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Court Declines to Prevent Merger of Washington Medical and Recreational Marijuana Markets

By David Spellman

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Over the last year, the Washington state marijuana industry has anticipated the transition from an unregulated medical marijuana market to an integrated, medical-recreational market on July 1, 2016, under the Cannabis Patient Protection Act.

A month before the roll-out date, a medical doctor and marijuana patient sued the governor and others to block the merger.[1] On June 30, the federal court refused to stop the merger.[2] The doctor and terminally-ill patient argued that the new rules will chill their medical communications in violation of the First Amendment. But the court validly rejected their request for an injunction on jurisdictional grounds. They had no private claim under the Controlled Substances Act, First Amendment and Supremacy Clause. The doctor and patient also failed to establish injury supporting a pretrial injunction.

Find more information on the history of the two merged industries, the recent suit and some takeaways below.

Background

How did Washington state end up with two marijuana markets? The two market system is a legacy of the initiative process during the past 14 years. The unregulated medical market and the regulated recreational market have recently coexisted since 2014.

In 1998, Washington Initiative 692 granted legal defenses to specific categories of persons in the medical marijuana industries to claims under the state Controlled Substances Act.[3] The defenses were granted to physicians advising and providing valid documentation to qualified medical marijuana patients, and qualifying medical marijuana patients and primary caregivers.

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[1] *Dr. Gregory Carter, MD v. Governor Jay Inslee*, No. 2:16-cv-00809-JJC (W.D. Wash.)
[2] Dkt. 22 (June 30, 2016).
[3] Initiative Measure No. 692, Medical Use of Marijuana, codified in RCW Chapter 69.51A.040, which was initially called the Washington State Medical Use of Marijuana Act, MUMA, and later Washington State Medical Use of Cannabis Act, RCW 69.51A.090.

Fourteen years later, the voters authorized a state-regulated, intrastate legal recreational marijuana industry under Initiative 502 in November 2012. The State's Liquor and Cannabis Board (LCB) regulates the production, processing and sale of recreational marijuana. Retail sales began in 2014, after the Department of Justice issued guidance that it would not seek to interfere in state programs maintaining a system of strict enforcement consistent with federal priorities in 2013.

Why did the legislature merge the two industries? After legalization of recreational pot, roughly one third of the state pot industry remained in the medical system, and the state decided to regulate the medical market more directly by merging the two markets.

In 2015, the state passed Senate Bill 5052 (the Cannabis Patient Protection Act) regulating the previously unregulated medical pot market and requiring the integration of the medical and recreational markets. The July 2015 law has a one-year roll out — it became effective on July 1.

What are the specifics of the new regime? For medical products, the statute requires the Washington State Department of Health (DOH) to develop a standard authorization form, contract for a voluntary-patient database and establish a new certification profession (medical marijuana consultants). As part of the new regime, health care professionals must provide authorization for medical use, which may be provided to the authorized retailers.

A retail pot store may receive authorization from the LCB to sell medical marijuana but must employ at least one licensed medical marijuana consultant who reviews the patient's authorization form and enters the patient into the DOH database. Other retail employees may verify that a patient is in the database but are not to access their medical diagnosis. The penalty for violating the limitations on the database is liability for a felony.

The new law permits qualified patients to grow plants at their residence and to form cooperatives. The law also requires they may use only approved means to process concentrates and infused products and use approved noncombustible methods for resin extraction.

Patients with terminal and debilitating conditions who chose not to be entered into the database have fewer benefits than those who register. The unregistered patients may have up to four-home grown plants, purchase recreational marijuana, and retain an affirmative defense to criminal prosecution.

But registering patients receive additional benefits under the new law. They may buy and possess more and different products than recreational customers. They are permitted to have up to 15 home-grown plants by a health care provider at home. They may participate in registered cooperative with up to 60 plants. They also avoid the sales tax and have a defense to charges of violations of state law.

Will the court's decision not to block the merger likely be overturned by an appellate court? Our opinion is no. The court has broad discretion when denying a preliminary injunction. The doctor and patient faced substantial obstacles in their quest to bar the rollout of the new law. A preliminary injunction is an extraordinary and drastic remedy — granted only in a plain and clear case.

The record did not demonstrate a likelihood that the doctor and patient would prevail in challenging the new regime. The doctor and patient did not present a straightforward case for a federal court to intervene. The doctor and patient failed to include a federal § 1983 claim for the violation of civil rights under the Constitution. Next, the doctor and patient had no right to sue under the Constitution's Supremacy Clause according to a recent Supreme Court decision.[4]

Additionally, they sued under the Controlled Substances Act claiming it preempted the state marijuana law. But Congress expressly stated in a subsection of the Controlled Substances Act that there is no private right to sue under the Act. 21 U.S.C. § 882(b). And, the Colorado court rejected a similar argument.[5]

Doctor/patient communications are not more at risk under the new law than under the old law. The court ruled that the doctor and patient failed to establish a strong likelihood of success on their theory that the new law was unconstitutional. The court ruled the new provisions allaying fear of criminal prosecution were similar to the old ones. The court also pointed to how the patient information in the database "is subject to strict confidentiality."

In addition to proving a likelihood of prevailing at trial, the doctor and patient were required to prove they would *likely* suffer irreparable harm. The court ruled they merely proved *potential* versus the required *likely* injury. The claim of irreparable harm is undercut by the federal administration's policy of noninterference in state regulation of marijuana consistent with the factors set forth in the Cole memorandum. The congressional restriction on the funding enforcement efforts against regulated medical marijuana further undercuts the claim of injury.

The court also balanced the fairness of the situation. The court ruled the harm to the public from barring the integrated system outweighed the injury claimed by the doctor and patient.

What are the takeaways? Transitioning brings uncertainties and challenges.[6] One way to respond to a transition is to file a lawsuit and move for an injunction. But moving for an injunction is dicey, except in a plain and clear case with a well-developed record.

While the Cannabis Patient Protection Act is not perfect, it is part of the ongoing transition of an industry now offering qualified patients additional benefits that were not available under the old regime. The federal suit diverted the state's limited resources from other policy issues. Instead of pot-shot suits, the industry focus should be on policies inhibiting the industry: the tax squeeze on retailers and the restrictions on public enjoyment, out-of-state ownership, and the like.

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[4] *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1383, 191 L. Ed. 2d 471 (2015)("the Supremacy Clause certainly does not create a cause of action.")

[5] *Smith v. Hickenlooper*, No. 15-cv-00462-WYD-NYW, 2016 WL 759163 (D. Colo. Feb. 26, 2016).

[6] *See* William Bridges, *Managing Transitions: Making the Most of Change* (1991).

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