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CANNABIS NEWS

CALIFORNIA'S CANNABIS SOCIAL EQUITY PROGRAMS ARE NOT MEETING GOALS

A report, issued by the California Cannabis Industry Association, reviewed seven jurisdictions that have cannabis social equity programs and found the programs are not working as intended.

Background

The report was written by the Diversity, Inclusion and Social Equity Committee of the California Cannabis Industry Association (CCIA). The report indicated that social equity grants are issued by the state without much in the way of accountability, while local programs are experiencing delays and have large amounts of funds unallocated.

CCIA focused on cities that were among the first to receive state funding under a 2018 law, the California Cannabis Equity Act, which provided millions of dollars in grants to the Cities of Long Beach, Los Angeles, Oakland, Sacramento, and San Francisco, as well as the Counties of Humboldt and Mendocino. The report determined that, despite good intentions in the plans, participants in most of those social equity programs had been underserved and unable to get their businesses operational.

Many participants in social equity programs, the CCIA found:

> . . .experienced a lack of support in times of need and were left without support when the city's sometimes ill-conceived programs made it impossible for them to begin operating before they ran out of capital.

Social Equity as Social Good

Social equity programs are designed to ameliorate the negative effects of the War on Drugs and to ensure that those who were harmed by racially discriminatory and often brutal policies have a fair opportunity to benefit from cannabis legalization. It is widely acknowledged that disadvantaged populations—particularly people of color—bore an unfair share of the costs of cannabis prohibition. Between 2001 and 2010, the report notes, there were over 8 million cannabis arrests in the United States, almost 90 percent of which were for possession.

Although the rate of cannabis use is equal amongst all populations, people of color are almost four times as likely to be arrested for cannabis possession. The California Cannabis Equity Act (CCEA) aimed to counteract these wrongs through use of a grant program from the state to local jurisdictions to develop and operate programs that focused on the inclusion and support of individuals in California's legal cannabis marketplace who are from communities negatively or disproportionately impacted by cannabis criminalization.

While the goals behind the program are undoubtedly good, funds under the CCEA have proven unsuccessful in vital areas, according to the report. CCIA asserts:

> . . .there is a paucity of transparency and timeliness—there is no statewide database of the success of these programs, with some counties hardly having any available data at all.

This leads to a variable rate of success, dependent more on the local structure of a social equity program than any other factor.

Recommendations for Successful Social Equity Programs

Beyond highlighting the issues California's social equity programs face, the report offered several recommendations to improve the programs' efficacy. Among the recommendations is the creation of a state-level oversight committee of equity operators and community members to ensure state funds are utilized appropriately. The report also suggests the possibility of adopting a definition of "social equity" in state law to avoid confusion among various local jurisdictions adopting their own proposals based on their own view of what constitutes social equity.

CCIA also suggested bolstering financial assistance for social equity participants through funding sources that may solve existing logjams, including license-fee deferrals, tax relief, and specific funds earmarked to assist with start-up costs. The report also suggested an overall increase in state funding to ensure the programs are successful.

Conclusion and Implications

Social equity programs, which have become common in state legalization statutes, are often touted as one of the primary goals behind cannabis legalization. Yet in practice, these programs are frequently under-funded, lacking in resources, and unlikely to actually provide the equity they seek. A social equity program is only as strong as the cannabis operators who are able to open through assistance under the program, and across the state, local jurisdictions are under-delivering on big promises. More state funding can certainly help to solve the problem, but money alone will not convert under-achieving local programs into statewide success stories. A stronger hand may be needed at the state level to ensure that funds are properly utilized, and that social equity programs ultimately succeed in diversifying California's legal cannabis marketplace and righting some of the wrongs of the War on Drugs. The report is available online at: https://growthzonesitesprod.azureedge.net/wp-content/uploads/sites/421/2021/11/Accountability-Project-FINAL.pdf.
(Jordan Ferguson)

CALIFORNIA CELEBRATES A CANNABIS ANNIVERSARY: IT'S BEEN 25 YEARS SINCE THE STATE LEGALIZED MEDICINAL USE— A RECAP OF THE LEGAL ROAD TAKEN

California and cannabis shared an anniversary in November 2021, marking 25 years since the state began the first initial steps in a journey that would lead to adoption of recreational cannabis legalization. What follows is a recap of the many steps and hurdles the state has scaled to journey from medicinal cannabis to recreational cannabis legalization and regulation.

Medicinal Legalization

The journey to recreational cannabis legalization all began, as is not uncommon amongst the many states that have embraced some form of legalization, with medicinal cannabis.

Proposition 215: The Compassionate Use Act

On November 5, 1996 California voters approved Proposition 215, The California Compassionate Use Act (CUA) which basically took effect immediately. This approval made the state the first in the nation to legalize the medicinal cannabis use, sale and cultivation. Proposition 215:

> supported exempting patients and defined caregivers who possess or cultivate marijuana for medical treatment recommended by a physician from criminal laws which otherwise prohibit possession or cultivation of marijuana. (https://ballotpedia.org/California_Proposition_215,_Medical_Marijuana_Initiative_(1996))

The ballot measure passed by direct vote of 55.58 percent to 44.42 percent. Under the measure, in a nutshell:

> ...qualified patients and caregivers may possess 8 ounces of dried marijuana, as long as they possess a state-issued identification card. However, Cal. Health and Safety Code Section 1362.77 does not require a state-issued identification card. Under the Health and Safety Code, a card holder or "qualified patient" (one possessing a doctor's recommendation) may possess up to eight oz. of dried herb, plus six mature or 12 immature plants. The state-issued identification card is for the patients' convenience only and is not required. Further, if the recommending physician indicates that a given patient requires more than the prescribed limits, that patient may possess an amount "consistent with that patient's needs."

In addition, marijuana smoking is also restricted by location. It may not be smoked wherever smoking is prohibited by law, within 1000 feet of a school, recreation center, or youth center, on a school bus, or in a moving vehicle or boat. According to Cal. Health and Safety Code Section 1362.785 Medical Marijuana use is not required to be accommodated inside the workplace or in any type of correctional facilities or during work hours. (https://en.wikipedia.org/wiki/1996_California_Proposition_215)

The CUA, as described by the state's Attorney General:

> . . .is a narrowly drafted statute designed to allow a qualified medical patient and his or her primary caregiver to possess and cultivate marijuana for the patient's personal use (*People v. London*, 228 Cal.App.4th 544 (2014) *and see*: https://oag.ca.gov/system/files/attachments/press-docs/MEDICINAL%20CANNABIS%20Guidelines.pdf)

Senate Bill 420

In the wake of Proposition 215, the California Senate enacted, in 2003, Senate Bill (SB) 420 the Medical Marijuana Program Act (MMPA), which became law on January 1, 2004. The MMPA clarified requirements related to medical cannabis and required the state's office of Attorney General to adopt guidelines to "ensure the security and non-diversion of cannabis grown for medicinal use." (https://oag.ca.gov/system/files/attachments/press-docs/MEDICINAL%20CANNABIS%20Guidelines.pdf)

The MMPA didn't amend the CUA but, instead, implemented the CUA and among other things:

> . . .requires the California Department of Public Health to establish and maintain a program for the voluntary registration of qualified medicinal cannabis patients and their primary caregivers thorugh a statewide identification card system. (https://oag.ca.gov/system/files/attachments/press-docs/MEDICINAL%20CANNABIS%20Guidelines.pdf)

Pursuant to the MMPA the Attorney General promulgated guidelines. (Ibid)

No 'Successful' Legal Challenges to Medicinal Cannabis Legalization

According the the California Attorney General, there have been no "successful" legal challenges to the state's medicinal legalization laws:

> . . .California's medicinal cannabis laws have not been successfully challenged in court on the ground that they are pre-empted by the Controlled Substances Act. (*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798.) In fact, Congress has provided that states are free to regulate in the area of controlled substances, including cannabis, provided that state law does not positively conflict with the Controlled Substances Act. (21 U.S.C. § 903.) Indeed, neither the MAUCRSA, the CUA, nor the MMPA, conflict with the Controlled Substances Act because, in adopting these laws, California exercised the state's reserved powers to not punish certain cannabis-related offenses under state law when a physician has recommended its use to treat a serious medical condition. (*See: City of Garden Grove v. Superior Court (Kha)* (2007) 157 Cal.App.4th 355, 371-373, 381-382.) (Ibid)

The Medical Marijuana Regulation and Safety Act of 2016

On October 11, 2015, Senate Bill 654, Assembly Bill 266 and Assembly Bill 243, collectively known as the Medical Marijuana Regulation and Safety Act (MMRSA) were signed into law. The MMRSA established a "state regulatory and licensing system for the cultivation, manufacturing, delivery, and sale of medicinal cannabis. . ." (Ibid)

Legalization of Recreational Cannabis

On November 8, 2016 California voters passed Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA) which established a:

> . . .comprehensive system to legalize, control, and regulate the cultivation, processing, manufacture, distribution, testing, and sale of non-medical marijuana, including marijuana products, for use by adults 21 years and older. (Ibid)

The AUMA also provided for the taxation of the commercial growth and retail sale of cannabis. The AUMA didn't alter the CUA or MCRSA but added and amended numerous statutes including the Penal Code. The intent behind the AUMA was, in part:

> . . .to combat the illegal market by creating a regulatory structure to govern California's commercial cannabis activity, prevent access by minors, and protect public safety, public health, and the environment. (Ibid)

California voters approved Proposition 64, The Adult Use of Marijuana Act, on the November 2016 ballot by a vote of 57 percent to 42 percent, which:

> . . .allowed adults aged 21 years or older to possess and use marijuana for recreational purposes. The measure created two new taxes, one levied on cultivation and the other on retail price. Prop. 64 was designed to allocate revenue from the taxes to be spent on drug research, treatment, and enforcement, health and safety grants addressing marijuana, youth programs, and preventing environmental damage resulting from illegal marijuana production. (https://ballotpedia.org/California_Proposition_64,_Marijuana_Legalization_(2016))

The ballot measure allowed, as of January 1, 2018, for the sale and taxation of recreational cannabis.

In addition to legalization of recreational cannabis, Proposition 64 also:

> . . .reduces the penalty for many marijuana offenses – what previously was a felony in many cases has been changed to a misdemeanor or a wobbler. Several misdemeanor offenses are now infractions. A number of statutes are created to regulate the consumption of marijuana in public. The Act has a resentencing provision which permits persons previously convicted of designated marijuana offenses to obtain a reduced conviction or sentence, if they would have received the benefits of the Act had it been in place when the crime was committed. If the crime was for conduct now legal under the Act, there is a provision requiring the court to "dismiss and seal" the record of conviction. The Act establishes a comprehensive system to control the cultivation, distribution and sale of nonmedical marijuana and marijuana products. The Act creates a marijuana tax to be imposed on purchasers of marijuana and marijuana products. (https://www.courts.ca.gov/documents/prop64-Memo-20161110.pdf)

The Bill to Regulate Them Both: Senate Bill 94—The Medicinal and Adult-Use Cannabis Regulation and Safety Act.

On June 27, 2017, Senate Bill 94, the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA) was signed into law and *repealed* the MCRSA and consolidated the state's medicinal and adult use cannabis regulatory systems. In general, the MAUCRSA imposed similar requirements on both commercial medicinal and adult-use cannabis activity.

The full text and bill history of Senate Bill 94 is available online at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB94

Conclusion and Implications

Since passage of the MAUCRSA, California agencies have enacted a myriad of regulations too broad for coverage in this article. California began its journey with legalization of cannabis in for form of medicinal cannabis and it took from 1996 to 2016 [effective 2018] for the state to move from medicinal legalization to recreational cannabis legalization. This pattern is not unusual for states that have legalized recreational cannabis. The regulation of cannabis however, remains a work in progress for the state and the number of regulations has grown exponentially. In any event, happy 25th anniversary to California in celebration of legalizing medicinal cannabis.
(Robert Schuster)

REGULATORY DEVELOPMENTS

CALIFORNIA ATTORNEY GENERAL ISSUES WARNING CONCERNING ILLEGAL CANNABIS EDIBLES AND THE RISK TO CHILDREN

On October 28, 2021, California Attorney General Rob Bonta issued a consumer alert warning Californians of cannabis-infused edibles that are being packaged and sold as copycat versions of popular food and candy products. These illegal and unregulated edibles may contain dangerously high-levels of THC and be sold in packaging nearly identical to those of popular brands of breakfast cereal, candies and snack foods.

Also on October 28, 2021, with Halloween just days away, Attorney General Bonta took to Twitter® to reinforce his warning of the dangers of illicit, copycat food and snack products:

> Illicit cannabis products packaged to look like well-known food & candy brands pose a risk to our kids & teens. I urge all Californians not to consume these unregulated, potentially dangerous cannabis products & if you see a copycat -- report it! (https://twitter.com/AGRobBonta/status/1453851118744662022?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1453851118744662022%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fsanfrancisco.cbslocal.com%2F2021%2F10%2F28%2Fillegal-pot-edibles-snacks-attorney-general-rob-bonta-alert%2F)

The Tweet also contained photographs of side-by-side photographs of the real food and the illicit cannabis-infused copy-cat products of Oreos, Fruity Pebbles cereal, Sour Patch gummy candy and Doritos chips with the following comments by Bonta:

> These aren't Doritos, these are not Sour Patch Kids, these are not Oreos. They are unregulated and untested cannabis products sold by unlicensed manufacturers and marketed to underage Californians.

The Danger of Ingesting Very High Milligrams of THC

Bonta pointed out that an illicit bag of Doritos, for example, has an unverified 600 milligrams of THC in a bag which would far exceed California's limit of 100 milligrams per package. He was quoted as adding:

> While cannabis-infused edibles packaged to look like our favorite brands may seem harmless and fun, the dangers of consuming unregulated and untested cannabis products are high, particularly for children and teens.

Identifying Illicit Edibles

Attorney General Bonta offered the following advice on identifying illicit edibles:

> Cannabis-infused edible products are being made to mimic major brands. . . .The products are primarily sold online and at unlicensed shops, are marketed to children and teens, and often boast levels of THC at many times the legal limit.

At first glance, the packaging for these illegal products appear nearly identical to those of major brands, but no major candy or food companies manufacture or sell cannabis or CBD products. Californians should look for copycat packaging with language that indicates that the product contains cannabis — such as "medicated," "THC," "CBD," "keep out of reach of children and animals," and/or an image of a cannabis leaf.

> In California, legal cannabis products must be affixed with the universal symbol. . . .If you see indications of copycat packaging or do not see the universal symbol, the product is illicit — and may be dangerous. (https://oag.ca.gov/news/press-releases/attorney-general-bonta-cannabis-infused-edibles-packaged-popular-food-and-candy)

Emphasizing The Risk to Children

In the face of the illicit food stuffs, the Attorney General emphasized the safe and structured nature of California's recreational cannabis scheme and of the dangers to minors:

> The fact is: here in California, we have a safe, regulated, and legal cannabis market. But if a product is being marketed to children, mimicking a well-known consumer brand, and advertising sky-high levels of THC—it's not likely to be a part of it. I urge all Californians to look carefully at the packaging of the products they are purchasing and report these copycat products if they come across them. (Ibid)

The Attorney General went on to state:

> Illegal cannabis products present a risk to public health and safety. Children can experience a variety of delayed symptoms upon ingesting cannabis edibles, including, but not limited to difficulty breathing, lethargy, dizziness, nausea, and loss of coordination. Illegal products made with synthetic cannabinoids may pose additional health risks. Synthetic cannabinoids can be highly toxic and are illegal in the state of California. Side effects of consuming synthetic cannabinoids include rapid heart rate, agitation, vomiting, trouble breathing, psychosis, among others.

In recent years, California has seen an uptick in pediatric exposure and ICU visits related to cannabis edibles, as well as an increase in children as young as 12 who are intentionally using cannabis products. In 2020, there were 1,173 calls to the Poison Control Center for services related to children age 0-19 ingesting cannabis products. This is up from 404 calls in 2016, with the biggest increase for children age 0-5. California has also seen a rise in emergency room visits related to cannabis poisoning among young children. In 2016, there were approximately 21 visits per one million Californians age 0-5. In 2020, there were approximately 113 visits. (Ibid)

Conclusion and Implications

Even in the face of legalization cannabis in California, illicit and black-market sales of cannabis and cannabis-related products continue to compete with sanctioned dispensaries. And as with alcohol and tabaco sales, regulations alone won't stop companies from trying to expose their products, illicit or not, to the state's youth. The full text of the Attorney General's warnings appear online at: https://oag.ca.gov/news/press-releases/attorney-general-bonta-cannabis-infused-edibles-packaged-popular-food-and-candy. (Robert Schuster)

LAWSUITS FILED OR PENDING

INTELLECTUAL PROPERTY DISPUTES ARE NO BREEZ(E)— PROMONTORY HOLDINGS, LLC SUES THE BREEZE BRAND, LLC IN CALIFORNIA SUPERIOR COURT FOR TRADEMARK INFRINGEMENT

Cannabis product categories have expanded well beyond the traditional flower product into areas such as topicals, edibles, vapes, and more. In the edible space, brands are moving beyond the brownies of yesteryear by developing oral sprays, gummies, mints, cookies, and many others both to provide THC and CBD based offerings. With this vast array of products on dispensary and store shelves, brand recognition is becoming an increasingly important part of developing a successful product.

As we reported last winter, some brands are taking the route of imitating existing non-cannabis products as the Ferrara Candy Company alleged Inland Empire 420 Supply and Tops Cannabis did with their "Medicated Nerds" products aping their well-established Nerds candy brand. However, as certain cannabis brands are becoming well established in the space, their products are becoming the object of imitation. At least that is the allegation in a new trademark infringement case filed by Promontory Holdings, LLC (Promontory) against The Breeze Brand, LLC (Breeze Brand) in California in the Orange County Superior Court (Case No. 30-2021-01226742-CU-IP-CJC).

Trademark Basics

A trademark is a designation that is distinctive and used in a manner to identify distinct source of good or service. Trademarks are unique among the various types of intellectual property rights recognized under American law because they are granted not only to protect the holder of the right and the value accrued in developing the brand or product, but also to protect consumers when seeking out products on the market.

To establish infringement of a valid trademark, the mark's owner must show that there is a likelihood that the use of the mark by another party is likely to lead to confusion among consumers or that it will dilute the value of their mark. Promontory alleges in its complaint that Breeze Brand is doing just this by confusing the customers it has been cultivating since 2015 by offering a very similar range of CBD-infused products.

Background

Promontory has been marketing CBD-infused products in California since late 2015, initially through breezmints.com and now through findbreez.com, as well as its retail partners under the word mark "Breez" and with a related logos. Since at least 2020, Breeze Brand has been marketing its own line of CBD-infused products under the name "Breeze" with a related logo.

Promontory's Allegations

As is typical in trademark infringement cases, Promontory's complaint against Breeze Brand alleges not only trademark infringement in violation of Business and Professions Code § 14245 but includes allegations that Breeze Brand has engaged in unfair competition in violation of Business and Professions Code § 17200 *et seq.* and at common law.

These claims all revolve on whether there is a likelihood that consumers will be confused regarding the origin of the product they are purchasing or consuming. In this case, the product categories are remarkably similar which only goes to support Promontory's argument that consumers will be confused. Promontory markets CBD and THC mints, tablets, and tinctures while Breeze Brand markets CBD gummies and vape pens.

Though Promontory does not make out a separate claim for dilution of its brand, it does state in its complaint that its Breez branding has been found to be among the top cannabis brands in California by a third-party industry analyst and that Breeze Brands conduct would "dilute the substantial value" of its registered trademark.

Conclusion and Implications

Cannabis brands themselves becoming a target of trademark infringement can be seen as a sign of the cannabis industry maturing. Cases such as the one brought by Promontory are not unique in the intellectual property law arena, but they are a relatively new development in the cannabis space. Courts are likely to apply the same tests and standards here as they have in non-cannabis cases in the past. Regardless, this will be a case to watch for cannabis businesses looking to develop a strong yet defensible branding strategy.
(Andreas L. Booher)

JUDICIAL DEVELOPMENTS

CALIFORNIA COURT OF APPEAL ADDRESSES THE IMPACT OF A SUPERIOR COURT DECLARATORY RELIEF ORDER INVOLVING A CITY'S MUNICIPAL CODE FOR CANNABIS DISPENSARIES

Taft v. Vargas, *Unpub.*, Case No. E076173 (4th Dist. Sept. 17, 2021).

Several parties wanting to operate retail cannabis dispensaries in the City of Jurupa Valley (City) sued the City and various other parties, including several defendants who already received permission to operate. The Superior Court issued declaratory relief, finding unconstitutional a provision in the City's municipal code relating to the process for obtaining necessary exemptions for such businesses. It denied the plaintiffs any other relief. While neither the plaintiffs nor the City appealed, several of the individual defendants who already had obtained exemptions appealed, believing the provisions at issue not to be unconstitutional. In an *unpublished* decision, the Court of Appeal dismissed the appeal, noting that the Superior Court's declaration did not take away these defendants' exemptions (or otherwise affect their rights), and it had no jurisdiction to hear an appeal in the absence of any party that was aggrieved by the Superior Court judgment.

Factual and Procedural Background

The City of Jurupa Valley's municipal code generally banned "commercial cannabis activity." In November 2018, voters in the City approved "Measure L," which added to the municipal code a new chapter that created exemptions from the ban and thereby allowed some cannabis-related businesses. Among other things, Measure L allowed for a limited number of exemptions for retail cannabis dispensaries to be issued—one per 15,000 residents of the City. Based on the City's then-current population, there could be a maximum of seven such exemptions.

Applications under Measure L were to be divided into two categories: priority and non-priority. In many ways, the requirements for each type of permit were the same. The difference was that a priority application required an original or certified copy of the applicant's initial statement by unincorporated association filed with the California Secretary of State that contained certain language and which was file-stamped on or before a certain date. Any applicant that could not include such a document would be considered a non-priority application.

The City received and approved six priority applications for exemptions to operate a retail cannabis dispensary. For various reasons, plaintiffs were precluded from filing priority applications. They sued the City and its City Manager. An amended petition added defendants, including the six individuals who had filed priority applications, as well as the entities on behalf of which they filed the applications. Ultimately, the Superior Court found that certain portions of the exemption process were unconstitutional and issued a declaration that they violated equal protection principles under even rational basis review. The Superior Court found, however, that the declaration was the only appropriate remedy and denied all other requested relief.

Neither plaintiffs nor the City or City Manager appealed. However, five of the six individual defendants who had applied for and received exemptions for retail cannabis dispensaries under the priority application process appealed. The only briefing received in the Court of Appeal was the individual defendants' opening brief; no respondent's brief was filed.

The Court of Appeal's Decision

The Court of Appeal did not address the merits of the appeal. Instead, it concluded that the appellants lacked standing to attack a judgment that was effectively in their favor. In particular, the Court of Appeal noted that the Superior Court's grant of declaratory relief did not disturb the City's approval of any exemption pursuant to the priority application process, including those granted to the appellants. The declaratory relief had no effect on appellants'

rights or interests in operating their businesses as allowed by their exemptions. Other relief sought by plaintiffs that conceivably could have injuriously affected appellants was denied by the Superior Court. Thus, the judgment was effectively in appellants' favor, to the extent it affected their interests at all. Given this context, the Court of Appeal concluded that appellants therefore lacked standing to assert any claim of error in the Superior Court decision. Since no party with standing had appealed, the Court of Appeal found it lacked jurisdiction to decide the appeal and dismissed.

Conclusion and Implications

The case, although *unpublished*, is significant because it contains a discussion regarding the jurisdiction of appellate courts and when a party has been aggrieved for purposes of pursuing an appeal. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/E076173.PDF. (James Purvis)

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