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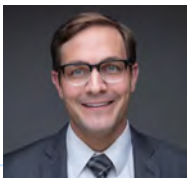
Tort Trial and Insurance Practice Section

Spring 2022

COMMITTEE NEWS

Cannabis Law and Policy

Advising Bank Clients about Cannabis: Due Diligence, Suspicious-Activity Reports, and Master Accounts



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Despite the legalization of cannabis in some form throughout the country, many banks have resisted working with the cannabis industry. According to the Financial Crimes Enforcement Network ("FinCEN"), only 706 out of the country's thousands of financial institutions were actively banking any marijuana-related clients in June 2021.[1] Many hemp producers also remain unbanked.

That is in large part due to federal laws aimed at money laundering. Cannabis was long treated as a principal target of those laws. Federal regulators, however, have recently revised their interpretation of those laws, potentially opening the door for more financial institutions to enter the cannabis industry.

I. The Bank Secrecy Act

At its core, the Bank Secrecy Act, 12 U.S.C.A. § 1951 (West) *et seq.*, requires certain financial institutions to help combat money laundering. They must keep records

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In This Issue

Chair-Elect Message

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Dear CLPC (Cannabis Law and Policy Committee) Members –

Greetings from your Chair-Elect. We are having a great year under the leadership of Lisa Pittman, Chair, who I thank for the opportunity to write this in the "Message from the Chair" space as she has submitted a content article for this newsletter instead. Additionally, she is pleased to announce that she has started her own boutique firm practicing primarily cannabis law. She can be reached at lisa@pittman.legal. Congratulations, Lisa Pittman!

We recently returned from a successful trip to Atlanta where our Committee had a panel on cannabis and insurance at the Business Litigation Committee (BLC) Standalone meeting, and from Baltimore where we spoke at the TIPS Spring Section Conference. We hope to partner with other Committees and entities again for events and speaking opportunities!

Thank you to all of our hard-working Committee members who have helped in some way. All of our authors and people who have found us authors for TortSource and the Newsletter are greatly appreciated. It is also a great way to get you and your firm name out there. Our TortSource publication should be coming out soon! The editor has accepted all of the submissions from our Committee. Great job.

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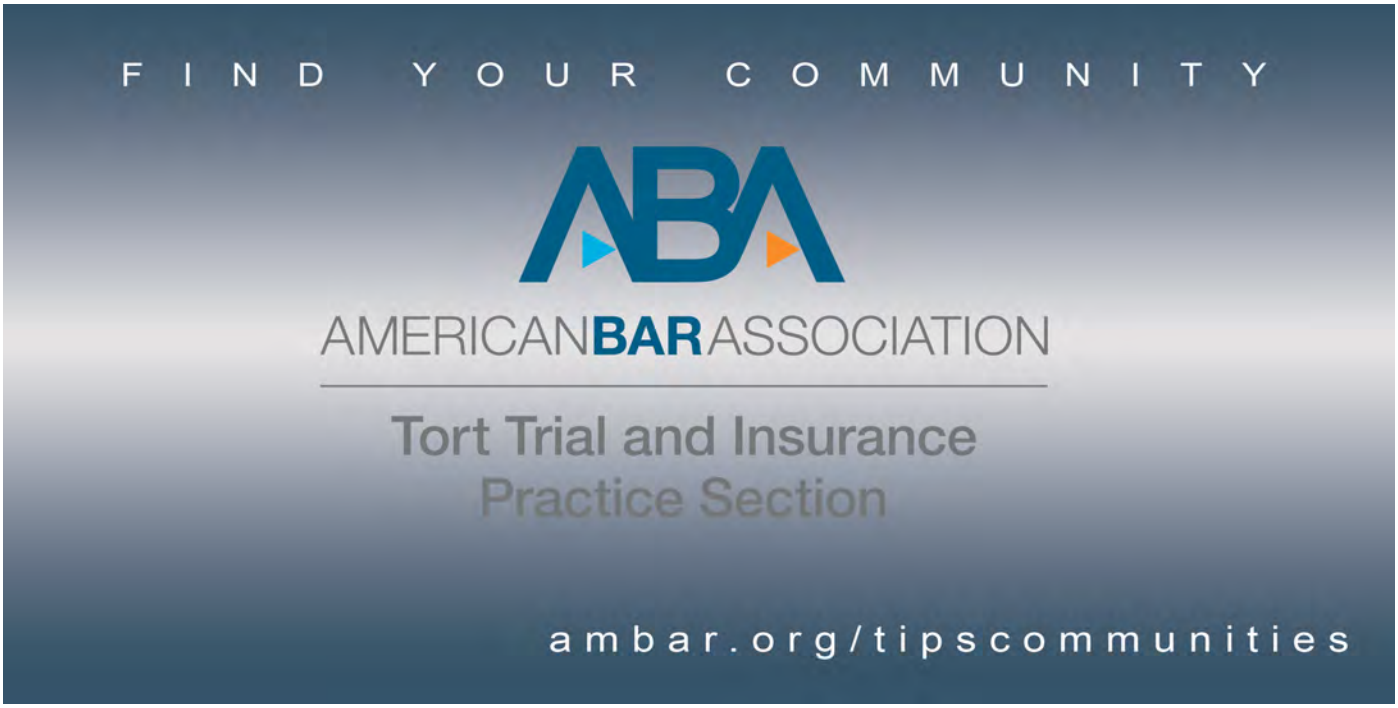

A big kudos to Will Garvin and Nelisa Inyang of Buchanan Ingersoll & Rooney PC who drafted a comment to the proposed model rule changes that would greatly affect cannabis practitioners. We submitted a draft to TIPS Council that was approved in record time. This is a contribution to the larger work of the ABA, and we appreciate the ability to comment on policy matters affecting our ability to practice freely in this area.

Also, a shout-out to Svetlana Gitman and Lisa Romeo from American Arbitration Association (AAA) who gave a great presentation to our Committee about using arbitration in cannabis cases, and in answering our pointed questions about fears of sending cannabis cases to arbitration. It was very informative and alleviated many misconceptions about arbitration! We hope to continue working with TIPS' newest sponsor in this regard. If you have any questions about arbitration/mediation issues, or how to join the AAA panel, please contact Svetlana! GitmanS@adr.org.

If you know anyone else who would like to join our Committee, please spread the word. We are building a great base of excellent attorneys and hope to be the go-to resource for cannabis law and policy referrals and expertise. You may also join our monthly Zoom meetings generally the 2nd Thursday of each month at 2PM Central Time. If you would like the link, please contact us!

Happy reading and thank you for your participation in the CLPC and in TIPS.

Cannabis Law and Policy

website

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Federal Trademark Registration Program Still At Odds with Cannabis Industry

Introduction

While U.S. federal registration of cannabis-related marks has been easier since enactment of the 2018 Farm Bill, the cannabis industry will continue to face many hurdles with respect to federal registration until complete nationwide cannabis legalization is achieved.

Article

In order to federally register and maintain a trademark in the United States, the mark must be used in interstate commerce. Further, mark owners are required to periodically submit evidence of this use to the United States Patent and Trademark Office (USPTO) for approval. However, these requirements are far more amorphous when the goods and services associated with the trademark are illegal at the federal level.

Currently, cannabis is illegal at the federal level, but is legal in the following states: Alaska, Arizona, California, Colorado, Connecticut, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Mexico, New Jersey, New York, Oregon, Vermont, Virginia, Washington (state) and Wisconsin, as well as in the District of Columbia (Washington (city)). The rapidly expanding cannabis industry throughout the United States, coupled with the discrepancy between state and federal law regarding legality, has resulted in a "legal nightmare" situation for cannabis businesses seeking to take advantage of the benefits of the federal trademark registration program. The registrability problem arises because of the Trademark Manual of Examining Procedure's requirement that use of a trademark in United States commerce must be *lawful* under federal law to be the basis for federal registration under the U.S. Trademark Act.[1] Accordingly, trademarks associated with cannabis-related products and services have not been eligible for federal trademark registration because the U.S. federal government classifies cannabis as a controlled substance under the Controlled Substances Act (CSA).

In response to growing demand from U.S. citizens for more freedom to grow and produce cannabis products, the federal government slightly relaxed rules surrounding legality, and therefore registrability, via the 2018 Farm Bill. The 2018 Farm Bill amended the Controlled Substances Act (CSA) to remove certain cannabis products, defined as "the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids,

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Medical Marijuana and Federal Prosecutions – A New Take on Protections for State Licensees

Ben Morrical, Brian Higgins, and **Andrea Steel**

In late January, the U.S. Court of Appeals for the First Circuit issued its opinion in *United States v. Bilodeau*, 24 F.4th 705 (1st Cir. 2022), a case involving two marijuana growers from Maine who were indicted by the federal Department of Justice (DOJ) on charges of violating the Controlled Substances Act (CSA). The growers were operating three facilities in Maine where they grew and/or distributed marijuana, purportedly as registered caregivers to qualified patients, which is legal under Maine's medical marijuana laws. The growers maintained "facially valid documents" demonstrating their compliance with such laws.

However, after an investigation into the growers' operation, federal agents executed search warrants for two of the growers' facilities and subsequently indicted the growers for, among other things, "knowing and intentional manufacture and possession of marijuana with intent to distribute in violation of the CSA and conspiracy to do the same." The growers then petitioned the U.S. District Court for the District of Maine for an injunction preventing the federal government from proceeding with the prosecutions, arguing that the Rohrabacher amendment prohibited the use of federal funds for such an endeavor.

Rohrabacher's Practical Limit on Prosecution

The Rohrabacher amendment, named for former US Representative for California's 48th district Dana Rohrabacher, is a rider that has been attached to Congress' annual appropriations bill every year since 2015. The amendment stipulates that none of the funds made available to the DOJ under Congress' annual appropriations bills may be used to prevent any of the fifty states from "implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." As stated by the First Circuit, the Rohrabacher amendment "places a practical limit on federal prosecutors' ability to enforce the CSA with respect to certain conduct involving medical marijuana."

The growers asserted that, pursuant to the Rohrabacher amendment, the DOJ could not use federal funds to prosecute them for violating the CSA. They argued that because their allegedly illegal activities were authorized under Maine's medical marijuana laws, a prosecution for such activities would therefore amount to the DOJ effectively preventing Maine from implementing its own laws authorizing the cultivation and distribution of medical marijuana. The District Court did not agree

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Bicycle Day

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As I write this, preparing for the grand opening of Pittman Legal on April 20, it is April 19: Bicycle Day. Bicycle Day marks the first LSD trip. In 1943, Albert Hoffman, a chemist who had been experimenting with fungus, inadvertently ingested LSD he stumbled upon creating, with no knowledge it would be psychoactive. He became disoriented, rode his bicycle home, and made history on another day we now celebrate in the plant medicine world.

LSD? But doesn't that make you jump out of windows to your death? That's what I was taught growing up and I always had a healthy fear of all drugs, especially psychedelics. With the amount of trauma in my life, I was also sure that if I tried them, I would have a "bad trip." But it turns out, fearing all drugs may not necessarily be healthy, and psychedelics have been shown in study after study to treat PTSD, depression, anxiety, addition … to the point of seeming to cure the conditions. Really?

Psychedelics refers to a number of substances including LSD, MDMA, DMT, psilocybin (mushrooms), ketamine, peyote, and ayahuasca – also called entheogens. Entheogens are considered psychoactive substances that induce alterations in perception, mood, consciousness, cognition, or behavior for spiritual development or a sacred experience. Entheogens are used for religious, magical, shamanic, or spiritual purposes in many parts of the world. My interest began accidentally as I noticed Johns Hopkins studies posted on LinkedIn that demonstrated psilocybin helps the brain to regrow neural connections, important to me due to my concussions, and, that the brain makes thousands of connections while under the influence, in essence talking to itself in ways that are normally blocked. As I began to learn more, I discovered the many scientific studies that have been performed proving that psychedelic therapy can be transformational in someone with a treatment resistant condition. After a lifetime of being on various anti-depressants with poor effects and results, the potential for a single session that could lead to three+ months of pill-free relief piqued my interest.

There are two different techniques for consuming psychedelics: the "hero dose:" the breakthrough full day or multi-day session, previously held primarily in Latin American retreats but increasingly in the U.S., and typically at centers being set up for ongoing psychedelics therapy. These experiences often include a combination of several substances over the course of a few days, and usually the experience is shared in a small group. The other method is "microdosing," where an imperceptible amount of psychedelics is taken 4 or 5 days a week. Microdosing is reported to

have several health benefits, such as improving cognition and mood and reducing pain. It is also reported to provide intense focus and creativity, and for this, it has been utilized by programmers in Silicon Valley for years. A microdoser discovered the double-helix structure of DNA. Steve Jobs credited it to his accomplishments.

I tried microdosing while at a friend's house for several days last summer. At the time, I was in the middle of a major migraine, I could not sleep, and my anxiety was going haywire. I was shocked that on day 2, the migraine *completely* dissipated, and I was awash in a warm calm that was both mental and physical. I felt uncommonly laser focused and my mood did a 180, despite being at said friend's house because my new car broke down in his city. This led me to believe, OK, there is something here… that all these practically debilitating conditions could be lifted from me so quickly and easily was pretty awe-inspiring for me. I thought I had tried everything – and according to my psychiatrist, I had. Much like discovering the therapeutic benefits that cannabis provides, discovering the power of these entheogens has motivated me to share the news, learn more, work to legalize, and get more people on board.

While the cannabis and psychedelic industries share some parallels – they are both plant-based controlled substances, in new industries kickstarted by very passionate people – that is about where the parallels end. We have not progressed much with cannabis research since it was outlawed, it seems we are no closer to federal legalization than we were five years ago, cannabis businesses continue to face countless business hurdles and ongoing stigma, and investment capital and quality leadership are still spotty. However, with psychedelics, research picked up where it left off in the 60s, FDA recognizes psychedelics as a "breakthrough therapy" and has authorized numerous clinical trials, pharma companies and venture capitalists are pouring tons of money into this, the USPTO awards patents and trademarks, and frankly, it seems like psychedelics is supported by a broader mainstream and bipartisan audience than "weed."

An increasing number of states have passed decriminalization laws and research laws, particularly for PTSD and depression. In Texas, a research bill was passed on the first effort in 2021 (with support from Rick Perry), but we have been working since 2011 to get cannabis legalized medically and we are still not there. It is envisioned that psychedelics legalization would not look like walking into a dispensary and taking them home. The model will more likely be supervised administration in a medical setting, combined with psychotherapy. Legal opportunities include learning how to set these clinics up and the associated regulatory requirements, as well as all around business advice navigating a contradictory and daunting legal environment … but one that is about to cause a paradigm shift in psychology and other areas.

Attorneys in the psychedelics space will tell you that this practice involves an "evolved conscience" of sorts, where one always needs to be mindful that most of these substances originate in indigenous cultures that have been using them for thousands of years. For some, it is controversial to commercialize and patent these substances. This level of spirituality is *not* found in the cannabis industry. The Psychedelic Bar Association requires its members to take the "North Star Pledge," which includes a commitment to personal growth; mindfulness of the potential consequences of unethical behavior to individuals, communities, and the psychedelic field at large; respect toward indigenous tradition; a pledge to make the world more equitable and just; and a willingness to give back over personal gain. Some of this is the antithesis of typical lawyering, but, this is not a typical practice, and it is currently steered with those who have been imbued with the benefits of psychedelics themselves.

Psychedelics is the next frontier. While I am very proud of getting the Cannabis Law & Policy Committee launched here, the next step will be to incorporate the emerging psychedelics law practice into our ranks where we will create educational opportunities for attorneys, and anyone who will listen. So next April 19, you will know it's not just cannabis day-eve; it marked the beginning of a slow revolution we are still in the process of understanding.

If you would like to learn more, I recommend reading Michael Pollan's books such as "How to Change Your Mind" or "This is Your Mind on Plants;" "Manifesting Minds" by Rick Doblin, the founder of MAPS *(*Multidisciplinary Association for Psychedelic Studies, a multimillion dollar research organization employing 130 neuroscientists and pharmacologists); Terrance McKenna's "Food of the Gods;" and "Conscious Medicine" by Francois Bourzat, a counselor/guide Michael Pollan used. I still have other books on my nightstand to read, including one by the much reviled Timothy Leary – the vestiges of what I was taught make me feel naughty for even picking up the book, so I have still not opened it. I recommend you begin by watching the "Fantastic Fungi" documentary on Netflix, spearheaded by the dedicated work of Paul Stamets. I guarantee your mind will be at least a little bit blown, and you will be left with a hunger for more (or at least for mushrooms). Happy Bicycling!

Advising... Continued from page 1

and file suspicious activity reports, or "SARs," when they detect a transaction that suggests money laundering—for instance one involving funds derived from illegal activity. *See e.g.* 31 C.F.R. § 1020.320. The law also makes it a crime to knowingly engage in monetary transactions involving the proceeds of unlawful activity. *See e.g.* 18 U.S.C.A. § 1957 (West).

One such unlawful activity, for over 80 years, was the production and sale of cannabis. Until recently, the Controlled Substances Act, 21 U.S.C.A. § 801 (West) *et seq.*, did not distinguish between hemp and marijuana. It prohibited both as Schedule I substances. 21 U.S.C.A. § 812(c)(c)(17) (West); *see also* § 812(c)(c)(10) (specifically listing "marihuana").

Even as many states began to legalize cannabis in one form or another, banks faced risk in dealing with the cannabis industry. Because all cannabis remained illegal at the federal level, the Bank Secrecy Act required banks to avoid and report any transactions involving the proceeds from such sales.

II. Amending the Controlled Substances Act

That risk lessened slightly. In 2013, the Department of Justice, led by Attorney General James Cole, issued a memorandum instructing federal prosecutors to narrow their marijuana-enforcement efforts.[2] The Cole memorandum advised prioritizing serious threats, such as distribution to minors and gang activity. Under the memorandum, prosecutors should deemphasize marijuana-related cases not implicating these priorities.

Things moved still more rapidly for hemp. In the 2014 Farm Bill, Congress authorized research into hemp. *See* 7 U.S.C.A. § 5940 (West). Then, in the 2018 Farm Bill, Congress altogether removed hemp from the list of controlled substances. 21 U.S.C. § 812(c)(c)(17). Hemp is any cannabis plant or byproduct containing no more than a 0.3% concentration of tetrahydrocannabinol on a dry-weight basis. 7 U.S.C.A. § 1639o(1) (West).

The 2018 Farm Bill did not impact the legal status of marijuana. Despite wavering enforcement priorities from the Cole memorandum onward,[3] marijuana remains a Schedule I drug, prohibited even in those jurisdictions that have legalized it under state law. 21 U.S.C.A. § 812(c)(c)(10), (17) (West). But for hemp, the 2018 Farm Bill was momentous. It was an invitation for states to treat hemp as a legitimate agricultural commodity.

III. Federal Guidance on Banking Regulations

In light of these developments, federal regulators issued a series of guidance documents interpreting the money-laundering statutes.

(A) Banking with Marijuana Clients

In 2014, FinCEN advised how financial institutions can, in a limited capacity, serve marijuana-related clients.[4] The guidance relied heavily on the Cole memorandum. It recommended intensive customer due diligence ensuring, among other things, compliance with state law.

Despite the legalization of cannabis in some form throughout the country, many banks have resisted working with the cannabis industry.

Still, FinCEN directed financial institutions to continue filing SARs for marijuana-related businesses. For clients not implicating the Cole memorandum priorities, banks should issue "marijuana limited" SARs; for clients implicating any of the priorities, banks should issue "marijuana priority" SARs; and whenever banks deemed it necessary to terminate a relationship for money-laundering concerns, they should issue a "marijuana termination" SAR.

In related guidance, the Federal Reserve System advised that financial institutions focused on serving marijuana-related clients may not open master accounts.[5] A master account is essentially a bank account for banks. It gives access to the Federal Reserve System's services, including its electronic payment systems. By denying financial institutions this important function as a depository institution, regulators significantly blunted banks' ability to work with marijuana-related clients. Many banks dealing with marijuana-related clients have consequently turned to closed-loop systems that do not require access to a master account at the Federal Reserve.

(B) Banking with Hemp Clients

Regulators issued more friendly guidance for bankers dealing with hemp clients. In 2019, FinCEN issued a joint statement with other regulators stating that not only may financial institutions work with hemp clients, they need no longer file SARs based solely on those clients' hemp production.[6]

FinCEN, in 2020, followed up that joint statement.[7] Similar to the 2014 guidance, the 2020 guidance advised that customer due diligence include verifying a client's compliance with state law. If a customer has commingled hemp transactions with marijuana-related activities, financial institutions should only file a SAR to the extent required by the 2014 guidance. If, by contrast, "the proceeds of the [hemp and marijuana] businesses are kept separate …," then the previous direction to file a SAR "applies only to the marijuana related part of the business." Banks must otherwise report hemp-related transactions in the same manner as for other industries.

IV. Federal Legislation

As with any federal regulations, the above guidance may change. It maintains a complex patchwork of interweaving state and federal laws and of different rules for difficult-to-distinguish substances. That partly explains why many financial institutions have resisted dealing with cannabis businesses.

One avenue that could help is federal legislation. In February 2022, the U.S. House of Representatives passed the SAFE Banking Act. Among other things, it would prohibit federal regulators from punishing financial institutions that serve cannabis-related businesses operating in accordance with local state law. This may address the obstacle to opening master accounts. Over the past three years, the House has passed some form of the SAFE Banking Act six times, although the U.S. Senate has not yet taken it up.

This area of law continues to develop rapidly. Because it is complex, quickly changing, and largely dependent on state law, we recommend consulting with local counsel experienced in these matters. Please contact us if you have questions.

Endnotes

1 *Marijuana Banking Update*, U.S. Department of Treasury, Financial Crimes Enforcement Network, *available at* https://www.fincen.gov/sites/default/files/shared/303751_MJ%20Banking%20Update%203rd%20QTR%20FY2021_Public.pdf (last accessed Apr. 12, 2022).

2 *Memorandum for All United States Attorneys*, James M. Cole, Deputy Attorney General (Aug. 29, 2013), *available at* https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf. *See also Guidance Regarding Marijuana Related Financial Crimes*, James M. Cole, Deputy Attorney General (Feb. 14, 2014), *available at* https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%20%282%29.pdf.

3 *See e.g. Marijuana Enforcement*, Jefferson B. Sessions, III, Attorney General (Jan. 4, 2018), *available at* https://www.justice.gov/opa/press-release/file/1022196/download (rescinding the Cole memorandum).

4 *BSA Expectations Regarding Marijuana Related Businesses*, U.S. Department of the Treasury, Financial Crimes Enforcement Network (Feb. 14, 2014), available at https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf.

5 *See e.g. Fourth Corner Credit Union v. Fed. Rsrv. Bank of Kansas City*, 861 F.3d 1052 (10th Cir. 2017).

6 *Providing Financial Services to Customers Engaged in Hemp-Related Businesses*, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Financial Crimes Enforcement Network, Office of the Comptroller of the Currency, and Conference of State Bank Supervisors (Dec. 3, 2019), *available at* https://www.fincen.gov/sites/default/files/2019-12/Hemp%20Guidance%20%28Final%2012-3-19%29%20FINAL.pdf.

7 *FinCEN Guidance Regarding Due Diligence Requirements under the Bank Secrecy Act for Hemp-Related Business Customers*, U.S. Department of Treasury, Financial Crimes Enforcement Network (Jun. 29, 2020), *available at* https://www.fincen.gov/sites/default/files/2020-06/FinCEN_Hemp_Guidance_508_FINAL.pdf.

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isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol [THC] concentration of not more than 0.3 percent on a dry weight basis" from the CSA.[2] Accordingly, federal registration is now permitted for cannabis-related products so long as the goods/services recitation includes the following specific exclusive language, "…all of the foregoing containing CBD solely derived from hemp with a delta-9 tetrahydrocannabinol (THC) concentration of not more than 0.3 percent on a dry weight basis."

The updated laws are somewhat straightforward for trademark applications filed after the 2018 Farm Bill was enacted. For applications with filing dates that predate the 2018 Farm Bill with goods and services encompassing cannabis products, registration will be refused due to unlawful use or lack of bona fide intent to use in lawful commerce under the CSA. This is because these pre-2018 applications lacked a valid basis to support registration in view of the unlawful nature of the goods/services at the time the applications were filed. However, Examining Attorneys should provide these applicants the option of amending the filing date, filing basis, and specific exclusive language to overcome a refusal for illegality in an Office Action.

As if the foregoing rules and requirements were not complicated enough, there is yet another wrinkle for cannabis companies seeking federal trademark registration. Even if the identified goods/services are now legal under the CSA, these products may also raise lawful-use issues under the Federal Food Drug and Cosmetic Act (FDCA). Namely, use in foods or dietary supplements of a drug or substance undergoing clinical investigations, without approval of the U.S. Food and Drug Administration (FDA), violates the FDCA.[3] The 2018 Farm Bill explicitly preserved FDA's authority to regulate products containing cannabis or cannabis-derived compounds under the FDCA. Therefore, registration of marks for foods, beverages, dietary supplements, or pet treats containing legal cannabis products will still be refused registration as unlawful under the FDCA.

Lastly, for applications reciting services involving the cultivation or production of cannabis that is legal within the terms of the 2018 Farm Bill, Examining Attorneys will also issue inquiries regarding the applicant's authorization to produce cannabis products. In response to these inquiries, Applicants will be required to provide additional statements and evidence to confirm that their activities meet the requirements of the 2018 Farm Bill with respect to the production of hemp. The 2018 Farm Bill requires hemp to be produced under license or authorization by a state, territory, or tribal government in accordance with a plan approved by the U.S. Department of Agriculture (USDA) for the commercial production of hemp.

Accordingly, Applicants that fall in this category should ensure their production businesses are approved by, or fall within the guidelines of, the USDA prior to filing.

In conclusion, the cannabis industry still faces many hurdles with respect to federal trademark registration. This is likely to be true until complete cannabis legalization is achieved at the federal government level. In the meantime, cannabis companies can take advantage of state registration programs, where available. Regardless, pathways to federal registration are available for determined cannabis applicants, and recent history shows that the federal government appears to be warming to the cannabis industry. Moreover, at least three comprehensive federal cannabis reform bills (and one aimed at eliminating banking and other financial restrictions relating to cannabis businesses) are pending in the current session of the U.S. Congress.

Endnotes

1 TMEP § 907.

2 2018 Farm Bill Section 297A.

3 21 U.S.C.A. § 331(ll) (West) indicates that a dietary supplement is deemed to be a food within the meaning of the FDCA.

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with the growers, however, and ruled that the prosecution of all counts against them could proceed. The court premised this decision on its finding that the growers were "patently out of compliance" with Maine's medical marijuana laws and were instead "part of a 'large-scale… black-market marijuana operation'" that was clearly not authorized by such laws. The growers then appealed the Court's decision to the U.S. Court of Appeals for the First Circuit.

A Nuanced Interpretation of Rohrabacher

In hearing the interlocutory appeal, the First Circuit became only the second of the federal circuit courts to interpret the Rohrabacher amendment, following the Ninth Circuit's 2016 decision in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016). In its opinion, the First Circuit began by agreeing with the Ninth Circuit's reading of the amendment and its conclusion that "the DOJ may not spend funds to bring prosecutions if doing so prevents a state from giving practical effect to its medical marijuana laws." The First Circuit further echoed the Ninth Circuit by acknowledging that "the prosecution of persons whose conduct fully complied with" Maine's medical marijuana laws would prevent those laws from having much practical effect, which is "precisely what the rider forbids."

Importantly, however, the First Circuit ultimately disagreed with the Ninth Circuit regarding the circumstances under which a federal prosecution would prevent a state from giving practical effect to its medical marijuana laws. Rather than adopting the Ninth Circuit's "strict-compliance test to differentiate between prosecutions that prevent a state's medical marijuana laws from having practical effect and those that do not," the First Circuit opted for a more nuanced approach. It rejected the strict-compliance test promulgated by the Ninth Circuit in *McIntosh* on the grounds that "the potential for technical noncompliance is real enough that no person through any reasonable effort could always assure strict compliance."

While recognizing that the strict-compliance requirement went too far, however, the First Circuit stressed that "Congress surely did not intend for the [Rohrabacher amendment] to provide a safe harbor" to those with facially valid documents "without regard for blatantly illegitimate activity." The First Circuit stated that in this case, the evidence clearly showed that the growers' outward appearance of compliance with Maine's medical marijuana laws was a façade, employed for the purposes of selling marijuana to unauthorized users. Thus, the First Circuit upheld the ruling of the District Court, affirming its denial of the growers' motion to enjoin their prosecutions.

Impact of *Bilodeau* on Medical Marijuana Laws

Though the Maine growers were unsuccessful in challenging their prosecution by the DOJ under the Rohrabacher amendment, the First Circuit's interpretation of the amendment is an important development in the field of medical marijuana law. The only previous judicial guidance regarding the application and effect of the Rohrabacher amendment, provided by the Ninth Circuit in *McIntosh*, stipulated that individuals involved in the cultivation and distribution of medical marijuana must strictly comply with all aspects of their state's medical marijuana laws to avoid being prosecuted by the federal government for violations of the CSA. The First Circuit has now supplied a fresh interpretation in *Bilodeau* that is much friendlier to those in the medical marijuana business.

Under the First Circuit's approach, one who is legally engaging in the industry under their state's medical marijuana laws cannot be prosecuted by the DOJ for it unless their conduct rises to the level of "blatantly illegitimate activity." If a medical marijuana grower or distributor is making a reasonable effort to comply with their state's medical marijuana laws, they will be protected from federal prosecution by the Rohrabacher amendment, even if there are aspects of their conduct that are not in strict compliance with such laws.

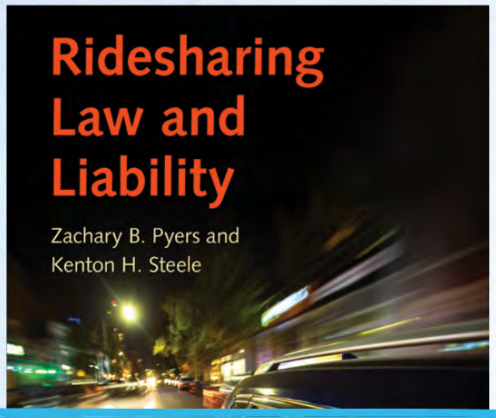
Of course, it must be noted that the First Circuit's interpretation of the Rohrabacher amendment in *Bilodeau* is not binding on other federal judicial circuits, nor does it provide a bright line rule. The First Circuit itself acknowledged that in "charting this middle course," it did not "fully define [the] precise boundaries" of what types of conduct would qualify as "blatantly illegitimate activity." The only activity that the First Circuit has clearly classified as "blatantly illegitimate" is that of the growers in *Bilodeau* – an operation "aimed at supplying [marijuana to] persons whom [none of the prosecuted growers] ever thought were qualifying patients under Maine law."

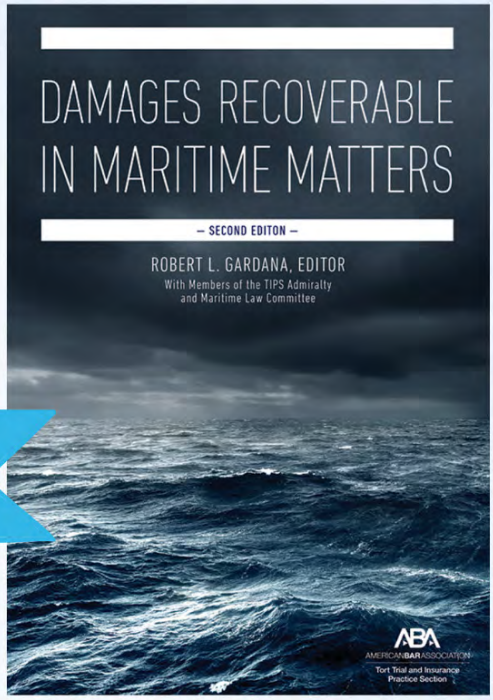
Takeaways for Medical Marijuana Businesses

In light of *Bilodeau*, those engaging in the medical marijuana business should continue to make every effort possible to fully comply with all aspects of their state's medical marijuana laws. Though it is promising that the First Circuit's decision in *Bilodeau* interprets the Rohrabacher amendment as providing greater protection from DOJ prosecution for state-licensed medical marijuana growers and distributors, this is still a very new area of law which is rife with the possibility of conflict between the federal government and the state legislatures that have enacted statutes legalizing medical marijuana within their borders.

Those in Maine, New Hampshire, Massachusetts, Rhode Island, and Puerto Rico who are legally growing, selling, buying, or using medical marijuana under their state's laws can take some degree of comfort in knowing that they are not likely to be federally prosecuted for minor failures to comply, so long as they are not engaging in blatantly illegitimate activity. However, those in other states should continue to err on the side of caution when it comes to strict compliance, as there is no telling whether the First Circuit's interpretation of the Rohrabacher amendment will be adopted by other federal circuit courts.

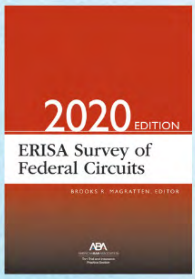
CHECK OUT WHAT'S NEW FROM TIPS

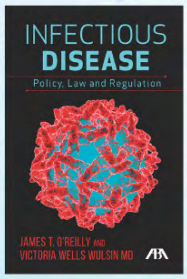


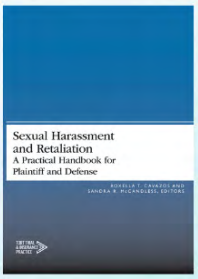


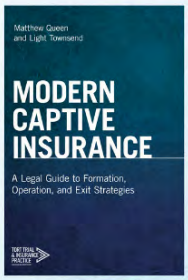
HOT OFF THE PRESSES

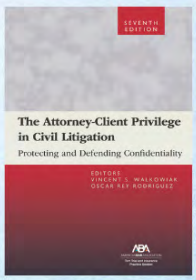
MORE NEW TITLES











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May 11, 2022	**Psych!: How Psychology Impacts Negotiations and Trial** Theresa Beckom – 312/988-5672	Webinar
August 3-9, 2022	**ABA Annual Meeting** Contact: Janet Hummons – 312/988-5656 Danielle Daly – 312/988-5708	Hyatt Regency Chicago, IL
August 17-19, 2022	**Fidelity & Surety Law Midwinter Conference** Contact: Danielle Daly – 312/988-5708	Grand Hyatt Nashville, TN
August 18-20, 2022	**Life Health & Disability & ERISA Conference** Contact: Danielle Daly – 312/988-5708	Grand Hyatt Nashville, TN