SB 423: Montana Marijuana Act
Developments through February 2014

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Background

The 2011 Legislature repealed Montana's Medical Marijuana Act with passage of Senate Bill 423, which replaced the voter-passed initiative with new requirements for the cultivation, manufacture, and possession of marijuana for use by people with debilitating medical conditions. SB 423 also required the Children, Families, Health, and Human Services Interim Committee to monitor the new law and to draft legislation if members decide changes to the law are needed.

To assist the committee with its monitoring duties, this briefing paper summarizes developments related to SB 423 since June 2013.

Legal Challenge: Montana Cannabis Industry Association v. State of Montana

The 2011 lawsuit challenging the constitutionality of SB 423 is set to go to trial in May. Both the plaintiffs and the state have filed numerous motions in advance of the non-jury trial.

Most significantly, the Montana Cannabis Industry Association and other plaintiffs are no longer asking that the entire Montana Marijuana Act be prevented from going into effect. Instead, the plaintiffs are now seeking to enjoin only six provisions of the act. Five of those provisions have been on hold since June 2011, as follows:

- limiting to three the number of cardholders for whom a provider may grow or manufacture marijuana;
- prohibiting a provider from receiving compensation for marijuana or marijuana-related products;
- prohibiting advertising of marijuana products;
- allowing the Department of Public Health and Human Services and state and local law enforcement to conduct unannounced inspections of providers; and
- requiring DPHHS to report to the Board of Medical Examiners the names of doctors who provide written certification for more than 25 patients in a 12-month period so the board may review the physicians' practices.

The plaintiffs also are asking that a sixth provision of the law be found unconstitutional: prohibiting probationers, parolees, and people in the custody of the Department of Corrections

LEGISLATIVE COUNCIL
April 4, 2014
Exhibit 4

or a youth court from registering to use marijuana for debilitating conditions. This prohibition is currently in effect, because Helena District Court Judge James Reynolds declined to enjoin it in 2011.

In scaling back their legal challenge to cover only these six issues, the plaintiffs said that the injunction currently in place "struck an effective balance" between the plaintiffs' interest in preserving commercial services for patients and the state's interest in curbing abuses that occurred under the original Medical Marijuana Act.

Both the plaintiffs and the state have filed motions for summary judgment, asking Judge Reynolds to rule on the six provisions in advance of the non-jury trial. The plaintiffs contend that all six provisions are unconstitutional and should be permanently prevented from going into effect.

Meanwhile, the state is arguing that the six provisions are constitutional and that the first five provisions should be allowed to go into effect, while the probationer and parolee provisions should remain in effect. The state's briefs note that marijuana remains illegal under federal law and that the state "has a legitimate interest in lessening the conflict between a state law and a federal law."

In other motions filed with the district court:

- the state has asked that plaintiffs be prevented from presenting any evidence or argument at trial on whether marijuana should be classified as a Schedule I substance, how marijuana compares to other scheduled drugs, whether marijuana has medical benefits, and whether SB 423 provided for the availability of an initial legal source for marijuana; and

- the plaintiffs have asked that the court prevent the state from calling Drug Enforcement Administration Agent Daniel Dunlap as a witness. The U.S. Department of Justice has placed limits on the amount of detail Dunlap can provide on drug investigations in Montana, and plaintiffs say that prevents them from questioning him on the basis for his testimony.

The legal challenge has been pending since May 2011. Reynolds issued an injunction in June 2011 that kept the five provisions from going into effect, ruling in part that the production and use of marijuana for medical reasons was protected under the Montana Constitution's right to seek health and to pursue employment. As a result, any limits placed on that right had to meet the highest standard of judicial review.

The state appealed portions of the injunction to the Montana Supreme Court, which ruled in September 2012 that Reynolds had used the wrong legal standard for review. The high court sent the case back to Reynolds to be decided using a "rational basis" test, under which the state must show that SB 423 was rationally related to a legitimate state interest.

Reynolds continued the injunction on the five provisions while the case was pending. Last year, he scheduled trial on the merits of the challenge for May 20, 2014. He is expected to rule on the various motions for summary judgment before that date.

What Remains If the District Court Rules in the Plaintiffs' Favor?

Numerous features of SB 423 would remain in effect under the plaintiffs' request for summary judgment. Key features include:

- cardholders and providers must be Montana residents;
- people with severe chronic pain must provide supporting proof of the condition;
- two physicians must certify that a minor will benefit from the use of marijuana;
- doctors must meet a defined standard of care in providing written certification for use of marijuana and may not use telemedicine to provide written certification, may not accept anything of value from a provider, and may not examine people where marijuana is grown or manufactured;
- providers must submit fingerprints for a criminal history background check to ensure that they don't have a felony conviction or any type of drug conviction;
- landlords may prevent tenants from growing or using marijuana for a debilitating medical condition;
- a cardholder with a tetrahydrocannabinol level of 5 ng/ml or higher may be charged with DUI;
- a sentencing judge may require an offender to surrender a registry identification card as part of the offender's sentence;
- registered cardholders may not use marijuana in public or in certain other specified locations or situations;
- schools may prohibit cardholders from participating in extracurricular activities; and
- local governments may regulate providers and prohibit storefront businesses.

Registry Statistics

SB 423 put in place more stringent requirements for people to qualify for a card to use marijuana for a debilitating medical condition. It also created new requirements for people who grow or manufacture marijuana for use by a cardholder and for doctors who certify that use of marijuana may benefit a patient.

Since those new requirements went into effect in July 2011, the number of cardholders and providers has decreased substantially. The number of doctors writing certifications has also decreased, but to a lesser degree.

The number of Montanans registered to use marijuana has dropped by nearly 75 percent since May 2011, when numbers reached their highest at 31,522 patients. DPHHS statistics showed 8,050 cardholders registered in January 2014. The number of patients declined almost every month from May 2011 to June 2013. Since then, the number of cardholders has gone up slightly every month, for a 14 percent increase from June 2013, when 7,043 cardholders were registered. The number of cardholders topped 8,000 in January 2014 for the first time in more than a year.

The majority of patients are still receiving a card for severe chronic pain, as they were before SB 423 was passed. However, they make up a smaller percentage of the total. In May 2011, 73 percent of the patients received a card solely for severe or chronic pain. Additional patients also received cards for chronic pain coupled with either nausea, seizures, muscle spasms, or a combination of those conditions. In January 2014, 64.5 percent of the patients listed severe chronic pain as a reason for obtaining a card.

The number of providers is down by almost 93 percent from May 2011, when 4,650 people were registered as caregivers under the original law. The number of providers has hovered around the 300 mark since November 2012, and 313 were registered in January. Nearly two-thirds of the providers had 10 or fewer patients in January, while nine providers were growing or manufacturing marijuana for more than 100 patients. DPHHS figures, which show the number of patients per provider in groups of 10 patients, indicate those nine providers had at least 1,729 patients, or 21 percent of the patients.

In January, 207 doctors had provided written certifications for patients, down 43 percent from the 362 doctors who were providing certifications in May 2011. The majority of the doctors — 188 — provided certification for 20 or fewer patients each. Nineteen doctors provided certification for more than 20 patients, with 10 of those physicians providing certification for more than 100 patients each. Those 10 physicians have provided certifications for at least 7,090 of the 8,050 cardholders registered with the state in January, or 88 percent.

Initiative Attempt

In November 2012, supporters of marijuana legalization submitted a proposed constitutional initiative to allow recreational use of marijuana by adults. The Secretary of State's Office approved the petition for signature gathering in February 2013. However, supporters have not turned in any signatures and confirmed in January that they were dropping their attempt to put the measure on the November ballot this year. Instead, they said they will focus their efforts on the 2016 elections, when a greater number of people are expected to be voting because it will be a presidential election year.

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