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From MMRSA to MCRSA to MAUCRSA: The Current State of Affairs in California Cannabis Regulation and Risks of Leasing Real Property to Cannabis Businesses

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Summary

Much has happened in the cannabis world since publication of my last article (Hamill, *Proposition 64 and Beyond: Insights From a Former City Prosecutor on the Risks of Leasing to Cannabis Operators in Today's Legal Landscape*, 40 CEB RPLR 28 (Mar. 2017)). We saw state agencies release 200 pages of draft regulations for the Medical Cannabis Regulation and Safety Act (MCRSA), only to have MCRSA repealed and replaced with yet another set of cannabis laws called the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA). Bus & P C §§26000–26231.2. MAUCRSA effectively repeals MCRSA, tweaks the Adult Use of Marijuana Act (AUMA), and combines medical and recreational laws into one comprehensive piece of legislation.

We also saw the United States Attorney General attempt to work around and weaken federal "protections" that provide comfort to cannabis businesses: the Cole Memorandum and the Rohrabacher-Farr Amendment. Attorney General Jeff Sessions recently asked congressional leadership to repeal the Rohrabacher-Farr Amendment and sent letters to the Governors of several states warning that their regulatory systems are not Cole-compliant and that, even if they were, the United States could still prosecute their cannabis businesses.

Leasing to cannabis operators is still tremendously risky.

If a tenant engages in unlawful commercial cannabis activity, the tenant and property owner may be subject to civil and criminal penalties under local, state, and federal laws, including monetary fines, asset forfeiture, and imprisonment. MAUCRSA provides a safe harbor to innocent property owners who lease property to licensed operators, but the safe harbor does not protect against unlicensed activity or federal enforcement.

Cannabis is illegal and classified as a Schedule 1 drug under the federal Controlled Substances Act (CSA). 21 USC §§801–904. Although the Rohrabacher-Farr Amendment and the Cole Memorandum currently limit federal enforcement, they are impermanent and, with very narrow exceptions, do not prohibit the federal government from enforcing the CSA against property owners.

This article provides an update on the latest in California cannabis regulation and explains the basic legal implications of the new regulatory structure for California property owners interested in leasing to cannabis businesses.

Disclaimer: Cannabis laws are fluid and complex. This article provides a broad overview and does not address every possible risk or nuance. It should not be construed as legal advice. Consult a qualified attorney before engaging in any cannabis-related activity.

Background

Enacted June 27, 2017, MAUCRSA harmonizes California's medical and recreational cannabis regulatory systems. With limited exceptions, MAUCRSA requires every commercial operator to have a state license, comply with local laws, and obtain property owner consent to cannabis activity. See Bus & P C §§26037(a), 26051.5(a)(2).

License categories include cultivation, testing, distribution, manufacturing, retail, and microbusiness. Bus & P C §26050. If the local zoning code does not allow a certain category of cannabis activity, then an operator cannot lawfully operate or obtain a state license for that category of activity. Bus & P C §§26055(d), 26030(f).

California plans to issue licenses under MAUCRSA starting January 1, 2018. Bus & P C §26012(d). Previously, under MCRSA, a medical cannabis operator complying with the Compassionate Use Act (CUA) (Health & S C §11362.5), the Medical Marijuana Program Act (MMPA) (Health & S C §11362.7 et seq.), and local requirements on or before January 1, 2018, could continue operating until the state approved or denied its license application. MAUCRSA does not allow continued unlicensed operation, but does provide a temporary licensing option for applicants awaiting approval of a state license. Bus & P C §26050.1. Before the issuance of MAUCRSA licenses, however, cannabis businesses are operating in a gray area. Operators must comply with MMPA and CUA and local laws, but because MAUCRSA has already taken effect, cannabis businesses are technically noncompliant without possessing a state license, despite the fact there is currently no means to obtain one. MAUCRSA regulations will likely provide guidance on this issue.

California licensing authorities are planning to withdraw the proposed MCRSA regulations and use the emergency rulemaking process for the proposed MAUCRSA regulations, which are expected to be published in the fall of 2017. See California Cannabis Portal Statement of Upcoming Withdrawal of MCRSA Regulations, July 26, 2017, https://cannabis.ca.gov/2017/07/26/statement-on-upcoming-withdrawal-of-mcrsa-regulations/.

Local, State, and Federal Enforcement Against Property Owners

Local and State Enforcement

Local governments have a variety of tools to pursue illegal cannabis operators and their landlords, including administrative code enforcement procedures, civil nuisance abatement actions, and criminal actions. Nuisance abatement actions are a popular option because, depending on the municipal code, they enable local governments to obtain injunctive relief and recover attorney fees. See CCP §731; Govt C §38773.5. Local governments may also criminally prosecute cannabis operators and landlords for misdemeanor violation of a local ordinance. See Govt C §36900(a). MAUCRSA retains the statutory penalties added to the local enforcement toolbox via MCRSA and AUMA and does not interfere with local government rights to pursue existing administrative, civil, and criminal remedies.

In addition to local government remedies, unlicensed operators and landlords are subject to state-level criminal and civil penalties, including fines and imprisonment. See Health & S C §11366.5. The state's asset forfeiture laws may also be used under MAUCRSA against unlicensed operators and property owners. See Health & S C §11470(g). Property that is used as a family residence or for other lawful purposes, or that is owned by two or more persons, one of whom had no knowledge of its unlawful use, is not subject to state forfeiture. Health & S C §11470(g).

Property Owners May Be Held Liable for the Entire Amount of an Enforcement Action Against a Cannabis Operator

Generally, municipalities seek two code enforcement objectives: compliance and cost recovery. Fees and costs are easier to recover from property owners because, in most cases, owners are easily identifiable through public records; state law enables municipalities to secure costs and fees associated with nuisance abatement against the property through liens, special assessments, and judgments. Cannabis operators, on the other hand, tend to disappear mid-prosecution; judgments against them are typically difficult to recover.

Many municipal codes contain some variation of an ordinance that imposes joint and several liability against persons "allowing" and "permitting" violations of the code. In these jurisdictions, property owners are frequently named as defendants on the theory that by leasing property to a cannabis operator, the property owner is allowing or permitting code violations. However, even if a municipal code does not contain such language, state law gives local governments broad authority to secure fees and costs incurred in a nuisance abatement action against the property owner.

A city may, by ordinance, provide for the recovery of attorney fees in any action, administrative proceeding, or special proceeding to abate a nuisance. Govt C §38773.5(b). Cities can collect attorney fees and costs associated with nuisance abatement from the property owner by making them a lien or special assessment against the property (Govt C §§38773.1(a), 38773.5(a)) or by obtaining and recording a civil judgment against the property owner (see CCP §697.310). Subject to specified exceptions, a recorded judgment creates a lien on all real property owned by the judgment debtor in the county in which it is recorded. *FDIC v Charlton* (1993) 17 CA4th 1066, 1069, reported at 16 CEB RPLR 362 (Nov. 1993).

State law gives counties similar authority to record liens and special assessments against property owners in nuisance abatement actions. See Govt C §§25845, 25845.5.

Thus, property owners risk being held liable not only for their own legal defense costs, but for significant costs and fees incurred by municipalities in nuisance abatement actions against cannabis operators.

MAUCRSA builds on local government law enforcement tools against cannabis operators. The license application process requires background checks, payment of a bond, and a substantial amount of personal identifying information from cannabis business operators. See Bus & P C §26051.5. Accordingly, it should be easier for local governments to achieve compliance and cost recovery from operators licensed under MAUCRSA than it is now under MMPA and CUA.

Enforcement and Property Owner Protections Under MAUCRSA

Cannabis Operators Must Comply With Local Laws. It is well established that cannabis businesses must comply with local laws under the current legal framework. Local governments have inherent power to determine the appropriate use of land within their borders. *City of Riverside v Inland Empire Patients Health & Wellness Ctr., Inc.* (2013) 56 C4th 729, reported at 36 CEB RPLR 87 (July 2013). Neither CUA nor MMPA expressly or impliedly preempts the authority of California cities and counties, under their traditional land

use and police powers, to allow, restrict, limit, or entirely exclude facilities that distribute medical marijuana. 56 C4th at 762.

MAUCRSA preserves local government control, explicitly stating that it does not supersede or limit the authority of local jurisdictions to prohibit the establishment or operation of cannabis businesses. Bus & P C §26200(a). Accordingly, all cannabis operators must comply with local ordinances and obtain any required regulatory permits.

It is commonly assumed that a business license or tax certificate authorizes commercial cannabis activity, or that a collective operating under CUA and MMPA does not require local licensing or other authorization. However, under most municipal codes, a business license is merely a tax paid to a local government to conduct business within the jurisdiction; the issuance of such license does not entitle the license holder to carry on any otherwise prohibited business. A use in violation of a local zoning code, for example, is prohibited regardless of whether the operator holds a business license.

Local Government Authorization Requirements Have Changed Under MAUCRSA. Previously, MCRSA required commercial license applicants to show local authorization before applying for a state license. Now, under MAUCRSA, operators are not required to show proof of local authorization during the application process, although they can choose to do so voluntarily. Bus & P C §26055(e). Regardless, the state cannot issue a license to an operator that does not comply with local laws. Bus & P C §26055(d). Further, if a cannabis operator obtains a state license to operate in a municipality that does not allow such activity, the state can revoke the license. Bus & P C §§26030(f), 26031(a)–(b). Property owners should mandate that tenants obtain proof of local authorization and provide it to the state during the application process. That way, there can be no question of whether the local government authorizes the cannabis activity. Otherwise, the operator might obtain a state license after enduring a lengthy and expensive state application process, only to later be denied local government authorization.

Operators Must Obtain Property Owner Authorizations. MAUCRSA requires a statement from the landowner or landowner's agent acknowledging and consenting to commercial cannabis activity on the property. Bus & P C §26051.5(a)(2). This raises problems for property owners because a property owner who consents to cannabis activity cannot later claim to be unaware of that cannabis activity. Accordingly, any such property owner will not likely benefit from the innocent owner defense, which is discussed below under "Property Owners Face Asset Forfeiture and Other Risks." Further, consenting to cannabis activity may impede the landlord's ability to allege unlawful detainer on the grounds of illegal activity. See *Chretien v Patients Mut. Assistance Collective Corp.* (Alameda Super Ct, Nov. 27, 2012, No. RG12–643579) Order Granting Motion to Quash Summons and Complaint at 20. (*Chretien* is discussed below under "Property Owners Should Include an Escape Clause Requiring Tenants to Vacate Immediately on Law Enforcement Threat, Including Asset Forfeiture.")

MAUCRSA Provides "Safe Harbor" for Property Owners. MAUCRSA provides cannabis businesses operating under a state license and a local permit immunity from state civil and criminal penalties, including seizure and forfeiture of assets. Bus & P C §§26037(a), 26032(b). MAUCRSA also provides immunity from arrest, prosecution, civil fines, and seizure or forfeiture of assets to a property owner who, in good faith, allows its property to be used by a licensee as permitted under both a state license and a local permit. Bus & P C §26037(b).

However, because MAUCRSA requires property owners to provide written consent to cannabis activity before the tenant obtains a license (see Bus & P C §26051.5(a)(2)), a property owner cannot know at the time of providing such authorization whether the tenant will actually receive a state license. If the tenant never obtains a state license but operates anyway, then the safe harbor does not protect the landlord from local and state enforcement actions because the tenant is not a "licensee." See Bus & P C §26001(z). A property owner also risks losing protection under the safe harbor if the cannabis operator violates any state or local laws, because any unlawful activity risks revocation of the license. See Bus & P C §§26030–26031. Property owners should condition their consent on the tenant's securing and maintaining a valid state license and operating in compliance with all state and local laws.

Note that the MAUCRSA immunities and asset forfeiture protection apply only to enforcement actions brought under state law. MAUCRSA does not prohibit federal enforcement, including asset forfeiture by the federal government, which is discussed in more detail below under "Federal Enforcement."

Federal Enforcement

The ability of cannabis businesses to operate in California with limited federal intervention hinges on two things: the August 29, 2013, Cole Memorandum (discussed below under "The Cole Memorandum Provides Nonbinding Guidance Suggesting That States With Robust Cannabis Regulations Are Low Priority for Federal Enforcement") and the Rohrabacher-Farr Amendment (discussed below under "The Rohrabacher-Farr Amendment Temporarily Prohibits Department of Justice Spending on Enforcement Actions Against

Medical Cannabis Operations in States That Have Legalized Such Activity"). The federal government is authorized to enforce the CSA against any cannabis operator or property owner, but the Rohrabacher-Farr Amendment currently prohibits the United States Department of Justice from using appropriated funds to enforce against state law-compliant medical cannabis operations in California. Further, the existing policy position of the Department of Justice, as set forth in the Cole Memorandum, suggests that enforcement efforts will focus on jurisdictions that have weak regulatory systems or have not legalized cannabis.

Property Owners Face Asset Forfeiture and Other Risks

The federal government can include a property owner in an enforcement action against a cannabis operator under a variety of legal theories, including aiding and abetting and conspiracy. See 18 USC §2; 21 USC §846. Under federal law, whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal. 18 USC §2.

Because cultivating, manufacturing, and distributing marijuana are federal crimes, real property used to facilitate the commission of those crimes is subject to federal asset forfeiture. See 21 USC §§853, 881; 18 USC §§983, 985.

Title 18 USC §983(d) provides an "innocent owner defense" to asset forfeiture of real property to an owner who

- Did not know of the conduct giving rise to forfeiture; or
- On 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.

California property owners will encounter difficulty asserting the innocent owner defense, however, because of MAUCRSA's requirement that property owners expressly consent to cannabis activity at the property. See Bus & P C §26051.5(a)(2). The consent requirement makes it unlikely that a California property owner can show it did not know of the conduct giving rise to the forfeiture. Further, the consent requirement strengthens a federal government argument that a property owner aided and abetted in the commission of the CSA violation and is therefore punishable as a principal.

The Cole Memorandum Provides Nonbinding Guidance Suggesting That States With Robust Cannabis Regulations Are Low Priority for Federal Enforcement

The Cole Memorandum is a Department of Justice policy memorandum issued under the Obama Administration. See Cole, James M., Guidance Regarding Marijuana Enforcement, U.S. Department of Justice (Aug. 29, 2013), which is available at https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf. The Cole Memorandum guides United States attorneys to focus on a set of federal enforcement priorities as they pertain to cannabis, including the distribution of marijuana to minors, interstate smuggling, and drugged driving. It rests on the expectation that states that have legalized cannabis activity will implement robust regulatory and enforcement systems to alleviate public safety, health, and law enforcement concerns. The Cole Memorandum implies that the Department of Justice will not prosecute operators abiding by the law in states with robust regulatory structures, but expressly reserves the right to prosecute at any time.

The Cole Memorandum is merely a policy and does not carry force of law. The Department of Justice can replace the Cole Memorandum with alternative priorities or disregard it at any time.

Recently, the Governors of Colorado, Oregon, Alaska, and Washington wrote to Attorney General Sessions requesting that the Department of Justice reaffirm the Cole Memorandum; they received alarming messages in return. See July 24, 2017, Letter from Office of the Attorney General, available at https://s3.amazonaws.com/big.assets.huffingtonpost.com/LtrfromSessions.pdf. Attorney General Sessions wrote that the Department of Justice "remains committed to enforcing" the federal ban on cannabis, a "dangerous drug," noting that pursuant to the Department of Justice's right to exercise discretion to prosecute under federal law, the United States can prosecute in "Cole-compliant" states at any time. The Department of Justice needs funding to prosecute, however, which brings us to the current status of the Rohrabacher-Farr Amendment.

The Rohrabacher-Farr Amendment Temporarily Prohibits Department of Justice Spending on Enforcement Actions Against Medical Cannabis Operations in States That Have Legalized Such Activity

The Rohrabacher-Farr Amendment, also known as Rohrabacher-Blumenauer, prohibits the Department of Justice from spending funds to prevent states' implementation of their medical marijuana laws. The Rohrabacher-Farr Amendment is a rider in an omnibus appropriations bill funding the federal government. Since

it was first passed in 2014, it has been renewed periodically with bipartisan support.

The Ninth Circuit has interpreted the Rohrabacher-Farr Amendment as prohibiting the Department of Justice from spending funds from relevant appropriations acts for the prosecution of individuals engaged in conduct permitted by state medical marijuana laws and who fully complied with such laws. See *U.S. v McIntosh* (9th Cir 2016) 833 F3d 1163, 1178 (*McIntosh*). In *McIntosh*, the Ninth Circuit warned that the federal government can appropriate funds for CSA prosecutions tomorrow, or the temporary lack of funds could become a more permanent lack of funds if Congress continues to include the same rider in future appropriations bills. 833 F3d at 1179.

On August 8, 2017, the United States District Court for the Northern District of California halted a federal cannabis case in order to effectuate the Rohrabacher-Farr prohibition on expenditures. See *U.S. v Pisarski* (ND Cal, No. 14-cr-00278-RS-1) Aug. 8, 2017, Order Granting Motion for Temporary Stay (*Pisarski*) at 1 (citing *McIntosh*). In granting defendants' motion to stay, the court explained: "Their conduct strictly complied with all relevant conditions imposed by California law on the use, distribution, possession, and cultivation of medical marijuana." *Pisarski* at 4. The court concluded that defendants were fully compliant with state law following an evidentiary hearing; accordingly, federal prosecution was barred unless and until "a future appropriations bill permits the government to proceed." *Pisarski* at 10.

The Rohrabacher-Farr Amendment addresses medical marijuana, but it does not mention recreational cannabis. Accordingly, the Rohrabacher-Farr Amendment arguably does not prohibit the Department of Justice from using appropriated funds to pursue recreational cannabis businesses and their landlords.

On May 5, 2017, the Rohrabacher-Farr Amendment was renewed until September 30, 2017, as part of a $1 trillion spending bill. Consolidated Appropriations Act of 2017, Pub L 115–31, §537, 131 Stat 135. Days before the spending bill was signed into law, Attorney General Sessions wrote to congressional leaders urging that the Rohrabacher-Farr Amendment not be renewed, stating that it would "inhibit [the Justice Department's] authority to enforce the Controlled Substances Act ... it would be unwise for Congress to restrict the discretion of the Department [of Justice] to fund particular prosecutions, particularly in the midst of an historic drug epidemic and potentially long term uptick in violent crime." May 1, 2017, Letter from Office of the Attorney General Re: Department of Justice Appropriations, available at https://www.scribd.com/document/351079834/Sessions-Asks-Congress-To-Undo-Medical-Marijuana-Protections.

On July 27, 2017, the Senate Appropriations Committee approved inclusion of the Rohrabacher-Farr Amendment in the Subcommittee for Commerce, Justice, Science, and Related Agencies appropriations bill for fiscal year 2018. See Full Committee Markup of the CJS, THUD, and Legislative Branch Appropriations Bills for FY2018 (July 27, 2017), 1:14:44–1:17:50; available at https://www.appropriations.senate.gov/hearings/full-committee-markup-of-the-cjs-thud-and-legislative-branch-appropriations-bills-for-fy2018. In September 2017, however, the House Rules Committee leadership blocked a vote on the Amendment. See Press Release, *Reps. Blumenauer and Rohrabacher Statement on House Rules Committee Leadership Decision to Block Vote on Medical Marijuana Protections* (Sept. 7, 2017), available at https://blumenauer.house.gov/media-center/press-releases/reps-blumenauer-and-rohrabacher-statement-house-rules-committee.

Days later, however, the Amendment was included as part of an emergency aid package approved by Congress, in effect until December 8, 2017. See HR 601, Continuing Appropriations Act, 2018, and Supplemental Appropriations for Disaster Relief Requirements Act, 2017. The fate of the Amendment is unknown following expiration of the emergency aid package. The actions of House Rules Committee leadership are in line with Attorney General Sessions's request that Congress not renew the Amendment. Property owners and cannabis industry operators should pay attention to developments at the federal level. If Congress does not renew the Rohrabacher-Farr Amendment, the Department of Justice will be free to use appropriated funds to pursue all medical and nonmedical California cannabis operators and their landlords, even if they possess a valid state license.

Additional Considerations Unique to Cannabis-Related Leases

Cannabis Activity May Be Prohibited at Encumbered Properties

If a property is encumbered by a mortgage or other financing, property owners must consult financing documents to ensure that cannabis activity is not prohibited and will not cause the loan to be called or the property to be foreclosed on. It is unlikely that traditional commercial lenders would allow use of the property in a manner that is illegal under federal law.

Property Owners Should Refrain From Any Involvement With the Business Aside From Accepting Payment of Rent and Use Caution in Leasing to Multiple Entities

Previously, MCRSA's definitions of "premises" and "applicant" potentially subjected property owners to the

same strict licensing requirements as commercial cannabis operators. MAUCRSA revised the definitions of "applicant," "owner," and "premises." See Bus & P C §26001(c), (al), (ap). Now, as long as a property owner is not involved in the direction, control, or management of the license applicant, is not chief executive officer of a nonprofit or other cannabis entity, is not a member of the board of directors of a nonprofit cannabis entity, and does not own 20 percent or more of the license applicant, the property owner will not be considered an "applicant" or an "owner" subject to MAUCRSA's strict licensing requirements and regulations. Bus & P C §26001(al).

Property owners should pay careful attention to MAUCRSA regulations as they pertain to "premises." MAUCRSA allows only one licensee per "premises." See Bus & P C §26001(ap). It is unclear whether "premises" means the full property encompassed in one assessor parcel number or whether one parcel can be divided into multiple separate units, each of which would be a separate "premises." Further guidance is expected when the new regulations are released.

Courts May Enforce a Cannabis-Related Contract if It Is Not Against Public Policy and a Remedy Exists That Does Not Require Ordering a Violation of the Law

When a contract is challenged on the basis of illegality, the extent of enforceability depends on a variety of factors, including the policy of the transgressed law, the kind of illegality, and the particular facts. See *Asdourian v Araj* (1985) 38 C3d 276, 292, reported at 8 CEB RPLR 79 (June 1985). Generally, contracts with an illegal object will not be enforced, but in compelling cases, illegal contracts will be enforced in order to avoid unjust enrichment to a defendant and a disproportionately harsh penalty on the plaintiff. 38 C3d at 292. Even when contracts concern illegal objects, a court is not barred from according relief when the court can enforce a contract in a way that does not require illegal conduct. See *Bassidji v Goe* (9th-Cir-2005) 413 F3d 928, 938. However, if enforcement of a contract would require the court to order illegal conduct, that contract is unenforceable. 413 F3d at 938.

Some state and federal courts have enforced cannabis-related contracts. See *Mann v Gullickson* (ND Cal, Nov. 2, 2016, No. 15-cv-03630-MEJ) 2016 US Dist Lexis 152125, Order Denying Motion for Summary Judgment (*Mann*); *Green Earth Wellness Ctr., LLC v Atain Specialty Ins. Co.* (D Colo 2016) 163 F Supp 3d 821. In *Mann*, plaintiff filed an action in state court for breach of a promissory note related to a cannabis business. Defendant removed the action to federal court. Defendant moved for summary judgment, alleging that the note was void ab initio because it related to cannabis, which was prohibited under the CSA. *Mann* at 3. For guidance, the court looked to the Colorado district court's decision in *Green Earth*, which addressed a similar breach of contract claim.

In *Green Earth*, plaintiff sued defendant insurance company for breach of contract. Defendant moved for summary judgment, arguing that the CSA's prohibition of cannabis required denying coverage for Green Earth's losses. 163 F Supp 3d at 826. The *Green Earth* court explained that since *Tracy v USAA Cas. Ins. Co.* (D Haw, Mar. 16, 2012, Civ. No. 11–00487 LEK-KSC) 2012 US Dist Lexis 35913, in which the court refused to enforce an insurance policy for cannabis activity on public policy grounds, there has been an "erosion of clear and consistent federal public policy" toward cannabis. 163 F Supp 3d at 835. The court declined to declare the insurance policy void on public policy grounds, finding that defendant, having knowingly and intelligently entered into the policy of its own will, was obligated to comply with its terms or pay damages for having breached it. 163 F Supp 3d at 835.

As the *Mann* court explains, the federal government's concern over the CSA's medical marijuana prohibition has waned and the underlying policy purporting to support the prohibition has been undermined. *Mann* at 33 (citing *Conant v Walters* (9th Cir 2002) 309 F3d 629, 641 (Kozinski, J, concurring) (discussing uses and benefits of medical marijuana)). The federal government is currently proscribed from enforcing the CSA in jurisdictions that have set up systems authorizing and regulating medical marijuana, which have independently determined that marijuana has a medical benefit for their citizens. *Mann* at 33 (citing *U.S. v McIntosh* (9th Cir 2016) 833 F3d 1163, 1179 n3 (listing 43 jurisdictions permitting medical marijuana)). Indeed, California has found that seriously ill Californians have the right to obtain and use marijuana for medical purposes. See Health & S C §11362.5(b)(1)(A). The court ultimately granted relief to plaintiff because

- Mandating payment of the note would not require the defendant to possess, cultivate, or distribute marijuana or in any other way violate the CSA (*Mann* at 14); and
- Given the federal government's wavering policy on medical marijuana, and California's expressed policy interest in allowing qualified patients to obtain medical marijuana, the purported illegality did not mandate nonenforcement of the contract.

Mann at 17.

Arguably, payment of money in exchange for possession of real property is not an act in direct violation of the CSA, nor is evicting a tenant for violating a lease covenant. However, landlords cannot expect a court to order a remedy that requires a tenant to possess, cultivate,

or distribute marijuana, or otherwise violate the CSA. For example, if a lease includes a provision for revenue-sharing as part of payment of rent, an action to compel payment of that share in state or federal court will not succeed. Not to mention revenue-sharing may also subject the landlord to additional liability as a potential owner of the cannabis business.

Courts are still grappling with how to resolve contractual conflicts in states that have legalized cannabis, so property owners must proceed with caution. Property owners should

- Refrain from any sort of profit-sharing or joint ownership of cannabis businesses;
- Designate California in a choice of venue and governing law clause; and
- Include a mandatory alternative dispute resolution clause governed by state-based rather than federally based dispute resolution procedures.

Private alternative dispute resolution will provide the optimal forum for a property owner to enforce the terms of a lease. A private arbitrator or mediator is more likely to enforce a cannabis-related lease than any state or federal court.

Property Owners Should Include an Escape Clause Requiring Tenants to Vacate Immediately on Law Enforcement Threat, Including Asset Forfeiture

California's unlawful detainer statute provides that a tenant is guilty of unlawful detainer if it uses the property in an unlawful manner. CCP §1161(4). However, when a lease expressly allows cannabis activity and the tenant complies with all state and local laws, a property owner will not likely prevail in an unlawful detainer action on the grounds that the activity is unlawful under federal law. As demonstrated in an Alameda County Superior Court case, this creates a serious problem for property owners facing threats of asset forfeiture. See *Chretien v Patients Mut. Assistance Collective Corp.* (Alameda Super Ct, Nov. 27, 2012, No. RG12–643579) Order Granting Motion to Quash Summons and Complaint (*Chretien*).

In *Chretien*, property owner Ana Chretien attempted to evict tenant Harborside Health Center after the United States Attorney threatened asset forfeiture. *Chretien* at 1. Chretien alleged that the tenant was guilty of unlawful detainer under CCP §1161(4) because the tenant used the property in violation of federal law. *Chretien* at 2. The court ruled that Harborside was compliant with state law and had not violated its lease and that Chretien could not use state courts to try to enforce a federal law. *Chretien* at 2.

Further, the court stated that even if CCP §1161(4) authorized landlords to base unlawful detainer actions solely on a tenant's operation of a dispensary in violation of federal law, the *Chretien* lease would give Harborside formidable affirmative defenses to such a claim because it authorized Harborside to use the premises for the exact purpose the landlord alleged was unlawful. *Chretien* at 2. The court suggested that the landlord arguably waived or would be equitably estopped from exercising any legal right she had under CCP §1161(4) and explained that plaintiff's remedy for defendant's violation of federal law, if any, would lie with the federal court. *Chretien* at 2, 3, 20.

The *Chretien* case provides a dramatic example of why it is imperative for property owners to include an escape clause in the lease to require a tenant to vacate immediately on any law enforcement threat, including asset forfeiture. Thankfully for Chretien, the City of Oakland sued the federal government to enjoin the Department of Justice from seizing the property where Harborside operates. Following a years-long legal battle, the federal government dropped the case against Harborside and the property owner in 2016. Reilly & Mollie, *Feds Drop Case Against Influential Medical Marijuana Dispensary*, Huffington Post, May 3, 2016, available at http://www.huffingtonpost.com/entry/harborside-health-center-case-dropped_us_5728d2d1e4b016f37893a9c2.

Conclusion

The cannabis industry is still high-risk. Property owners willing to take the risk should retain competent counsel and ensure they understand the implications of local, state, and federal laws, are apprised of all potential risks, and take every precaution to ensure that they are protected to the maximum extent.

Checklist for Property Owners Before Lease

___ Ensure that the proposed category of activity is lawful under state and local laws. Do not take the operator's word for it.

___ Confirm with local government that the zoning code authorizes the proposed category of activity at the specific location.

___ Ascertain whether and how the local government imposes liability on property owners that (1) lease to cannabis operators and/or (2) allow maintenance of a public nuisance.

___ Do not be fooled by tax certificates or business licenses. Even if an operator obtains a business license or tax certificate, if the property is not zoned for this activity, the activity is unlawful.

___ Understand that a license to conduct commercial cannabis activity is valid at only one location. A license to

conduct a certain activity at another property does not authorize the activity at your property.

___ If your property is encumbered, ensure that allowing cannabis activity does not violate the terms of your financing agreement(s).

NOTE: This checklist is not comprehensive. It includes basic considerations, but any property owner should consult with an attorney regarding its own specific facts and circumstances to determine the proper course of action. This checklist is subject to change once California implements MAUCRSA regulations.

Suggested Lease Clauses (Favoring Landlord)

- Include forfeiture threats, letters from banks or note holders, changes in federal enforcement policy, and local, state, or federal enforcement, intervention, or investigation as grounds for automatic and immediate termination of the lease by landlord, allowing landlord to require that all cannabis activity cease and all cannabis-related materials and entities vacate the property immediately.
- Include indemnity provisions requiring the operator to defend and cover all costs of defense, fees, fines, and penalties in the event of forfeiture threats, letters from banks or note holders, changes in federal enforcement policy, and local, state, or federal enforcement, intervention, or investigation.
- Require tenant to expressly warrant that it is a "licensee permitted under both a state license and a local permit following the requirements of the applicable local ordinances" to ensure the property owner's ability to claim safe harbor under state law.
- Require tenant to secure and maintain state and local licenses at all times. Mandate that tenant immediately report any license review, challenge, and/or revocation proceedings.
- Negotiate terms with tenant regarding payment of rent and care of the property while state and local license applications are pending. The new and untested application process could take months to years.
- Because MAUCRSA licenses are valid for 12 months and must be renewed annually, if a lease term is longer than 12 months, make clear that tenant will cease all cannabis activity immediately if the licenses are not renewed. Ensure that cannabis activity never occurs on the property without all required licenses.
- Include mandatory alternative dispute resolution clause governed by state organizations and procedures.
- Designate California in choice of law and venue clause.
- Require tenant to obtain proof of local authorization and provide such proof to the state during the license application process.

Additional Tips

- Clearly state in the consent letter that the landlord's consent to cannabis activity is contingent on the operator complying with all state and local laws and obtaining all legally required authorizations, including local authorization and a state license, and is automatically revoked on the denial or revocation of any such authorization or license.
- Take action immediately on learning of unlawful activity to avoid being deemed complicit/permitting/allowing under state and local law.
- Do not get involved in the direction, control, or management of the license applicant.
- *No Percentage Rent.* Do not engage in profit-sharing or any other revenue-share model in which payment of rent is based on a percentage of cannabis-related sales. This will create lease enforcement trouble and liability issues.
- Prohibit recreational cannabis activity. Rohrabacher-Farr prevents use of federal dollars for prosecution related only to medical cannabis.

MIDCOURSE CORRECTIONS

The New Mathematics of Takings Cases

Roger Bernhardt

Murr v Wisconsin

Land use attorneys had been eagerly waiting for the United States Supreme Court to decide *Murr v Wisconsin* (2017) ___ US ___, 137 S Ct 1933, in the hope that the decision would give them some helpful guidance on the "denominator" issue in takings cases, *i.e.*, what property to use in calculating how much of a loss has been suffered. Well, we have gotten that decision, but I don't think it supplies the guidance they were looking for.

In *Murr* (more fully reported at p 111), the town of Troy, Wisconsin, had refused to let the Murr family separately sell or develop either of their two lots that fronted the St. Croix River because each of those parcels—both substandard in size—was deemed merged under local law after being acquired by the same family, and thus had lost the earlier grandfather exemptions that had given them protected status. The Murrs claimed that this treatment constituted a taking of one of those two parcels (Lot E), which was worth about $40,000. For takings purposes, did this $40,000 loss constitute 100