

SB 423: Montana Marijuana Act Developments Through January 2012

Prepared by Sue O'Connell
for the Law and Justice Interim Committee
February 2012

Background

Senate Bill 423 repealed Montana's Medical Marijuana Act on July 1, 2011, and replaced it with new requirements for the cultivation, manufacture, and possession of marijuana for use by people with debilitating medical conditions.

SB 423 specifically requires the Children, Families, Health, and Human Services Interim Committee to:

- monitor how the Department of Public Health and Human Services (DPHHS) puts the new law into effect; and
- draft legislation for 2013 if members decide changes to the law are needed.

This briefing paper summarizes developments related to SB 423's implementation since the Legislature adjourned in April 2011, as well as other items that have had or may have an effect on the cultivation and possession of marijuana for debilitating medical conditions.

Initiative Referendum 124: Putting SB 423 to a Vote

Within days after the 2011 legislative session ended, SB 423 opponents announced that they would try to place the law before the voters in November 2012. Their effort centered on a little-used practice in which Montanans may try to gather enough signatures from registered voters to place a law enacted by the Legislature on the ballot. Voters then decide whether to retain or reject the law.

Initiative Referendum 124 qualified for the ballot in September 2011. Patients For Reform Not Repeal gathered 36,374 signatures, representing at least 5% of the voters in 72 House districts. The signatures exceeded the number needed to qualify a measure for the ballot — at least 24,337 verified signatures representing 5% of the voters in each of at least 34 House districts.

However, backers failed to gather the number of signatures needed to suspend SB 423 until a vote takes place. That required signatures representing at least 15% of the registered voters in at least 51 House districts. The signatures met that level in three House districts.

As a result, SB 423 is in effect but is subject to approval by the voters this fall. If voters reject SB 423 in November, the original Medical Marijuana Act will go back into effect.

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

On May 13, 2011, the Montana Cannabis Industry Association, several individuals, and a doctor filed a legal action to prevent SB 423 from going into effect as scheduled on July 1, 2011. They argued that provisions of the bill violated both the state and U.S. constitutions.

On June 30, Helena District Judge James Reynolds let most of the law go into effect but halted the following five elements until a full trial is held on the merits of the case.

- the limit of three patients per provider (formerly known as a caregiver);
- the prohibition on providers being paid for marijuana or related products;
- the prohibition on advertising of marijuana and related products by registered cardholders or providers;
- the ability of DPHHS and local law enforcement to conduct unannounced inspections of the locations where providers indicate they will grow marijuana; and
- the requirement that DPHHS report to the Board of Medical Examiners the names of physicians who provide written certification for more than 25 patients in a 12-month period, so the Board may review the practices of those physicians.

The ruling allowed many businesses that were growing and providing marijuana to persons with debilitating medical conditions to keep operating until a final ruling is issued.

The Attorney General's Office has appealed the ruling to the Montana Supreme Court, and the plaintiffs have filed a cross-appeal.

The state's appeal focuses only on the District Court's decision to enjoin both the limit on the number of cardholders for whom a provider may grow marijuana and the ban on compensation. The state's brief notes that the District Court applied the highest level of judicial scrutiny to those provisions. As a result, the lower court determined that they violated the right to pursue health and employment.

The Attorney General's Office argues that previous Montana Supreme Court rulings have determined that the right to pursue employment is limited to lawful activities. The brief notes that commercial sales of marijuana are illegal under Montana and federal law.

The brief also maintains that the Montana Constitution doesn't provide a right to pursue health free of government regulations. And it argues that while Montana's right to privacy covers the right to make medical decisions, that right must be balanced against the state's interest in regulating certain activities — especially where no fundamental right is at issue.

The state is asking that the lower court's decision be reversed because subjecting SB 423 to a strict scrutiny analysis was "an erroneous conclusion of law." It's also asking the Supreme Court to correct the lower court's conclusions and to specify the type of constitutional analysis that the District Court should apply to its future consideration of the case when it proceeds to the trial stage.

The Montana Cannabis Industry Association appeal contends that — in addition to enjoining the five provisions — the District Court also should have blocked the prohibition on probationers and parolees obtaining cards as patients or providers. It also maintains that the lower court should have blocked the entire law because so many provisions are unconstitutional.

The final briefs in the appeal should be filed by early March. The court is likely to decide shortly after that whether to have a five-justice panel decide the case on the basis of the briefs or whether to hear oral arguments in the case.

After the Supreme Court decides the issues on appeal, the case will return to the District Court for a trial on the merits of the suit.

Other Legal Action

The Montana Cannabis Industry Association lawsuit is the main legal challenge to SB 423 at this point. However, other legal actions involving either SB 423 or the use of marijuana for medical conditions are percolating through the courts. Some of the key challenges are summarized below.

- **Christ v. State of Montana:** In December, another lawsuit was filed challenging SB 423 as unconstitutional and asking that enforcement of the entire law be halted while the lawsuit is pending. The suit was filed in Missoula County by Jason Christ, doing business as the Montana Caregivers Network (MCN). That business sponsored many of the traveling clinics that drew attention in 2010. They provided hundreds of Montanans at a time with the opportunity to see a doctor and obtain the certification needed to apply for a medical marijuana card.

Many of the claims in the suit stem from the provisions that prevent people on probation and parole from obtaining cards to use marijuana for their medical conditions or to grow marijuana for people with debilitating medical conditions. The suit says the law violates probationers' and parolees' right to privacy and dignity in making medical decisions, their right to pursue health, and their right to earn a living by supplying marijuana for people with debilitating medical conditions. The suit notes that hundreds of patients served by MCN are unable to obtain or renew a card to use marijuana for their medical conditions. The suit also says that SB 423 violates the right of free speech for physicians who are consulting with patients.

In its answer to the suit, the state suggested that the action should be stayed until the suit filed by the Montana Cannabis Industry Association is decided. The court has since set a March 28 scheduling conference in the matter.

- **Challenge to Federal Raids:** Some individual caregivers filed suit in May 2011 alleging the federal government violated their constitutional rights by carrying out raids against their medical marijuana businesses and seizing plants, marijuana, other property, and money. The plaintiffs contended that the raids violated the Tenth Amendment to the U.S. Constitution, which gives to the states rights that are not delegated to the federal government. They also said the raids violated the Ninth Amendment, which holds that the enumeration of rights in the U.S. Constitution is not meant to deny other rights retained by the people. Finally, they said the raids violated their right to be free from unreasonable search and seizure and their right to due process. They maintained that the state's former Medical Marijuana Act protected them from federal prosecution.

U.S. District Judge Donald Molloy dismissed the complaint in January 2012, saying the Supremacy Clause of the federal constitution "unambiguously provides that if there is any conflict between federal law and state law, federal law shall prevail." He noted federal courts have consistently held that the Commerce Clause of the U.S. Constitution gives the federal government authority to enforce the federal Controlled Substances Act. Under that federal law, cultivation and sale of marijuana are illegal.

- **Caregiver-to-Caregiver Sales:** District Court judges in Flathead and Missoula counties ruled in 2011 that the former Medical Marijuana Act did not allow caregivers to transfer or sell marijuana to other caregivers. Both rulings are now on appeal to the Montana Supreme Court. The appellants argue that the former law provided for such transactions because it allowed caregivers to acquire marijuana for their patients. They contend that caregivers must have the ability to obtain enough marijuana to meet their patients' needs if the caregivers are unable to grow an adequate supply on their own. The appellants also maintain that the former law implicitly allowed for caregiver-to-caregiver sales because it neither prohibited a caregiver from delivering marijuana to a second caregiver nor prohibited the second caregiver from acquiring it from the first caregiver.

The Attorney General's Office has filed a response in both cases. The state maintains that the former law specifically limited a caregiver to providing marijuana only to patients who had named the person as their caregiver.

If Initiative Referendum 124 succeeds in November, SB 423 will be repealed. The provisions of the former Medical Marijuana Act will then be in effect. A Supreme Court ruling on caregiver-to-caregiver sales would clarify an area of that law that many people have interpreted in different ways and that has created confusion for law enforcement.

Registry Statistics

DPHHS statistics for the marijuana registry program show that the number of patients declined nearly 49% between May 2011 and January 2012. The number of patients peaked at 31,522 in May and stood at 15,984 in December.

SB 423's new provisions on the issuance of cards went into effect June 1, 2011. Those provisions require cardholders to be Montana residents. Individuals also may not receive cards if they are on probation or parole, and they must meet stricter requirements to obtain cards for chronic pain. In addition, physicians may no longer use telemedicine or other electronic means as a way to provide the written certification needed to obtain a card.

The latest statistics also show that:

- the number of registered cardholders who are under the age of 18 has declined by about 67%, from 54 in May to 18 in January;
- the number of doctors providing written certification has declined from 362 in May to 274 in January;

- people obtaining cards for chronic pain represented 64% of the cardholders in January, compared with 73% in May;
- 16 doctors provided written certification for more than 100 patients in January, with the number of patients per doctor ranging from 101 to 110 patients to 2,801 to 2,810 patients; and
- 12 providers were growing or manufacturing marijuana for more than 100 patients, with the number of patients per provider ranging from 101 to 110 patients to 631 to 640 patients.

Regulation at the Local Level

SB 423 gave local governments explicit authority to regulate the cultivation and sale of marijuana for debilitating medical conditions. I-148 did not contain similar authority, meaning only local governments with self-governing powers could enact ordinances or regulations before passage of SB 423.

At least three local governments have taken action since passage of the new law:

- The Billings City Council extended an emergency ordinance that prohibited any new business that grows, sells, or distributes marijuana. It also enacted regulations for storefront businesses that were operating before the moratorium went into effect.
- The Roundup City Council passed an ordinance prohibiting anyone except patients from possessing, growing, selling, or distributing marijuana within the city limits.
- The Valley County Commission extended for another year a moratorium on new businesses that grow, sell, or distribute marijuana. The commission also enacted a ban on storefront businesses. Businesses that were in existence before the original moratorium was passed may continue operation. However, they may not expand to new locations or operate storefront businesses. The provisions of the county's ordinances do not affect the towns of Glasgow, Opheim, Nashua, or Fort Peck.

Issues Raised in the Children, Families, Health, and Human Services Interim Committee

To fulfill its monitoring duties, the Children and Families Committee receives updates at each of its meetings on developments related to SB 423, including issues raised by stakeholders and legislative staff. To date, they have heard about the following issues:

- SB 423 prohibits an individual under the supervision of the Department of Corrections or a youth court from obtaining a card as a patient or provider. The Department of Corrections has been made aware of instances in which probationers or parolees have obtained cards. The application forms developed by DPHHS allow applicants to attest to the fact that they are not under the department's supervision. Since becoming aware of the fact that some people on probation or parole have

received cards, DPHHS has been working with the Corrections Department to ensure that an applicant's status is verified through the Corrections database.

- A provision on shared premises prevents some people from being providers for persons who share their homes. The provision prohibits a provider from growing marijuana at a premise shared with a cardholder unless the two are related by the second degree of kinship by blood or marriage. A provider who cares for a developmentally disabled cardholder in her home has suggested that SB 423 should be amended to allow a waiver of this prohibition.
- The requirement for providers to submit fingerprints may be reducing the number of potential providers because of their concern that the submission may alert federal authorities that they are growing marijuana and may subject them to federal investigation.
- The decrease in the number of providers may be affecting the ability of patients to legally obtain marijuana and may be increasing illegal marijuana sales.
- If voters reject SB 423 in November, the law regarding use of marijuana for medical conditions will revert to the provisions in place before passage of SB 423. Many of the provisions of SB 423 that would no longer be in effect were included in other bills introduced in the 2011 Legislature and had the support of many legislators. Those included the ban on smoking in public, the requirement that patients and providers be Montana residents, the prohibition on the use of telemedicine or electronic means for physicians to diagnose debilitating conditions, the authority of local governments to regulate marijuana cultivation and sales, and the ability of law enforcement to obtain a search warrant for a blood test of a cardholder suspected of driving while impaired.

The Children and Families Committee has not yet determined whether to introduce legislation related to these or any other items.

CI0429 2045soxa.