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War on pot just went up in smoke

Michael Chernis *specializes in medical marijuana cases and has been a criminal defense attorney and commercial litigator for nearly 20 years. He is licensed to practice law in both California and New York, as well as several federal courts in those jurisdictions.*

Although marijuana advocates hailed last week's ruling by the 9th U.S. Circuit Court of Appeals as an end to the federal war on pot, we'll have to wait 'til the smoke clears to see exactly how far the decision carries.

The ruling in *United States v. McIntosh*, 2016 DJDAR 8484 (Aug. 16, 2016), comes as voters in nine states, including California, prepare to vote in November on whether to allow the recreational or medical use of marijuana this November.

Although the ruling affirms that the federal government can no longer prosecute medical marijuana suppliers and other individuals who are in full compliance with state medical marijuana laws, it leaves some areas where the feds can still take action against marijuana businesses.

The consolidated appeal at issue in *McIntosh* arises from criminal prosecutions in three different federal districts involving 10 different cases and 14 defendants. Two of the cases arose from activity in California, and one arose from activity in Washington. All three cases involved defendants operating without a permit "per se," and engaging in activities that, while pushing the boundaries of state law, were arguably within each state's medical marijuana laws.

The core issue at the heart of the court's decision was the interpretation of language contained in a spending rider for the 2014 and 2015 Appropriations Bills. The language of the rider stated that the Department of Justice was prohibited from using funds allocated to them to interfere with state implementation of medical marijuana laws.

Because this language was unclear and imprecise, the court had to interpret what it meant for the DOJ to "prevent" states from "implementing" their medical marijuana laws. And, specifically, the court had to determine whether prosecuting someone under the Controlled Substances Act (CSA) for conduct allowed under state law prevented that particular state from implementing its medical marijuana laws.

The DOJ argued that the language contained in the rider applied only to prosecution of state actors, such as licensing clerks, and did not apply to individual actors in the medical marijuana industry. Rejecting the DOJ's narrow interpretation of the rider language, the court concluded that if the DOJ punishes individuals for engaging in activities permitted under state law (such as the use, cultivation, distribution and possession of medical marijuana), then the DOJ is preventing state law from being implemented as a practical matter:

Monday, August 22, 2016

SPECIAL REPORT
Intellectual Property

Weekly Appellate Report Podcast
Rex Heinke (Akin Gump) discusses class arbitration after 'Sandquist;' Ben Feuer (Cal. App. Law Grp.) previews an OT2016 case considering the separation of church and state

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Government
New State Bar dues bill met with resistance
The Assembly approved amendments Friday to a new State Bar dues bill crafted with the hopes of possibly securing support from the state Senate through the elimination of two high-profile reform proposals.

Labor/Employment
State high court to consider federal workplace law
At the request of the 9th U.S. Circuit Court of Appeals, the state Supreme Court will consider whether a federal rule that favors employers in compensation disputes can be applied to wage and hour claims brought under California law.

Criminal
OC judge in Dekraai death penalty case 'disturbed' by new material
A judge presiding over the death penalty case of Seal Beach mass murderer Scott Dekraai said Friday he was "disappointed" and "disturbed" by a recently revealed log of notes from sheriff's deputies about jail informants.

Litigation
Sausalito attorney sued for assault by Uber driver
An allegedly inebriated attorney and her husband beat an Uber driver after he requested they take their argument outside his car, according to an

"DOJ, without taking any legal action against the Medical Marijuana states, prevents them from implementing their laws that authorize the use, distribution, possession, or cultivation of medical marijuana by prosecuting individuals for use, distribution, possession, or cultivation of medical marijuana that is authorized by such laws. By officially permitting certain conduct, state law provides for non-prosecution of individuals who engage in such conduct. If the federal government prosecutes such individuals, it has prevented the state from giving practical effect to its law providing for non-prosecution of individuals who engage in the permitted conduct."

The court's decision creates a barrier to federal prosecutions of individuals who can demonstrate strict compliance with their state's medical marijuana laws. Essentially, the ruling creates a defense to federal prosecution for medical marijuana producers where none existed before. The ruling has the effect of making a state's medical marijuana laws relevant in a federal prosecution, where the laws were previously irrelevant.

The court's ruling goes further to insulate medical marijuana actors from prosecution than the well-known "Cole Memo" of 2013, which laid out the priorities of the DOJ regarding the enforcement of the CSA. The Cole Memo, named for its author, then-Deputy Attorney General James M. Cole, established that jurisdictions that have legalized marijuana in some form (e.g., medical marijuana) pose less of a threat to federal priorities under the CSA, provided they have well-established regulatory schemes. The memo goes on to suggest that prosecution of individuals in those jurisdictions is the not the best use of DOJ time and resources, and signaled that the DOJ would generally leave it to the states to regulate such activity even though it violates the CSA.

Although the 9th Circuit's decision brings some much needed clarity to this area, there are a few notable caveats. While the court's ruling applies to medical marijuana regulation as discussed in the Cole Memo, it does not address participants and actors in the *recreational* marijuana industry. Additionally, the decision does nothing to protect individuals from prosecutions for conduct ancillary to medical marijuana activity, such as illegal firearms activity, money laundering and other criminal activity.

Perhaps the largest caveat to the court's decision is that it is subject to Congress re-authorizing the same limitation for future budgets. Without re-authorization, any impact this ruling has on the medical marijuana industry could completely change.

The unanimous 9th Circuit ruling was issued by a three-judge panel, two of whom are Republican appointees with a history of pro-law enforcement opinions.

Despite the outcome, however, Judge Diarmuid O'Scannlain wrote that medical marijuana purveyors should not feel immune from federal law: "Congress could restore funding tomorrow, a year from now, or four years from now," he wrote, "and the government could then prosecute individuals who committed offenses while the government lacked funding."

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RELATED RULINGS

U.S. v. McIntosh August 17, 2016
Following denial of injunctions, defendant-appellants win remand based on congressional appropriations rider prohibiting DOJ from spending funds to prevent states' implementation of medical marijuana laws.

assault and battery complaint filed in San Francisco Superior Court.

Firm Watch
On the Move
A list of moves from around the state.

Government
Bills limiting arbitration headed to state Assembly
Three state Senate bills affecting arbitration face votes in the less friendly confines of the Assembly this week.

Litigation
Judge dismisses $600 million antitrust lawsuit
A Los Angeles federal judge has dismissed a $600 million lawsuit brought by a California company alleging price fixing, corruption, and other commercial misconduct by a major Mexican-owned salt exporter.

Product Liability
Longstanding suit against coffee vendors will continue
A more than six-year-old lawsuit against Starbucks Corp. and other coffee makers, alleging their brews contain a cancer-causing toxin, will continue after a judge denied the plaintiff's motion to adjudicate the companies' final defense on Friday.

Administrative/Regulatory
War on pot just went up in smoke
Despite the outcome of a recent 9th Circuit ruling, Judge Diarmuid O'Scannlain cautioned that Congress could do an about-face tomorrow if it wanted to. By **Michael Chernis**

Criminal
Asset forfeiture bill will not have a significant effect
SB 443 will not have a major impact on the forfeiture landscape because the federal government has already fixed the "loophole" the bill aims to close. By **Pio Kim**

Law Practice
Client Care 3
When we receive documents such as court rulings, opposing briefs or contract drafts and lack sufficient time to form a reliable opinion of them, it is tempting to send them to the client immediately. That can be a mistake. By **David M. Balabanian**

Constitutional Law
SLAPPing a mixed cause of action OK'd
APPELLATE ZEALOTS: The Supreme Court recently decided that an anti-SLAPP motion may be brought against the portion of a mixed cause action that arises from protected rights. By **Charles Kagay**

Labor/Employment

Unce more unto the breach: Court revisits preemption in labor cases
On Aug. 9, the 9th Circuit considered whether Section 301 of the federal Labor Management Relations Act preempted various state law claims brought by unionized employees. By **Harold M. Brody and Elaine H. Lee**

Banning beards at work could get a little hairy
The question of whether private companies or public entities may prohibit their employees from wearing beards is somewhat of a head-scratcher. By **Nate Kowalski and Irma Rodríguez Moisa**

For whom the 'death knell doctrine' tolls in state courts
Despite the Legislature's attempts to eliminate uncertainty regarding questions of appealability, a recent decision from the 1st District Court of Appeal reminds us that conundrums can still arise. By **Zareh A. Jaltorossian and Jeffrey P. Fuchsman**

Administrative/Regulatory
Lawsuits challenge FDA e-cigarette rules
Regulations and litigation relating to tobacco and tobacco products had its initiation in the second half of the 20th century and appears to be continuing well into the 21st century. By **Daniel J. Herling**

Judicial Profile
Kenneth J. Fernandez
Superior Court Commissioner
Riverside County (Riverside)

Education
Public data on two-year degree programs is lacking
Law schools accredited by the American Bar Association are required each year to publicly disclose how their graduates performed on bar exams and in the employment market, but they do not have to break down statistics for those categories by how long it took students to complete their degrees.