that the Plaintiffs should not be entitled to an injunction against the enforcement of § 5416(d) because they have failed to make a sufficient showing of harm to warrant such relief.

To further counter the Plaintiffs' claims, the state argues that § 5416(d) is consistent with Prop. 64 and therefore a valid exercise of the Bureau's "broad" authority to regular cannabis delivery. The state's interpretation of consistency between § 5416(d) and Prop. 64 rests in the portion of § 26090(e) that states "a local jurisdiction shall not prevent delivery of cannabis or cannabis products on public roads by a licensee."

Conclusion and Implications

As the briefing in this case proves, reasonable minds can differ on California's authority to limit the ability of local jurisdictions to regulate cannabis deliveries. Depending on the outcome of this decision, the cannabis industry may well lose 80 percent of its potential markets as currently only approximately 20 percent of the state's jurisdictions permit cannabis activity. Alternatively, local jurisdictions may see their ability to regulate Californians' ability to have cannabis delivered to their doorstep evaporate. Regardless of the outcome, clarification on this issue will be an important one for all local jurisdictions regardless of where they stand on cannabis, as well as all cannabis businesses because of the potential to impact their operations. This is a big issue legalized cannabis in California and we will continue to monitor the outcome. It is fair to say that regardless of outcome, this case will very likely be headed to the Court of Appeal.
(Andreas L. Booher)

FLORIDA SUPREME COURT GRAPPLES WITH STATE'S APPROVAL OF MEDICAL CANNABIS—WILL ADDRESS ISSUE OF 'SPECIAL LAW' AT ORAL ARGUMENT

The Florida Supreme Court agreed to take up a case on appeal from the Court of Appeals regarding the legality of a 2016 voter initiative which amended the state's constitution allowing for medicinal cannabis use. The Court has already heard one round of oral argument and to the surprise of many observers, has now requested a second round of briefing and oral argument. [*Florida Department of Health, Etc., et. al. v. Florigrown, LLC, et. al.* SC19-1464]

Background

In 2016, voters approved an amendment to the state constitution to allow the use of marijuana for medical purposes. The Amendment requires the

Department of Health to issue regulations to implement and enforce its safe use. In 2017, the Florida Legislature amended a Florida statute governing medical marijuana in relation to the constitutional Amendment. Florigrown and others filed a lawsuit in the trial court challenging the constitutionality of the statute. The trial court entered a temporary injunction against the enforcement of the statute based on a determination that Florigrown has a substantial likelihood of success on the merits of its claims. The Department of Health appealed to the First District Court of Appeal, which agreed with the trial court but certified a question of great public importance to the Supreme Court for review. (https://thefloridachannel.org/videos/5-6-20-florida-supreme-court-oral-arguments-florida-department-of-health-etc-et-al-v-florigrown-llc-et-al-sc19-1464/)

The Department of Health appealed to the Supreme Court after lower courts sided with Florigrown. A panel of the First District Court of Appeal last year upheld part of a temporary injunction issued by a Leon County Circuit Judge Charles Dodson, who found that the 2017 law conflicted with the constitutional amendment. Dodson's temporary injunction required state health officials to begin registering Florigrown and other medical-marijuana firms to do business, but the judge's order was put on hold while the state appealed. (https://www.law.com/dailybusinessreview/2020/07/15/supreme-court-orders-more-arguments-on-medical-marijuana-law/?slreturn=20200615145038)

The Key Issue Now Before the Supreme Court

In general, the Supreme Court stated:

> On the Court's own motion, the parties are hereby requested to appear for oral argument on the issue addressed in the supplemental briefing ordered on *May 7, 2020*: Whether Florigrown, LLC, and Voice of Freedom, Inc., d/b/a Florigrown (collectively, Florigrown) have a substantial likelihood of success on the merits of their challenge to section 381.986(8)(a)1, (a)2.a., and (a)3., Florida Statutes (2017), as a special law granting a privilege to a private corporation.

https://www.docketalarm.com/cases/Florida_State_Supreme_Court/SC19-1464/FLORIDA_DEPARTMENT_OF_HEALTH_ETC._ET_AL._vs._FLORIGROWN_LLC_ETC._ET_AL./

Oral argument, round two, is scheduled for October 7, 2020. Unlike the first round of briefing and oral argument, this time out the Justices wanted to focus on whether the 2017 law is what is known as an unconstitutional "special" law.

'Special Law'

A law is deemed a special law if in reality, the law's focus is on one primary entity. If the Court determines the 2017 law was focused primarily, if not exclusively on one company in a "closed universe of licensed medical marijuana treatment centers," the result would be a ruling the law was unconstitutional.

Florigrown argues that the 2017 law is a special law because it created two "closed classes" of businesses that could receive cannabis licenses—one class involving companies that had been licensed after passage of the non-euphoric cannabis law; and the other including companies that were not chosen in the earlier round of licensing or had been in litigation with the state's department of health.

The Department of Health has, in opposition, argued that the outcome of the law:

> . . .'establishes a comprehensive and unified statutory system for the statewide licensure and regulation' of medical-marijuana firms which will function as medical marijuana treatment centers. (Ibid)

The Department of Health's Brief stated that:

> [The] statute did not create a closed universe of licensed MMTCs [medical marijuana treatment centers], ...The MMTC licensure statute, viewed properly as a comprehensive and unified whole, does not provide a benefit to private corporations that others—like Florigrown—do not or cannot also receive. (Dept of Health Brief)

Conclusion and Implications

Sometimes, even the seemingly straight forward path to cannabis legalization via vote "of the people"

can create unforeseen consequences; especially when a legislature grapples with how to implement the will of the people. Here, the 2017 legislation, ultimately created the problem in the eyes of certain cannabis firms. But the Supreme Court of Florida have now shown their hand by ordering additional briefs and oral argument on the sole issue of whether the legislation functioned as an unconstitutional "special law." If the Court finds it did, the entire state of medicinal cannabis use in Florida may very well find itself in "no man's land."
(Robert Schuster)

JUDICIAL DEVELOPMENTS

PENNSYLVANIA COURT FINDS EMPLOYER FAILED IN BURDEN OF PROOF TO DENY EMPLOYEE UNEMPLOYMENT INSURANCE ON GROUNDS OF CBD OIL USE

Washington Health System v. Unemployment Compensation Board of Review, Case No. 886 C.D. 2019 (Pa. Commw. Ct. May 11, 2020).

The Pennsylvania Commonwealth Court recently affirmed an order of the state's Unemployment Compensation Board of Review finding that a claimant was eligible for unemployment benefits after her employer terminated her employment for testing positive for cannabis. The claimant had told her employer she was using CBD oil and not marijuana.

Background

The case involved a woman who was employed as a licensed Occupational Therapist, and as such, was subject to drug testing under her employer's testing policy. On March 26, 2018, she underwent such a drug test—the test was positive for "marijuana," according to her employer. The claimant asserted that she used cannabidiol (CBD) to relieve symptoms of cancer. She was terminated because of the test results.

It was, perhaps telling however, that at the proceeding before the Unemployment Compensation Board of Review, the employer did not introduce into evidence the results of the drug test. The claimant did, at the hearing admit to using CBD oil, but denied using marijuana. Claimant also asserted at the hearing that one possible explanation was a false positive for marijuana.

Legal Background

Under Pennsylvania Unemployment Compensation Law, in a case involving discharge due to a drug policy violation, the employer must demonstrate: (1) that it had a substance abuse policy, and (2) that the employee violated the policy. (Citations omitted) If an employer meets its initial burden, a claimant will be ineligible for benefits and the burden shift to the claimant he or to demonstrate that the employer's substance abuse policy is in violation of the law or a collective bargaining agreement. Id. The unemployment compensation statute does not permit a claimant to show good cause or justification for a drug policy violation. (https://www.pml.org/2020/07/01/commonwealth-court-rules-that-cbd-user-is-eligible-for-unemployment-compensation-benefits/)

At the Compensation Board of Review

The issue before the Board was whether the claimant was entitled to unemployment benefits. At the hearing, the Board of Review acknowledged that if the claimant test positive for THC at or below .3 percent, the substance, in this case, CBD oil, would be deemed legal and unemployment compensation would be allowed. The employer did not introduce testing evidence. Given that the burden was initially on the employer, and essentially the "evidence" was heresay at best, the Board affirmed the claimant's right to unemployment compensation.

The Commonwealth Court's Decision

The court's analysis of the facts and law was straightforward. Since there was no real evidence of an employee testing for marijuana, the court only had the testimony of the claimant to go on. Since she admitted to CBD oil use but denied use of marijuana, the court found the employer had not carried the burden of proof.

The court also dismissed the employer's argument that the admitted use of CBD oil interfered with the claimant's ability to reasonably perform her job title tasks and duties.

Based on the complete failure of the employer to establish even a *prima facie* case for alleged use of marijuana or impacts to job performance, the court

affirmed the decision of the Board of Review.

A dissenting opinion was lodged and found that the court's conclusions about the "legality" of the sale and employee use of CBD oil violated the employer's policy that prohibited working under the influence of drugs—at any quantity. The dissent also cast doubt as to the legality of CBD oil. (https://www.lexology.com/library/detail.aspx?g=fcaaee1e-04ba-44a4-9d27-7747a646c712)

Conclusion and Implications

The law of the Commonwealth is fairly straight forward. CBD oil, coming in at or below .3 percent THC is not a drug the same as cannabis and is most likely legal. The case came down the failure of the employer to introduce evidence of the testing and test results presumably indicating what percentage of THC was indicated. The failure to do so certainly suggests the results were not favorable to the employer under the law. But along the lines of the dissent's posture, had the test results been introduced and shown any amount of THC in the claimant, her termination may have been justified, despite the "legality" of CBD oil. It is a cautionary tale of the risk employees take in the Commonwealth when using CBD oil. The Farm Bill may have legalized CBD but some employers may still hold the upper hand in establishing a strict liability intolerance for any "drug." (Robert Schuster)

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