

# Medical marijuana attorneys can breathe easier when advising clients

BY THOMAS E. HOWARD

The March 2016 Commercial Banking and Bankruptcy Law newsletter included my article titled, “You Cannot Go Bankrupt Selling Marijuana.” In that article, I reviewed recent bankruptcy decisions that barred medical marijuana businesses from relief under the Bankruptcy Code. In light of recent authority, those cases merit reconsideration.

On August 16, 2016, the Ninth Circuit Court of Appeals issued an opinion effectively legalizing medical marijuana businesses in any state or territory that permits it by their own laws. *U.S. v. McIntosh*, No. 15-10117 (9th Cir. 2016). Thus, attorneys advising medical marijuana businesses can now breathe a sigh of relief. The convoluted and conflicting field of state and federal statutes and case law just had a very large wrinkle ironed out.

In *McIntosh*, the Ninth Circuit disposed of ten interlocutory appeals from defendants indicted for violations of the Controlled Substances Act (CSA). One of the indictments alleged a defendant had over 30,000 marijuana plants. Many of the defendants faced charges for manufacturing more than 1,000 marijuana plants, the most egregious violation of the CSA. See 21 U.S.C. §§ 841(a)(1), 846.

The Ninth Circuit remanded all ten cases back to the district courts. If the Department of Justice (DOJ) prosecutors wished to continue their cases, the Ninth Circuit held that the defendants are entitled to evidentiary hearings to determine if their conduct complied with state medical marijuana laws. If the defendants complied with their state medical marijuana laws, the DOJ is prohibited by federal statute from spending any federal funds on their prosecution. Conversely, if the defendants operated outside the bounds of state medical marijuana laws, then the DOJ is

authorized to spend federal funds on the prosecution of the cases.

As a result, anyone acting in compliance with their state medical marijuana law faces no federal liability because no money is allocated for such prosecution. Since 2015, Congress has prohibited the DOJ from using *any* funds “to prevent Medical Marijuana States from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.” Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332–33 (2015) (“Section 542”).

The term “Medical Marijuana States” has been updated to include the states that have recently legalized medical marijuana, and territories like Puerto Rico and the District of Columbia. In drafting Section 542, Congress used its exclusive power under the Constitution’s Appropriations Clause to prevent any federal money from being spent to enforce its own marijuana laws. See U.S. Const. Art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .”). One need look no further for the definition of irony than to federal marijuana laws.

What Section 542 means for recent bankruptcy cases prohibiting marijuana business from seeking protection remains to be seen. Section 542 overrides the CSA when it comes to businesses in compliance with their state medical marijuana laws. As a result of the application of Section 542 in the *McIntosh* case, attorneys advising medical marijuana businesses can give simple advice to their clients. Specifically, make sure to always follow the applicable state medical marijuana laws. If these businesses carefully follow their state laws, there is no federal money to prosecute

them for alleged violations of the CSA.

Of course, budgets do not last as long as other statutes. While there is currently no federal money for prosecutions, Section 542 expires on September 30, 2016. Section 542 has already been continued with each passing budget extension. Consequently, attorneys for the medical marijuana business should regularly monitor its status. At least until Congress uses another Article I power and regulates interstate marijuana commerce by changing the CSA instead of defunding prosecutions for certain violations of it. ■

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