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Unlawful Detainer: Responsive Pleadings

§10.60A c. Dispensing or Using Medical Marijuana

There is no officially reported California precedent on whether a landlord is entitled to have a state court declare a lease terminated and order an eviction of the tenant solely on the basis of the tenant's dispensing or use of medical marijuana, which is unlawful under the federal Controlled Substances Act (CSA) (21 USC §§812(b)(1), 841(a)(1), 844(a)) but immunized from criminal and quasi-criminal penalties under state law. See §§4.44B–4.44E. See also Health & S C §11362.5 and Maly, *Up in Smoke? How to Avoid Getting Burned When Counseling Clients on California's Medical Marijuana Laws and Landlord-Tenant Rights*, 36 CEB Real Prop L Rep 34 (March 2013).

Anecdotal reports indicate mixed results. In a 2012 medical marijuana dispensary eviction case, for example, an Alameda County Superior Court judge refused to allow the landlord to evict the dispensary because the landlord knew about the nature of the tenant's business before executing the lease, and because California law does not allow a state court to declare a lease terminated and order a Sheriff to evict solely on the basis of the tenants' use of the property for a purpose that is unlawful under federal controlled substance law but immunized from criminal and quasi-criminal penalties under state law. See http://www.mercurynews.com/ci_22116405/; http://www.sfweekly.com/thesnitch/2012/12/03/harborside-health-center-landlord-cant-evict-medical-marijuana-dispensary.

Attempts to use antidiscrimination laws to protect medical marijuana users have not been successful in nuisance, employment discrimination, or land use cases, because of the CSA. See *e.g., City of Riverside v Inland Empire Patients Health & Wellness Ctr.* (2013) 56 C4th 729; *Ross v RagingWire Telecommunications, Inc.* (2008) 42 C4th 920; *James v City of Costa Mesa* (9th Cir 2012) 700 F3d 394.

Notwithstanding the decriminalization of medical marijuana cultivation and use in California, a city may prohibit the cultivation and sale of marijuana within the city limits in zoning and other land use ordinances, and such law is not preempted by state law. *Kirby v County of Fresno* (2015) 242 CA4th 940; *Maral v City of Live Oak* (2013) 221 CA4th 975. But in *Kirby*, the court concluded on the review of a demurrer that a provision of the local ordinance classifying the cultivation of medical marijuana as a misdemeanor was preempted by California's extensive statutory scheme addressing crimes, defenses, and immunities relating to marijuana, and so it allowed the constitutional challenge to the local ordinance to proceed on that narrow ground.

PRACTICE TIP► A successful defense to an eviction solely on the basis of the tenant's use of medical marijuana would require a direct challenge to the constitutionality of the CSA and its legislative

finding that marijuana is a drug with "no currently accepted medical use in treatment in the United States." 21 USC §812(b)(1)(B). Such a challenge would require a substantial amount of medical and scientific evidence, including expert witness testimony. Arguably, because it may easily be shown by such evidence that the legislative finding in §812(b)(1)(B) is outdated and currently inaccurate, the law may be challenged on equal protection grounds or because the privacy right under the due process clause in the Fourteenth Amendment of the federal constitution arguably supports a patient's right to use the best and most effective medicine for one's disease; like an abortion, the decision is very personal and is made between the individual patient and his or her physician. The right of privacy triggers the application of a strict scrutiny analysis rather than a rational basis test for a constitutional challenge. See *Planned Parenthood v Casey* (1994) 505 US 833, 896, 112 S Ct 2791; *Roe v Wade* (1973) 410 US 113, 163, 93 S Ct 705. Although these cases have been criticized and their impact eroded, no majority Supreme Court opinion has as yet overruled them.

The issue of privacy was not considered in either *Riverside* or *James*. The constitutional rights narrowly argued in *Ross* only involved (1) an aspect of the privacy right in the state constitution that protects the right of competent adult patients to refuse medical treatment, and (2) the right to due process in the federal constitution insofar as it supported a terminally ill patient's access to an investigational new drug that the government had not yet "approved for commercial sale but had determined to be sufficiently safe for testing on human beings." *Ross*, 42 C4th at 933. A California court of appeal case that considered and rejected a privacy right argument (*420 Caregivers, LLC v City of Los Angeles* (2012) 219 CA4th 1316; see §4.44D) considered privacy only as it pertained to information about users the city required medical marijuana dispensaries to report to the city in the course of dispensing.

NOTE► In a criminal action brought in a federal district court in Sacramento, *U.S. v Pickard* (ED Cal 2015) 100 F Supp 3d 981, the court rejected a constitutional challenge under the equal protection clause to marijuana's designation as a Schedule 1 drug under the CSA, which declared that Schedule 1 drugs have no medicinal purpose, are unsafe even under medical supervision, and contain a high potential for abuse. The court noted the continuing, serious, and principled differences between and among prominent, well-informed, and equivalently credible experts regarding the medical benefits of marijuana. The court then applied the rational basis test (because the right of privacy was not asserted by the defendant in that case) and concluded that the "continuing questions about marijuana and its effects make the classification rational."