Overview of Recent Developments Affecting Medical Marijuana

Thursday, May 3, 2012 General Session; 2:00 – 4:15 p.m.

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MUNICIPAL REGULATION OF MEDICAL MARIJUANA

A Comprehensive Review of Federal and State Law

League of California Cities
City Attorneys' Department
Spring Conference
May 2012

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Rarely does an area of the law receive as much judicial attention as California's medical marijuana laws. Since 1996, when voters approved the Compassionate Use Act ("CUA") as Proposition 215, cities have faced difficult issues concerning medical marijuana including its cultivation and distribution. To provide guidance in this evolving area of law, this paper provides an overview of the statutes and case law, as well as an in-depth look at various unsettled legal issues.

We begin with a summary of California's medical marijuana laws, followed by a discussion of the federal Controlled Substances Act ("CSA") and its potential conflicts with California's CUA and the Medical Marijuana Program ("MMP")[1] (referred to collectively as the "medical marijuana laws"), and key cases interpreting those laws. We then address case law regarding the collective cultivation and distribution model and local control, notably cities' ability to regulate certain medical marijuana activities. Courts have taken somewhat inconsistent approaches on these issues, and we attempt to reconcile them, where possible. We consider, too, various regulatory options for cities to consider in light of present statutory and case law. Finally, we provide a report on the federal government's recent efforts to enforce the CSA in California.[2]

COMPASSIONATE USE ACT

1n 1996, California voters adopted Proposition 215 known as the Compassionate Use Act ("CUA"), codified as Health and Safety Code section 11362.5.[3] The stated purposes of the CUA are:

- To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.[4]
- To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes are not subject to criminal prosecution or sanction.[5]
- To encourage the state and federal government to implement a plan to provide for the safe and affordable distribution of medical marijuana.[6]

The CUA exempts patients and their "primary caregivers" from criminal liability under state law for the possession and cultivation of marijuana for personal medical use. A qualified patient is an individual who has received a physician's recommendation for the use of marijuana for a medical purpose, and the primary caregiver is someone who has consistently assumed

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[1]Some cases refer to the "MMP" as the "MMPA." For consistency, all references herein are to the MMP.
[2]The authors wish to recognize and express appreciation to Lee Ann Meyer of Best Best & Krieger LLP for her significant contributions to this paper.
[3]All statutory citations herein are to the California Health and Safety Code, unless otherwise noted.
[4]§11362.5, subd. (b)(1)(A).
[5]§11362.5, subd. (b)(1)(B).
[6]§11362.5, subd. (b)(1)(C).

responsibility for the housing, health, or safety of a patient.[7] This limited criminal defense does not extend to those who supply marijuana to qualified patients and their caregivers, and selling, giving away, transporting, and growing large quantities of marijuana remain criminal notwithstanding the adoption of the CUA.[8] It also provides protection to physicians who "recommend" marijuana to qualified patients. Physicians, however, cannot issue a prescription because marijuana is illegal under federal law.[9]

THE MEDICAL MARIJUANA PROGRAM

In 2003, the Legislature adopted the Medical Marijuana Program ("MMP") to clarify the scope of lawful medical marijuana practices. The MMP was intended to:

- Clarify the scope of the application of the CUA and facilitate prompt identification of qualified patients and their primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers;
- Promote uniform and consistent application of the CUA among the counties within the state;
- Enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects; and
- Address additional issues that were not included in the CUA in order to promote the fair and orderly implementation of the Act.[10]

Additional terms are added to the MMP, including "qualified patient," defined as a "person who is entitled to the protections of Section 11362.5, but who does not have an identification card issued pursuant to this article."[11] There is also an expanded definition of "primary caregiver," which retains the same language as that in the CUA, but provides examples of individuals who may act as a primary caregiver, including owners and operators of clinics and care facilities. This definition also added the requirement that a primary caregiver must, with limited exceptions, be at least 18 years of age.[12]

One of the more important aspects of the MMP was its creation of a statewide medical marijuana identification card program, administered by the counties. Although participation in this program is voluntary, it allows those patients and primary caregivers to obtain an identification card thereby avoiding arrest for possession, transportation, delivery, or cultivation of medical marijuana.[13] The "amount established pursuant to this article" is addressed in Section 11362.77,

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[7] §11362.5, subd. (e); see also *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 771.
[8] *Id*. at 772.
[9] §11362.5, subd. (c).
[10] Stats. 2003, ch. 875, §1 (Sen. Bill No. 420).
[11] §11362.7, subd. (f).
[12] §11362.7, subd. (e).
[13] There is an exception when "there is reasonable cause to believe that the information contained in the card is false or falsified, the card was obtained by means of fraud, or the person is otherwise in violation of the provisions of this article." § 11362.71, subd. (e).

which authorizes possession of up to eight ounces of dried marijuana and no more than six mature or twelve immature marijuana plants.[14]

The MMP also provided additional narrow immunities to specified individuals for specific conduct related to the provision of medical marijuana to qualified patients: "As part of its effort to clarify and smooth implementation of the [Compassionate Use] Act, the Program immunizes from prosecution a range of conduct ancillary to the provision of medical marijuana to qualified patients. (§ 11362.765.)"[15] This "range of conduct" is carefully circumscribed, and includes transportation of marijuana by qualified patients for their own personal medical use under §11362.765, subdivision (b)(1). The MMP also immunizes from criminal liability a "designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana for medical purposes, in amounts not exceeding those established in subdivision (a) of Section 11362.77, only to the qualified patient of the primary caregiver, or to the person with an identification card who has designated the individual as a primary caregiver."[16] On the "sole basis" of this immunized range of conduct under Section 11362.765, the specified individuals are not subject to criminal liability under the enumerated Health and Safety Code sections relating to marijuana.

A key aspect of the medical marijuana laws is that there is no criminal immunity for commercial or for-profit distribution. Section 11362.765(a) provides "nothing in this section shall authorize . . . any individual or group to cultivate or distribute marijuana for profit." The MMP further provides that a primary caregiver who receives reasonable compensation for actual, out-of-pocket expenses incurred in providing services to a qualified patient "to enable that person to use marijuana under this article" shall not, "on the sole basis of that fact, be subject to prosecution or punishment under Section 11359 or 11360."[17]

Lastly, Section 11362.775 of the MMP provides additional immunities to specific individuals who associate to collectively or cooperatively cultivate medical marijuana: "Qualified patients, persons with valid identification cards, and the designated primary caregivers of qualified patients and persons with identification cards, who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions under Section 11357, 11358, 11359, 11360, 11366, 11366.5, or 11570." Like Section 11362.765, Section 11362.775 authorizes specific conduct (associating to collectively or cooperatively cultivate marijuana) by specific individuals (qualified patients with or without identification cards and their designated primary caregivers) and provides that, "<u>solely on the basis of that fact</u>," such individuals are not subject to criminal sanction for violation of state marijuana laws. (Emphasis added.) The Legislature's use of the phrase "collectively or cooperatively" has led to an unprecedented

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[14]The California Supreme Court decision in *People v. Kelly* (2010) 47 Cal. 4th 1008, discussed below, invalidated the quantity limits in section 11362.77, to the extent that those limits burden a defense under the CUA to a criminal charge of possessing or cultivating marijuana. In this respect, the court ruled, the limits constitute an impermissible amendment of the CUA.

[15]*People v. Mentch* (2008) 45 Cal.4th 274, 290.

[16]§11362.765, subd. (b)(2).

[17]§11362.765, subd. (c).

proliferation of medical marijuana collectives and cooperatives throughout the state. Together, the CUA and MMP have set the stage for one of the most contentious, and evolving, areas in California law.

THE FEDERAL CONTROLLED SUBSTANCES ACT

It is important to note the Federal Controlled Substances Act (CSA) prohibits all activities related to marijuana, including possession, cultivation, and distribution.[18] There is no exception for medical use.[19] The only lawful use of marijuana under federal law is in connection with a federally-approved research study in the public interest.[20] Thus, any state law recognizing medicinal use raises potential federal law preemption issues.

United States v. Oakland Cannabis Buyers' Cooperative
There are numerous federal cases involving medical marijuana and the CSA. The United States Supreme Court, however, first addressed the issue of medical marijuana in 2001. In *Oakland Cannabis Buyers' Cooperative*, the Court held that there is no "medical necessity" defense to federal criminal prosecution under the CSA's prohibition of the manufacture or distribution of marijuana.[21] Despite the decision, medical marijuana issues returned to the Court a mere four years later in *Gonzales v. Raich.* This time, the Court went further in its holding that there is no medical necessity defense to prosecution under the CSA.

Gonzales v. Raich
In *Raich*, the United States Supreme Court again held, notwithstanding the fact that possession and cultivation of marijuana may be non-criminal for certain individuals under California's CUA and similar laws in other states, federal regulation of marijuana under the CSA is within Congress' commerce power.[22] The Court held that even non-commercial intrastate cultivation of marijuana could have a substantial economic effect on interstate commerce. The mere fact that marijuana may be used for medicinal purposes "cannot possibly serve to distinguish it from the core activities regulated by the CSA."[23]

Although some argue that the Supreme Court's decision not to invalidate or overturn California's medical marijuana laws entirely implies the ability of the federal and state laws to coexist, others rely on these cases as support for the proposition that medical marijuana activities are patently illegal under federal law and should not be tolerated in California.

Marijuana legalization advocates argue there is no federal law preemption of California's medical marijuana laws. They rely on the following CSA language: "No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which

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[18] 21 U.S.C. § 801 *et seq*.
[19] 21 U.S.C. § 812(b)(1)(B) (As a Schedule I controlled substance, marijuana has no currently accepted medical use in the United States).
[20] 21 U.S.C. § 823(f).
[21] (2001) 532 U.S. 483.
[22] (2005) 545 U.S. 1.
[23] 545 U.S. at 28.

that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together."[24] In particular, advocates argue *Raich* did not "strike down" California's medical marijuana laws and that several California appellate decisions have found that the state's limited decriminalization of marijuana is not preempted by federal regulation under the CSA.[25] Nonetheless, the Supreme Court addressed such attempts to reconcile the CSA and state medical marijuana laws as follows: "[L]imiting the activity to marijuana possession and cultivation 'in accordance with state law' cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail."[26]

The Court also expressed concern regarding physicians who would have an "economic incentive to grant their patients permission to use the drug" as well as the consequences of exempting patients and caregivers from criminal liability for marijuana cultivation:[27] "The [California medical marijuana laws'] exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market. The likelihood that all such production will promptly terminate when patients recover or will precisely match the patients' medical needs during their convalescence seems remote; whereas the danger that excesses will satisfy some of the admittedly enormous demand for recreational use seems obvious."[28]

Notwithstanding the language of the CSA and the Supreme Court's decisions in *Oakland Cannabis* and *Raich*, the scope of the CSA and federal preemption of California's medical marijuana laws are now at issue again. The California Supreme Court has granted review of a recent appellate decision finding federal preemption of municipal regulations, *Pack v. Superior Court* (*City of Long Beach*) ("*Pack"),* discussed in more detail below.[29] Moreover, in light of recent federal enforcement activity surrounding commercial marijuana operations in California, the Supreme Court's analysis now appears prescient.

FEDERAL LAW PREEMPTION ISSUES

To understand the current federal preemption issues, it is helpful first to trace the development of federal preemption case law in California courts. We take the appellate decisions in their chronological order so that the reader may follow the law as it has evolved to the present.

City of Garden Grove v. Superior Court (*Kha*)

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[24] 21 U.S.C. § 903.

[25] See *Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734; *County of Butte v. Superior Court* (2009) 175 Cal.App.4th 729; *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798; *City of Garden Grove v. Superior Court* (*Kha*) (2007) 157 Cal.App.4th 355.

[26] 545 U.S. at 29.

[27] *Id.* at 30-32.

[28] *Id* .

[29] (2011) 199 Cal.App.4th 1070, *review granted* (Jan. 18, 2012), Case No. S197169.

The first California federal preemption case was *Kha*.[30] During a traffic stop, Garden Grove police seized a small amount of marijuana from Kha and issued him a citation for possessing less than one ounce while driving. Once the prosecutor discovered that Kha had a doctor's recommendation to use marijuana, however, the case was dismissed. Kha filed a motion for return of the marijuana, which the trial court granted. Seeing itself "caught in the middle of a conflict between state and federal law," the City of Garden Grove filed an appellate petition to vacate the trial court order, which the City viewed as ordering or directing the City to violate federal law.

The court of appeal (Fourth Appellate District, Division Three) denied the City's petition. The court held federal supremacy principles do not prohibit the return of marijuana to a user whose possession is legally sanctioned under state law. The court opined that Congress, in enacting the CSA, "clear[ly] did not intend to preempt the states on the issue of drug regulation."[31] The court expressed its view that it is "unreasonable to believe returning marijuana to qualified patients who have had it seized by local police will hinder the federal government's enforcement efforts. Practically speaking, this subset of medical marijuana users is too small to make a measurable impact on the war on drugs."[32] (See discussion below regarding recent federal enforcement activities, which suggests a different federal perspective.)

While recognizing that the CUA and MMP are silent on the issue of a return of marijuana once criminal charges are dismissed, the court concluded that "due process principles seem to us to compel" the return of marijuana lawfully possessed by a "qualified patient." The court then noted that retention of the marijuana, and its possible destruction, may be appropriate if the city is pursuing a marijuana-related prosecution, or if the defendant's possession does not comport with the CUA.[33] Thus, provided lawful possession is established (which is required under Section 11473.5 for a court to order the return of a controlled substance once a case is dismissed), *Kha* stands for the proposition that a "qualified patient" is entitled to the return of lawfully possessed medical marijuana once criminal charges are no longer pending, despite the CSA.

County of San Diego v. San Diego NORML

In 2008, a court of appeal next examined federal preemption in *San Diego NORML*.[34] The counties of San Diego and San Bernardino filed legal challenges to the MMP's requirement that counties implement and administer the state identification card program for qualified patients and primary caregivers. The Counties argued the MMP's voluntary identification card program, which provides limited arrest immunity, was an unconstitutional amendment to the CUA. The court of appeal (Fourth Appellate District, Division One) rejected the Counties' arguments and

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[30](2007) 157 Cal.App.4th 355.
[31]*Id* at 383.
[32]*Id*.
[33]*Id.* at 388.
[34](2008) 165 Cal.App.4th 798

held that "although the legislation that enacted the MMP added statutes regarding California's treatment of those who use medical marijuana or who aid such users, it did not add statutes or standards *to the CUA*. Instead, the MMP's identification card is part of a separate legislative scheme providing separate protections for persons engaged in the medical marijuana programs."[35]

As for federal law preemption, the court concluded that issuance of state identification cards to medical marijuana users and their caregivers does "not pose a significant impediment to specific federal objectives embodied in the CSA."[36] The court rejected the Counties' argument that the CSA and the MMP identification card program have a "positive conflict" because "the card issued by a county confirms that its bearer may violate or is immunized from federal laws."[37] The court concluded the CSA's objectives are to "combat recreational drug use, not to regulate a state's medical practices."[38] The *San Diego NORML* court did not recognize, however, the CSA prohibits all marijuana use is illegal recreational use and there is no exception for medicinal uses.

Qualified Patients Assn. v. City of Anaheim
Two years later yet another federal preemption decision was published. In a highly anticipated case, *Qualified Patients,* the same court of appeal that issued the *Kha* decision again ruled the medical marijuana laws are not preempted by the CSA.[39]

The City of Anaheim had enacted an ordinance that provided "it shall be unlawful for any person or entity to own, manage, conduct, or operate any Medical Marijuana Dispensary or to participate as an employee, contractor, agent or volunteer, or in any other manner or capacity, in any medical marijuana dispensary in the City of Anaheim." The ordinance defined a medical marijuana dispensary as any "facility or location where Medical Marijuana is made available to and/or distributed by or to three or more of the following: a qualified patient, a person with an identification card, or a primary caregiver." Finally, the ordinance provided for misdemeanor punishment for any person who violated any provision of the ordinance.[40]

A group identifying itself as the "Qualified Patients Association" together with an individual filed a lawsuit challenging the ordinance. Their lawsuit sought a declaratory judgment that the City's ordinance imposing criminal penalties for medical marijuana dispensary operation was preempted by the CUA and the MMP. Plaintiffs also asserted the ordinance violated the Unruh Civil Rights Act (Civ. Code, § 51).[41]

The trial court sustained the City's demurrer, without leave to amend, on the grounds that, as a matter of law, federal regulation of marijuana in the CSA preempted the CUA and the MMP to decriminalize specific medical marijuana activities under state law. The trial court also

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[35] *Id.* at 831.
[36] *Id*. at 826.
[37] *Id*.
[38] *Id*.
[39] (2010) 187 Cal.App.4th 734.
[40] *Id*. at 741-742.
[41] *Id*. at 742.

concluded plaintiffs failed to state a cause of action under the Unruh Civil Rights Act, which is aimed at "business establishments" (Civ. Code, § 51, subd. (b)), not local government legislative acts.

The court of appeal (Fourth Appellate District, Division Three) reversed the trial court's federal preemption ruling but affirmed the ruling on the Unruh Civil Rights Act. The court held that the CSA and federal supremacy principles do not preempt either the CUA claim or the MMP under the limited scope of federal preemption described in 21 U.S.C. § 903 because there was no conflict and the city had no power to enforce federal law.[42] Although the parties anticipated a precedential ruling on state law preemption (discussed below), *Qualified Patients* was a *federal* preemption decision: "California's decision in the CUA and the MMP to decriminalize for purposes of state law certain conduct related to medical marijuana does nothing to 'override' or attempt to override federal law, which remains in force."[43] Neither the CUA nor the MMP "mandate conduct that federal law prohibits, nor pose an obstacle to federal enforcement of federal law, [thus] the enactments' decriminalization provisions are not preempted by federal law."[44]

Reviewing the four "species" of federal preemption: express, conflict, obstacle, and field, the court concluded that express language in the CSA established that "Congress declined to assert express preemption in the area of controlled substances and directly foreswore field preemption [citation], leaving only conflict and obstacle preemption as potential bases supporting the trial court's preemption ruling."[45] The court of appeal determined there was no conflict preemption because "neither the CUA nor the MMP require [individuals to possess, cultivate, transport, possess for sale, or sell medical marijuana in a manner that violated federal law], there is no 'positive conflict' with federal law, as contemplated for preemption under the CSA."[46] That is, "[n]o positive conflict exists because neither the CUA nor the MMP requires anything the CSA forbids."[47]

Finally, as for obstacle preemption, the court explained that "[j]ust as the federal government may not commandeer state officials for federal purposes, a city may not stand in for the federal government and rely on purported federal preemption to implement federal legislative policy that differs from corresponding, express state legislation concerning medical marijuana."[48] The court of appeal concluded that "[t]he city may not justify its ordinance solely under federal law [citations], nor in doing so invoke federal preemption of state law that may invalidate the city's ordinance."[49] Accordingly, "[b]ecause the city has identified no defect on the face of plaintiffs' complaint concerning their cause of action for declaratory judgment that the city's ordinance is

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[42] *Id.* at 741.
[43] *Id*. at 757.
[44] *Id*. at 757.
[45] *Id*. at 758.
[46] *Id*. at 758.
[47] *Id*. at 758-759 (emphasis added).
[48] *Id.* at 761-762.
[49] *Id.* at 763.

preempted by state law, the city's demurrer fails. . . [,]" and the court reversed the trial court's ruling.[50]

Simply stated, the *Qualified Patients* court held that possession of medical marijuana does not constitute an offense under both state and federal laws. Thus, a city could not rely on federal preemption as the sole basis for banning collectives. The court said that, because possession and cultivation of medical marijuana do not violate state law, and a city has no power to punish for violations of federal law, a city may not justify a ban on medical marijuana collectives based solely on the federal prohibition on marijuana.[51] The *Qualified Patients* court adopted the view of the *San Diego NORML* court in concluding the CSA's objectives are to "combat recreational drug use, not to regulate a state's medical practices."[52] Neither court recognized the CSA prohibits all marijuana use as illegal recreational use and there is no exception for medicinal use.[53]

Given the appellate decisions in *Kha*, *San Diego NORML*, and *Qualified Patients*, it appeared that the federal law preemption issues were, for the most part, decided against preemption. As explained below, a new case would raise the federal preemption issue again, and this time, do so in a way with profound implications for cities and their ability to regulate medical marijuana.

Pack v. Superior Court (*City of Long Beach*)
The *Pack* opinion is one of the most controversial medical marijuana decisions to date.[54] At issue was the City of Long Beach's medical marijuana ordinance. It provided for comprehensive regulation of medical marijuana distribution facilities and defined "collective" as "an association of four or more qualified patients and their primary caregivers who associate at a location within the City to collectively or cooperatively cultivate medical marijuana."[55]

The City's ordinance not only regulated a collective's location but also its operation, by means of a permit system. The City required all collectives to submit applications and a nonrefundable application fee. The City set the fee at $14,742. Although there was no provision for a lottery in the ordinance, the City would create a lottery system for all qualified applicants for a limited number of operating permits. Only those medical marijuana collectives which had been issued medical marijuana collective permits could operate in the City.[56]

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[50] *Id*.
[51] *Id.*
[52] *Id*. citing *San Diego NORML*, *supra*, 165 Cal.App.4th at 826-827.
[53] As for state law preemption of the City's ordinance, the *Qualified Patients* court made it abundantly clear that the state law preemption issue was not ripe for review. The court added: "Whether the MMP bars local governments from using nuisance abatement law and penal legislation to prohibit the use of property for medical marijuana purposes remains to be determined." In fact, after supplemental briefing at the court's request, "the city and its amici curiae demonstrate the issue of state preemption under the MMP is by no means clear cut or easily resolved on first impressions." Significantly, the court stated: "We do not decide these issues."
[54] (2011) 199 Cal.App.4th 1070, *review granted* (Jan. 18, 2012), Case No. S197169.

[55] *Id*. at 1083-1084.
[56] *Id*.

Under the ordinance, each collective was required to install sound insulation, odor absorbing ventilation, closed-circuit television monitoring, and centrally monitored fire and burglar alarm systems. Collectives also had to submit representative marijuana samples to an independent laboratory to test for pesticides and other contaminants. After a permit issued, the collective had to pay an "Annual Regulatory Permit Fee," with the amount based on the number of collective members.

Plaintiffs Ryan Pack and Anthony Gayle were members of collectives that were closed for their failure to comply with the ordinance. They filed an action for declaratory relief "that the ordinance is invalid as it is preempted by federal law."[57] In quickly seeking injunctive relief, plaintiffs argued "they would be irreparably harmed by the continued enforcement of the ordinance, as there was no collective they could legally join in order to obtain medical marijuana. As to the probability of success, plaintiffs argued that the City's ordinance went beyond decriminalization and, instead, permitted conduct prohibited by the federal CSA, and thus was preempted."[58]

By the time they sought injunctive relief, however, the City had shut down the collectives. Plaintiffs argued they would be irreparably harmed by continued enforcement of the ordinance because the lottery had not occurred, and no collective had received a permit, so there was no collective they could legally join to obtain medical marijuana. In denying the preliminary injunction request, the court stated "[i]t is hardly equitable for [p]laintiffs to ask the court to enforce a federal law that they themselves are indisputably violating."[59] Meanwhile, the City conducted the lottery, which ultimately resulted in a permit for at least one collective.[60]

Undaunted, plaintiffs filed a petition for writ of mandate in the court of appeal. It issued an order to show cause and asked for briefing on the federal preemption issue. The court of appeal also invited *amicus curiae* briefing from various entities on both sides of the issue, including other cities considering or enacting medical marijuana collective ordinances, the United States Attorneys for California districts, the ACLU, and organizations advocating the legalization of marijuana.[61] Ultimately, the court of appeal granted the petition and found that the ordinance, "to the extent it permits collectives," *is* federally preempted.[62]

After summarizing the CSA, CUA, and MMP, the court stated that the CSA makes it "illegal to manufacture, distribute, or possess marijuana. [Citation] It is also illegal . . . to maintain any place for the purpose of manufacturing, distributing, or using any controlled substance[,]" including marijuana. The only exception "is the possession and use of marijuana in federally

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[57] *Id*. at 1084.
[58] *Id*.
[59] *Id*. at 1085.
[60] *Id*. at 1086.
[61] The United States Attorneys declined the invitation to submit an *amicus* brief but the court of appeal took judicial notice of "letters and memoranda which illuminate the federal government's position regarding the enforcement of the CSA with respect to medical marijuana collectives." *Id*. at 1086-1087.
[62] *Id*. at 1076.

approved research projects."[63] The CSA also "contains a provision setting forth the extent to which it preempts other laws."[64]

The court then described California voters' approval of the CUA, which added section 11362.5 to the Health and Safety Code, decriminalizing possession and cultivation of marijuana as applied to a patient or the patient's caregiver, "'who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.'"[65] The CSA did not preempt "simple decriminaliz[ation]."[66]

The MMP expanded the CUA's immunities, extending these to "possession for sale, transportation, maintaining a place for sale or use, and other offenses. Cultivation or distribution for profit, however, is still prohibited."[67] As noted, the MMP also provides arrest immunity by means of a voluntary identification card system. The court observed that the "statutory language provides that the card 'identifies a person authorized to engage in the medical use of marijuana.' (Health & Saf. Code, § 11362.71, subd. (d)(3).) It would be more appropriate to state that the card 'identifies a person whose use of marijuana is decriminalized.' As we discussed above, the CUA simply <u>decriminalized</u> the medical use of marijuana; <u>it did not authorize it</u>."[68]

The court next addressed the Attorney General's 2008 Guidelines, discussed in greater detail below.[69] In a footnote, the court added "[t]he Guidelines agree that California case authority has concluded that the CUA and MMPA are not preempted by the federal CSA. 'Neither [the CUA], nor the MMP[A], conflict with the CSA because, in adopting these laws, California did not "legalize" medical marijuana, but instead exercised the state's reserved powers to not punish certain marijuana offenses under state law when a physician has recommended its use to treat a serious medical condition.'"[70] Stated simply, the *Pack* court found that the CUA and MMP provide immunities to criminal prosecution under state law and not authorization to use marijuana in violation of the CSA.

The court then examined Long Beach's comprehensive regulation of medical marijuana collectives. It described the definition of a collective, the application, and application fee, and the lottery system for obtaining a permit.[71] In order to obtain a permit, a collective must demonstrate its compliance, and assure its continued compliance, with requirements such as odor absorbing ventilation and closed-circuit television monitoring. Collectives must agree to have representative samples independently analyzed by a laboratory to ensure they lack pesticides and contaminants. The "annual regulatory permit fee" begins at $10,000 for collectives numbering

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[63] *Id*. at 1077 (citing *United States v. Oakland Cannabis Buyers' Cooperative*, *supra*, 532 U.S. at pp. 489-490).
[64] *Id.*
[65] *Id*. at 1078 (quoting § 11362.5, subd. (d)).
[66] *Id.* (citing *Qualified Patients, supra*, 187 Cal.App.4th at 757).
[67] *Id*. at 1079 (citing § 11362.765).
[68] *Id.* at fn. 5 (emphasis added).
[69] *Id*. at 1082.
[70] *Id*. at 1081, fn. 12 (quoting Guidelines, below, at 3).
[71] The court pointed out that the ordinance contained no provision for a lottery system, but that no argument challenged the lottery on this basis. *Id*. at 1082, fn. 16.

between 4 and 500, then increases with the size of the collective.[72] "Violations of the ordinance are misdemeanors, as well as enjoinable nuisances per se."[73]

The court of appeal reviewed federal preemption law, noting that "'[t]here is a presumption against federal preemption in those areas traditionally regulated by the states. . . .'"[74] Examples of such matters include regulation of medical practices and state criminal sanctions for drug possession,[75] and "[m]ore importantly, a local government's land use regulation. . . ."[76]

As in *Qualified Patients*, the court quickly ruled out express and field preemption. Relying on *Wyeth v. Levine*,[77] involving the preemptive effect of the Federal Food, Drug, and Cosmetic Act ("FDCA"),[78] the court stated that the FDCA provided that "'a provision of state law would only be invalidated upon a "direct and positive conflict" with the FDCA.'"[79] The court found no distinction "between a federal statute which will only preempt those state and local laws which create a 'direct and positive conflict' (FDCA) and those which create 'a positive conflict . . . so that the two cannot consistently stand together' (CSA), and thus concluded "that the same construction applies here, and the federal CSA can preempt state and local laws under both conflict and obstacle preemption."[80]

To establish conflict preemption, one must show "that it is impossible to comply with the requirements of both laws."[81] "Since a person can comply with both the federal CSA and the City ordinance by simply not being involved in the cultivation or possession of medical marijuana at all, there is no conflict preemption."[82] The court did find one exception – the requirement that collectives have samples tested by an independent laboratory: "[T]his provision appears to *require* that certain individuals violate the federal CSA."[83] As a result, "[i]n this limited respect, conflict preemption applies."[84]

Relying on *Qualified Patients*, the court of appeal explained that "[o]bstacle preemption arises when the challenged laws stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[85] Determining that, "to Congress, *all* use of marijuana is

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[72] *Id*. at 1083.
[73] *Id*. at 1082-1084.
[74] *Id*. at 1087 (quoting *Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 938).
[75] *Id*. (citing *Qualified Patients*, *supra*, 187 Cal.App.4th at p. 757).
[76] *Id*. (citing *Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1169).
[77] (2009) 555 U.S. 555.
[78] 21 U.S.C. § 301 *et seq*.
[79] *Id*. at 1088-1089 (quoting *Wyeth, supra*, 129 S.Ct. at 1196).
[80] *Id*. at 1089.
[81] *Id*. at 1090 (citing *Wyeth*, *supra*, 129 S.Ct. at 1199).
[82] *Id*.
[83] *Id.* (emphasis in decision).
[84] *Id*. at 1091-1092.
[85] *Id*. at 1091.

recreational drug use, the combating of which is admittedly the core purpose of the federal CSA[,]" the court concluded that "an ordinance which establishes *a permit scheme* for medical marijuana collectives stands as an obstacle to the accomplishment of this purpose."[86]

The court explained the legal distinctions between "making an activity unlawful and making the activity lawful. An activity may be prohibited, neither prohibited nor authorized, or authorized." Thus, "[w]hen an act is prohibited by federal law, but neither prohibited nor authorized by state law, there is no obstacle preemption."[87] Simply by not criminalizing conduct that Congress has criminalized, state law does not present an obstacle to Congress's purposes. Thus, "the CUA is not preempted under obstacle preemption."[88] The court emphasized: "The CUA simply decriminalizes (under state law) the possession and cultivation of medical marijuana [citation]; it does not attempt to authorize the possession and cultivation of the drug."[89]

Long Beach's ordinance, however, "goes beyond decriminalization into authorization." Specifically, "the City determines which collectives are permissible and which collectives are not, and collects fees as a condition of continued operation by the permitted collectives." The court agreed with the federal government's position "that state and local laws which license the large-scale cultivation and manufacture of marijuana stand as an obstacle to federal enforcement efforts."[90]

The court went on to observe that certain provisions of the ordinance which simply identified prohibited conduct without regard to the issuance of a permit, such as closing hours, age restrictions, and no alcohol consumption on the premises, imposed limitations on collectives, and, thus, did not authorize activity prohibited by the CSA. Further location restrictions, imposed as a limitation on the operation of collectives, would not be federally preempted. The latter restrictions, however, appeared as part of the permit process, and the court left it to the trial court on remand to interpret whether those provisions could stand alone. The court thus granted the petition for writ of mandate.[91]

The *Pack* decision disagreed with the federal preemption analysis in *Qualified Patients* and *San Diego NORML*:

> The United States Supreme Court has already set forth the purposes of the federal CSA are "combating drug abuse and controlling the legitimate and illegitimate traffic in controlled substances with a particular concern of preventing "the diversion of drugs from legitimate to illicit[92] channels.

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[86] *Id*. at 1091-1092 (emphasis in decision).
[87] *Id.* at 1092.
[88] *Id*. at 1092-1093 (emphasis added).
[89] *Id*. (citing *Ross v. RagingWire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 926).
[90] *Id*. at 1093-1094 (emphasis added).
[91] *Id*. at 1097.
[92] *Id*. at 1092.

> For this reason, we disagree with our colleagues who, in two other appellate opinions [*Qualified Patients* and *San Diego NORML*], have implied that medical marijuana laws might not pose an obstacle to the accomplishment of the purposes of the federal CSA because the purpose of the federal CSA is to combat recreational drug use, not regulate a state's medical practices. While this statement of the purpose of the federal CSA is technically accurate, it is inapplicable in the context of medical marijuana. This because, as far as Congress is concerned, there is no such thing as medical marijuana. Congress has concluded that marijuana has no accepted medical use at all; it would not be on schedule I otherwise. Thus, to Congress, *all* use of marijuana is recreational drug use, the combating of which is admittedly the core purpose of the federal CSA.

In determining that all marijuana use is illegal recreational use under the CSA, including purported medical use under state law, the *Pack* decision is contrary to *San Diego NORML* and *Qualified Patients* which found no federal law preemption. This conflict will be resolved by the California Supreme Court when it issues its ruling on federal preemption in the *Pack* case.

There is a final observation about *Pack*. Even if the California Supreme Court decides there is no federal law premption in *Pack*, cities should be aware of recent federal enforcement of the CSA in California. In a footnote, the *Pack* court cautions public officials concerning their potential criminal liability for aiding and abetting a violation of the CSA by permitting marijuana activity.[93]

CALIFORNIA'S MEDICAL MARIJUANA LAWS

The questions of federal preemption represent only one aspect of the complex nature of California's medical marijuana laws. There are unanswered questions concerning the meaning and scope of the CUA and MMP. California courts have provided some guidance. We start with summaries of California Supreme Court decisions concerning medical marijuana, followed by a discussion of the Attorney General Guidelines and selected court of appeal cases, and how they impact local regulation of medical marijuana activities. We conclude the section with a discussion of the cases directly addressing municipal control of medical marijuana.

California Supreme Court Cases

People v. Mower

Prior to adoption of the MMP, the California Supreme Court decided *People v. Mower*, where the court held that the CUA does not confer immunity from arrest or complete immunity from prosecution.[94] The court determined that Section 11362.5, subdivision (d) "reasonably must be

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[93]"There may also be an issue of whether the ordinance *requires* certain City officials to violate federal law by aiding and abetting (or facilitating (21 U.S.C. § 843(b))) a violation of the federal CSA." *Pack, supra,* 199 Cal.App.4th 1070, fn 27.

[94](2002) 28 Cal.4th 457.

interpreted to grant a defendant a limited immunity from prosecution, which not only allows a defendant to raise his or her status as a qualified patient or primary caregiver as a defense at trial, but also permits a defendant to raise such status by moving to set aside an indictment or information prior to trial on the ground of the absence of reasonable or probable cause to believe that he or she is guilty."[95]

People v. Wright

Four years later in *People v. Wright*, the defendant was convicted of possession for sale and transportation of marijuana after the trial court declined to instruct the jury that the CUA provides a defense to the transportation charge.[96] The MMP was enacted while the case was pending. The court held that the MMP, which specifically provides an affirmative defense to the crime of transporting marijuana by individuals entitled to the protections of the CUA (§ 11362.765), applied retroactively to cases pending at the time of its enactment. The court further held that the trial court erred in declining to instruct the jury on an affirmative defense to the transportation charge based on the CUA. The error was harmless, however, because the jury found that the defendant possessed the marijuana with the specific intent to sell it, not for his own personal medical use. The court also held that a qualified patient is not required to identify himself or herself to police as a medicinal user of marijuana as a condition to asserting any defenses under the MMP.

Ross v. RagingWire Telecommunications

The first civil California Supreme Court decision was *Ross v. RagingWire Telecommunications.*[97] The plaintiff, a qualified patient who was terminated from defendant company after a pre-employment drug test revealed his marijuana use, alleged disability-based discrimination and wrongful termination. The court held that the defendant could not state a cause of action under the California Fair Employment and Housing Act ("FEHA") based on the company's refusal to accommodate his use of medical marijuana:

> [G]iven the Compassionate Use Act's modest objectives and the manner in which it was presented to the voters for adoption, we have no reason to conclude the voters intended to speak so broadly, and in a context so far removed from the criminal law, as to require employers to accommodate marijuana use."[98] The court's analysis included the observation that "[n]o state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law. [Citations[.][99]

The court also articulated the following important principle regarding oft-claimed rights to marijuana under the CUA:

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[95] *Id*. at 484.
[96] (2006) 40 Cal.4th 81.
[97] (2008) 42 Cal.4th 920.
[98] *Id.* 930.
[99] *Id.* at 926.

> [T]he only 'right' to obtain and use marijuana created by the Compassionate Use Act is the right of 'a patient, or. . . a patient's primary caregiver, [to] possess[ ] or cultivate[ ] marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician' without thereby becoming subject to punishment under sections 11357 and 11358 of the Health and Safety Code. [Citation.][100]

This decision is a further example of the court's consistent approach to medical marijuana issues; a narrow interpretation of of the statutory scheme.

People v. Mentch

In 2008, the California Supreme Court issued, perhaps, its most important decision on medical marijuana. In addressing a controversial provision of the MMP, the court provided guidance as to the limits and narrow scope of the medical marijuana laws. In *People v. Mentch*, the court addressed the statutory immunities from prosecution for a range of conduct related to marijuana.[101] The court's decision provides an analytical foundation for pending and future issues concerning the CUA and MMP.

The specific issue before the court was whether Mentch qualified as a primary caregiver. The court held that a person is not entitled to the CUA or MMP immunities from criminal prosecution if the person claiming to be a primary caregiver merely supplies marijuana to a qualified patient:

A person "whose caregiving consisted principally of supplying marijuana and instructing on its use, and who otherwise only sporadically took some patients to medical appointments" cannot qualify as a primary caregiver under the CUA, nor did the MMP provide him with any defense.[102]

> Mentch himself highlights the dog-chasing-its-tail absurdity of allowing the administration of medical marijuana to patients to form the basis for authorizing the administration of medical marijuana to patients in his attempts to distinguish this case from *People ex rel. Lungren v. Peron, supra*, 59 Cal.App.4th 1383, and *People v. Urziceanu, supra*, 132 Cal.App.4th 747. *Peron* and *Urziceanu*, he argues, involved only casual or occasional provision of medical marijuana; here, in contrast, he "consistently" provided medical marijuana, "consistently" allowed his patients to cultivate medical marijuana at his house, and was his five patients' "exclusive source" for medical marijuana. The essence of this argument is that the occasional provision of marijuana to someone is illegal, but the frequent provision of marijuana to that same person may be lawful. The vice in the approach of the cooperatives at issue in *Peron* and *Urziceanu* therefore evidently was not that they provided marijuana to their customers; it was that they did not do it enough.

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[100] *Id.* at 929.

[101] (2008) 45 Cal.4th 274.

[102] *Id*. at 278.

> Nothing in the text or in the supporting ballot arguments suggests this is what the voters intended. The words the statute uses—housing, health, safety—imply a caretaking relationship directed at the core survival needs of a seriously ill patient, not just one single pharmaceutical need. The ballot arguments in support suggest a patient is generally personally responsible for noncommercially supplying his or her own marijuana: "Proposition 215 allows patients to cultivate their own marijuana simply because federal laws prevent the sale of marijuana, and a state initiative cannot overrule those laws." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) argument in favor of Prop. 215, p. 60.) But as the focus is on the "seriously and terminally ill" (*ibid*.), logically the Act must offer some alternative for those unable to act in their own behalf; accordingly, the Act allows "'primary caregiver[s]' the same authority to act on behalf of those too ill or bedridden to do so." To exercise that authority, however, one must be a "primary"—principal, lead, central—"caregiver"—one responsible for rendering assistance in the provision of daily life necessities—for a qualifying seriously or terminally ill patient.
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> Fn. 7. The Act is a narrow measure with narrow ends. As we acknowledged only months ago, "'the proponents' ballot arguments reveal a delicate tightrope walk designed to induce voter approval, which we would upset were we to stretch the proposition's limited immunity to cover that which its language does not.'" The Act's drafters took pains to note that "neither relaxation much less evisceration of the state's marijuana laws was envisioned." We must interpret the text with those constraints in mind.

Stated simply, "[t]o qualify as such, however, the primary caregiver must do more than supply marijuana to the patient. He or she must be responsible for "rendering assistance in the provision of daily life necessities—for a qualifying seriously or terminally ill patient."[103]

The court's analysis was also instructive in interpreting the MMP's limited immunities: "As part of its effort to clarify and smooth implementation of the Act, the Program immunizes from prosecution a range of conduct ancillary to the provision of medical marijuana to qualified patients. (§11362.765.)"[104] It does so, however, in a carefully circumscribed manner. In rejecting the defendant's broad interpretation of the MMP and finding that he was not entitled to a defense arising from it, the California Supreme Court explained how the immunities afforded under Section 11362.765 are to be applied:

> While the Program does convey additional immunities against cultivation and possession for sale charges to specific groups of people, it does so only for specific actions; it does not provide globally that the specified groups of people may never be charged with cultivation or possession for sale. That is, the

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[103] *Id*.
[104] *Id*. at 290.

> immunities conveyed by section 11362.765 have three defining characteristics: (1) they each apply only to a specific group of people; (2) they each apply only to a specific range of conduct; and (3) they each apply only against a specific set of laws."[105]

To the extent that a defendant's conduct falls outside of the specifically immunized "range of conduct," he or she subjects himself or herself, like the defendant in *Mentch*, "to the full force of criminal law."[106]

> Finally, as relevant here, subdivision (b)(3) of section 11362.765 grants immunity to a specific group of individuals—those who assist in administering medical marijuana or acquiring the skills necessary to cultivate it—for specific conduct, namely, assistance in the administration of, or teaching how to cultivate, medical marijuana. This immunity is significant; in its absence, those who assist patients or primary caregivers in learning how to cultivate marijuana might themselves be open to prosecution for cultivation. (§ 11358.)
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> Here, this means Mentch, to the extent he assisted in administering, or advised or counseled in the administration or cultivation of, medical marijuana, could not be charged with cultivation or possession for sale "on that sole basis." (§ 11362.765, subd. (a).) It does not mean Mentch could not be charged with cultivation or possession for sale on *any* basis; to the extent he went beyond the immunized range of conduct, *i.e.*, administration, advice, and counseling, he would, once again, subject himself to the full force of the criminal law. As it is undisputed Mentch did much more than administer, advise, and counsel, the Program provides him no defense, and the trial court did not err in failing to instruct on it.[107]

The court's analysis of Section 11362.765, can also be applied to the similar language in Section 11362.775 that specific groups of people (qualified patients, persons with identification cards, and primary caregivers) shall not be subject to criminal sanctions under the enumerated Health and Safety Code sections <u>on the sole basis of</u> the conduct immunized in the statute. As shown below, this issue has arisen in yet another controversial court of appeal decision. This time, with direct consequences for cities.

People v. Kelly

The most recent California Supreme Court decision on medical marijuana is *Kelly.*[108] In that case, the court considered whether it was appropriate for the Legislature to have set limits on the amount of medical marijuana qualified individuals could possess under the MMP. The court held that, to the extent that the quantity limitations in Section 11362.77 restrict a defense under

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[105] *Id*.

[106] *Id*. at 292; see also *Kruse,* 177 Cal.App.4th at 1171.

[107] *Id*. At 291

[108] (2010) 47 Cal.4th 1008.

the CUA to a criminal charge of possessing or cultivating marijuana, the section impermissibly amends the CUA and is invalid. Section 11362.77 is not, however, void in its entirety insofar as it is still enforceable with respect to those who voluntarily participate in the identification card program to provide protection from arrest. Again, the decision illustrates how the court approaches medical marijuana issues by strictly interpreting the statutory scheme.

The California Supreme Court has recently granted review of three new civil medical marijuana cases concerning the scope of the cities' ability to regulate the land uses associated with medical marijuana activities. These cases will be explained in more detail below.

The Scope of Medical Marijuana Law – Attorney General Guidelines and Selected Court of Appeal Decisions

From the beginning, marijuana users have tested the limits of medical marijuana law, and the courts of appeal have sometimes responded with decisions attempting to clarify those laws. Because issues of municipal authority over medicinal marijuana depend, in part, upon decisions on the scope of permissible conduct under the law, we provide a summary of selected cases. We look first at the controversial guidelines issued by the California Attorney General in 2008.

Attorney General Guidelines

In 2008, then Attorney General Jerry Brown published Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use ("Guidelines"). The Guidelines address various issues surrounding medical marijuana, including collective and cooperative operations. The Guidelines:

- Limit lawful distribution activities to true agricultural co-ops and collectives that provide crops to their members;

- Prohibit collectives and cooperatives from profiting from the sale of marijuana;

- Allow members to be reimbursed for certain services (including cultivation), provided that the reimbursement is limited to the amount to cover overhead costs and operating expenses;

- Allow members to reimburse the collective for marijuana that has been allocated to them (See Section 11362.765). Marijuana may be provided free to members, provided in exchange for services, allocated based on fees for reimbursement only, or any combination of these; and

- Declare that distribution of medical marijuana is subject to sales tax and requires a seller's permit from the State Board of Equalization.

Unlike an agricultural cooperative, a "collective" is not defined under state law, but it similarly facilitates agricultural collaboration between members. A co-op, by definition, files articles of incorporation and must abide by certain rules for its organization, elections and distribution of earnings. A co-op's earnings must be used for the general welfare of its members or be distributed equally in the form of cash, property, services, or credit. Both co-ops and collectives are formed for the benefit of their members and must require membership applications and verification of status as a caregiver or qualified patient; they must also refuse membership to those who divert marijuana for non-medical use. Collectives and co-ops must acquire marijuana from and allocate it only to constituent members. Storefront dispensaries that deviate from these Guidelines are likely outside the scope of state law.

The Guidelines have received mixed reviews from advocates and opponents. In 2011, Attorney General Kamala Harris released a draft revision to the Guidelines. Of interest to the Attorney General's office were issues such as collective operations, edible products, profit making businesses, seizure of marijuana, cultivation, delivery/transportation and constitutional issues.

At the League of California Cities and other stakeholders' urgings, the Attorney General has declined to amend the regulations until the Courts and the Legislature take some pointed action to establish clear rules governing access to medical marijuana.[109] The consensus from all the stakeholders is that the law needs to be reformed and simplified to define the scope of the cultivation right, whether dispensaries and edible marijuana products are permissible and how marijuana grown for medicinal use may be lawfully transported.

The Attorney General, in her recent letter to the Legislature, acknowledged that the Guidelines are outdated and that California's medical marijuana laws have created considerable confusion and public safety issues.[110] The Guidelines have been highly criticized by medical marijuana opponents, law enforcement, and others, yet courts have found that they are entitled to great weight and often rely on them to resolve medical marijuana issues.

Despite confusion created by the Guidelines, case law is clear that the voter-passed initiative did not authorize the sale of marijuana, even for medical purposes. Attempts to broaden the law's immunity so as to provide easier access through purely commercial distribution have, for the most part, been rejected. Although some suggest the CUA "must be interpreted to allow 'some manufacture and distribution of marijuana for medicinal purposes' lest the statutory immunity be made impractical," the ballot materials "show that Proposition 215 was narrowly drafted to make it acceptable to voters and to avoid undue conflict with federal law."[111] Access to marijuana under the CUA was limited to individual cultivation by qualified patients for their own medical purposes and by primary caregivers on behalf of the patient(s) they cared for.

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[109] See December 21, 2011 letter from Kamala Harris to Mike Kasperak, President, League of California Cities

[110] <http://ag.ca.gov/cms_attachments/press/pdfs/n2600_letter_1.pdf?>

[111] *People v. Galambos* (2002) 104 Cal.App.4th 1147, 1168.

After the passage of the MMP and in reliance upon the Guidelines, medical marijuana advocates began to argue that Section 11362.775 authorizes collective distribution of medical marijuana in the form of storefront facilities known as dispensaries, collectives, and cooperatives; the opponents continue to assert that the storefront sale of marijuana is patently illegal under federal law, not expressly authorized under state law, and should not be tolerated or permitted.

As the courts worked to interpret the scope of the voters' intent in the CUA, and the scope of MMP cumulatively, two things happened. First, the medical marijuana industry learned to tailor its activities to what was "arguably" within the scope of legal conduct, and these activities quickly evolved into a statewide industry of sorts for growing, transporting and distributing medical marijuana. That is not to say that all medical marijuana activity is part of this larger "industry;" some medical marijuana is cultivated locally by local patients and their caregivers. But there is no denying that the medical marijuana industry has gone far beyond what was originally envisioned under the CUA or MMP. As the industry has proliferated, so have the complexities of the legal issues. An examination of selected appellate decisions in the non-municipal control area provides some understanding and guidance that is often helpful in determining how courts look at medical marijuana issues in the municipal regulation context.

People v. Trippet

In *Trippet*, the defendant was convicted of possession and transportation of more than two pounds of marijuana. The court of appeal held that, even though the CUA did not expressly provide patients and caregivers with a defense to marijuana transportation charges, an implied defense might apply if the "quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs."[112]

Of note, the court's formulation of the quantity standard for possession of marijuana ("reasonably related to the patient's current medical needs") under the CUA was later approved by the California Supreme Court in *Kelly*. The court noted that "both the statute's drafters and the proponents took pains to emphasize that, except as specifically provided in the proposed statute, neither relaxation much less evisceration of the state's marijuana laws was envisioned."[113] This language was later quoted approvingly by the California Supreme Court in *Mentch* in support of its conclusion that "[t]he [Compassionate Use] Act is a narrow measure with narrow ends."[114]

People ex rel. Lungren v. Peron

That same year, the court of appeal decided *Peron*.[115] The court held that defendant operators of the Cannabis Buyers' Club in San Francisco did not qualify as primary caregivers because they did not consistently assume responsibility for the health or safety of the thousands of people to whom the club furnished marijuana. The court rejected the argument that the CUA legalized the

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[112](1997) 56 Cal.App.4th 1532, 1550-1551.
[113]*Id*. at 1546.
[114]45 Cal.4th 274 at 286, fn. 7.
[115](1997) 59 Cal.App.4th 1383.

sale of marijuana, even on a non-profit basis and concluded that a commercial enterprise does not qualify as a primary caregiver.

As had the court in *Trippet,* the *Peron* court relied, in part, on the ballot materials in support of Proposition 215, which included the statement that the police could still arrest those who grow too much or try to sell marijuana.[116] Even after the passage of the MMP, this analysis still resonates with those who question the legality of the commercial dispensary model. Foreshadowing the MMP, the court concluded that a legitimate primary caregiver could care for more than a single patient, provided the consistent caregiving requirement is satisfied and, under the proper circumstances, a qualified patient could reimburse the caregiver for his or her actual expenses incurred in cultivating and furnishing marijuana for the patient's medical treatment.

People v. Galambos

In *Galambos*, the court affirmed the defendant's conviction for marijuana cultivation, rejecting his contention that the CUA immunized his cultivation activities as a "supplier" to an Oakland cooperative.[117] The court, following earlier case law, including *Trippet* and *Peron*, also rejected the assertion that the limited immunity afforded to patients and caregivers "necessarily implies...protection for those who provide medicinal cannabis to patients and/or caregivers."[118] Despite defendant's suggestion that the CUA "must be interpreted to allow 'some manufacture and distribution of marijuana for medicinal purposes' lest the statutory immunity be made impractical," the ballot materials "show that Proposition 215 was narrowly drafted to make it acceptable to voters and to avoid undue conflict with federal law."[119] The court also rejected defendant's medical necessity defense.

People v. Urziceanu

Urziceanu was the first decision to address Section 11362.775 of the MMP, which provides limited immunity related to collective cultivation of marijuana.[120] The case involved a qualified patient defendant who cultivated marijuana and distributed it from his home to the members of his cooperative called "FloraCare." Some of the members, comprised of qualified patients and primary caregivers, participated in the cultivation process. The court of appeal reversed defendant's conviction for conspiracy to sell marijuana and remanded the case for a new trial on that count.

In Part I of the court's discussion, the court held that the defendant had no defense under the CUA: "To the extent that the authors of the initiative wished to include these types of organizations [private enterprises and collectives] in its ambit, they could have expressly authorized their existence in the statute."[121] The court found support for this view in a comprehensive review of relevant case law to date, which had established that the CUA did not

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[116] *Id*. at 1393-1394.
[117] (2002) 104 Cal.App.4th 1147.
[118] *Id*. at 1165-1166.
[119] *Id.* at 1168.
[120] (2005) 132 Cal.App.4th 747.
[121] *Id.* at 769.

authorize a cannabis club to sell or give away marijuana to qualified patients. Though the court held that the defendant had no defense under the CUA, it found, in part II of its discussion, that Section 11362.775 did provide a potential defense:[122]

> [Section 11362.775] represents a dramatic change in the prohibitions on the use, distribution, and cultivation of marijuana for persons who are qualified patients or primary caregivers. Its specific itemization of the marijuana sales law indicates it contemplates the formation and operation of medicinal marijuana cooperatives that would receive reimbursement for marijuana and the services provided in conjunction with the provision of that marijuana. Contrary to the People's argument, this law did abrogate the limits expressed in the cases we discussed in part IA which took a restrictive view of the activities allowed by the Compassionate Use Act.[123]

It is somewhat difficult to square this analysis with the California Supreme Court's subsequent analysis in *Mentch*, discussed above. The "itemization of the marijuana sales law" in Section 11362.775 is part of the enumeration of other criminal laws related to marijuana (prohibiting possession for sale, transportation, etc.) for which the "specific group of people" (qualified patients, caregivers, and those with identification cards) enjoy immunity based solely on a "specific range of conduct" (associating to collectively or cooperatively cultivate marijuana for medical purposes). Put another way, the criminal activity encompassed by the marijuana sales law and other marijuana laws is not the "immunized range of conduct" in Section 11362.775. Rather, the specified individuals shall not be subject to prosecution under those laws, <u>solely on the basis</u> of associating to collectively or cooperatively cultivate. It is important to note that *Mentch's* three-pronged analytical approach to application of the additional immunities afforded under the MMP arguably compels this conclusion. Subsequent decisions by the appellate courts, however, have not adopted this analytical approach.[124]

People v. Hochanadel

In *Hochanadel*, the court of appeal held that the trial court erred in quashing a search warrant for a storefront dispensary because the officers had probable cause to believe that the defendant owners of the dispensary were not in compliance with the CUA.[125] The court held that a storefront medical marijuana dispensary did not qualify as a primary caregiver within the meaning of the CUA or MMP. The court also noted that defendants <u>might</u> have an affirmative defense under Section 11372.775 if their dispensary ("Hempies") was operated as a cooperative or collective, as such entities were described in the Attorney General Guidelines[126]—but the court "express[ed] no opinion as to whether defendants were in substantial compliance with [S]ection

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[122]The MMP was enacted while this case was pending.

[123]132 Cal.App.4th at 785.

[124]See *People v. Colvin* (2012) 203 Cal.App.4th 1029; *City of Lake Forest v. Evergreen Holistic Collective* (2012) 203 Cal.App.4th 1413.

[125](2009) 176 Cal.App.4th 997.

[126]California Attorney General's Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use, August 2008 (discussed in detail below).

11362.775 and the Guidelines, and whether, as in *Urziceanu*, there is sufficient evidence for defendants to raise [S]ection 11362.775 as a defense at trial."[127]

Although the court did not decide whether the defendants' operation fell under the statute's immunity, it did conclude that Section 11362.775 did not constitute an impermissible amendment of the CUA. Rather, the court reasoned, "it identifies groups that may lawfully distribute medical marijuana to patients under the CUA. Thus, it was designed to implement, not amend the CUA."[128]

Both *Urziceanu* and *Hochanadel* interpret Section 11362.775 as allowing distribution and sales in the form of "reimbursement" or "compensation" to collectives and cooperatives, with the latter decision relying heavily on the Guidelines. The express immunity in the MMP for receipt of compensation is limited, in a different section (§11362.765), to primary caregivers, and the "services" they provide to "an eligible qualified patient or person with identification card to enable that person to use marijuana under this article, or for payment for out-of-pocket expenses incurred or provides those services, or both...."[129] "On the sole basis of that fact," a primary caregiver who receives such compensation shall not be "subject to prosecution or punishment under Section 11359 [possession of marijuana for sale] or 11360 [transportation, sale, giving away, etc. of marijuana]."[130] In allowing compensation to primary caregivers, the Legislature did not intend "this section [to] authorize any individual or group to cultivate or distribute marijuana for profit."[131] A dispensary, regardless of its manner of formation, does not qualify as a primary caregiver. Not only the statutory definition of the term (which refers to an "individual," not entity, with particular caretaking responsibilities) but a long line of case law, culminating in the California Supreme Court's decision *Mentch*, has conclusively established this proposition.

Notably, Section 11362.765 does not permit even individual primary caregivers to sell marijuana to their patients. Rather, in subdivision (b)(2), immunity from prosecution is limited to "a designated primary caregiver who transports, processes, administers, delivers, or gives away marijuana for medical purposes, in amounts not exceeding those established in subdivision (a) of Section 11362.77, only to the qualified patient of the primary caregiver, or to the person with an identification card who has designated the individual as primary caregiver."

Section 11362.775, on the other hand, makes no mention of compensation or distribution relative to associating to collectively or cooperatively cultivate marijuana for medical purposes. Thus, it can be argued that a dispensary or collective engaged in commercial distribution of marijuana to qualified patients is not entitled to immunity under Section 11362.775. Legal analysts have taken this position.[132] Perhaps, the California Supreme Court, in one or more of the three medical

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[127] 176 Cal.App.4th at 1018.

[128] *Hochanadel, supra*, at 1013.

[129] §11362.765(c)

[130] *Id.*

[131] §11362.765(a)

[132] See "Room for Abuse: A Critical Analysis of the Legal Justification for the Marijuana Storefront Dispensary" by Chris Lindberg (2010) *40 Sw. L. Rev.* 59.

marijuana cases under review and discussed below, will decisively address and resolve this critical issue to clarify the scope of permissible distribution of medical marijuana under state law.

People v. Colvin

Except as otherwise provided by law, the transportation of marijuana is illegal under Section 11360. Depending on the amount transported, with 28.5 grams being the dividing line, it can be either a misdemeanor or a felony. The courts have provided clear guidance regarding what it means to "transport" a controlled substance: "Transportation of a controlled substance is established by carrying or conveying a usable quantity of a controlled substance with knowledge of its presence and illegal character."[133] "The crux of the crime of transporting is movement of the contraband from one place to another."[134] "The term 'transport' includes moving illegal drugs from one place to another, even by bicycle."[135] Following the passage of the CUA and MMP, the act of transporting marijuana became subject to certain limited defenses under state law.

The CUA expressly provides a defense to prosecution for only two criminal offenses: possession of marijuana and cultivation of marijuana. The MMP provides qualified patients and primary caregivers with additional immunities against prosecution for marijuana offenses, including transportation charges, based on certain conduct. The CUA's "implied defense" to a marijuana transportation charge (§11360), recognized by the court of appeal in *Trippet*, was codified in Section 11362.765. That provision authorizes transportation of marijuana by a qualified patient only for her own personal medical use and by a primary caregiver only for delivery to his own qualified patient(s).[136]

Unlike Section 11362.765, Section 11362.775 does not expressly immunize conduct related to transportation. In *Colvin*, the Second District Court of Appeal reversed the conviction of a defendant on transportation and possession charges based on Section 11362.775.[137]

The defendant owned and operated two dispensaries in Los Angeles with over 5,000 members, and was caught transporting marijuana between the two locations. The defendant, a qualified patient, testified that approximately fourteen of the dispensaries' thousands of members grew marijuana, and the cultivation took place in various locations. The trial court held that Colvin was not entitled to a defense under Section 11362.775 as "the transportation … had nothing to do with the cultivation process," and convicted him of all counts.

The court of appeal reversed, concluding, based on the trial court's finding that he was a qualified patient and operating a "legitimate" dispensary, that the defendant was entitled a

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[133] *People v. Meza* (1995) 38 Cal.App.4th 1741, 1746.

[134] *People v. Kilborn* (1970) 7 Cal.App.3d 998, 1003.

[135] *People v. LaCross* (2001) 91 Cal.App.4th 182, 185.

[136] §11360(b)(1) -(b)(2).

[137] (2012) 203 Cal.App.4th 1029.

defense under Section 11362.775. The court reviewed the Guidelines which provide that "collectives" and "cooperatives" may be formed under Section 11362.775. In the court's view, the Guidelines contemplated cooperatives like the one operated by defendant and that, as a "cultivator" of marijuana, he could transport marijuana to a cooperative.

In its analysis of Section 11362.775, the *Colvin* court rejected the Attorney General's more narrow reading of the statute and (somewhat ironically) based its interpretation on the Guidelines. The Attorney General argued that Section 11362.775 "does not condone 'a large-scale, wholesale-retail marijuana network' like Holistic," with its 5,000 members. Rather, the cultivation under this statute should entail "some united action or participation among all those involved, as distinct from merely a supplier-consumer relationship," some "'modicum of collaboration' in which qualified patients and caregivers come together in some way."[138]

The court stated that nothing in the statute or its legislative history supported this interpretation and noted there was no dispute that Colvin was a "qualified patient" or that Holistic "is comprised of other qualified patients, persons with valid identification cards or primary caregivers."[139] The dispute involved "what it means to 'collectively or cooperatively' cultivate medical marijuana. Looking at cooperatives in general, the court noted that these organizations "provide services for use primarily by their members." California law also allows for agricultural and consumer cooperatives. The trial court found that Holistic was a "legitimate" dispensary, "which implies that the court believed Holistic was complying with the appropriate laws."[140]

The Attorney General, the court observed, did not claim otherwise. Rather, the Attorney General maintained that to obtain the protection of Section 11362.775, "a medical marijuana cooperative . . . must establish that some number of its members participate in the process in some way. The Attorney General does not specify *how* many members must participate or in *what* way or ways they must do so, except to imply that Holistic, with its 5,000 members and 14 growers, is simply too big to allow any 'meaningful participation in the cooperative process...".[141] The court rejected this interpretation, which "would impose on medical marijuana cooperatives requirements not imposed on other [non-medical marijuana membership-based] cooperatives."[142]

The court noted that Holistic complied with the Guidelines by operating a "closed system," distributing to its members only marijuana grown by its members, and complied with other Guidelines as well: "To the extent these Guidelines have any weight, they contemplate cooperatives like Holistic."[143] The court further observed that if it were to follow the Attorney General's "suggested requirement, "the likely result would be "to limit drastically the size of medical marijuana establishments." That may well have been the Legislature's intent, but

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[138] *Id*. at 1037.
[139] 203 Cal.App.4th at 1039-1041.
[140] *Id*.
[141] *Id*. (emphasis in original).
[142] *Id*. at 1039.
[143] *Id*. at 1040-1041.

"nothing on the face of Section 11362.775, or in the inherent nature of a cooperative or collective, requires some unspecified number of members to engage in unspecified 'united action or participation' to qualify for the protection of section 11362.775."[144] In fact, "imposing the Attorney General's requirement would, it seems to us, contravene the intent of the MMP by limiting patients' access to medical marijuana and leading to inconsistent applications of the law."[145] The court thus concluded that Section 11362.775 applied and reversed the trial court judgment on both the transportation and possession counts accordingly.

Several aspects of the *Colvin* decision are worthy of note. It was decided by the same division of the Second District Court of Appeal that issued the decision in *Pack v. City of Long Beach,* which concluded that a local ordinance which permits and regulates medical marijuana collectives (whether "legitimate" under state law or not) is preempted by federal law. Although the validity of local regulations was not directly before the court in *Colvin*, the court concluded that the defendant's dispensary was "legitimate" although it was not contested by the Attorney General. The complete absence of federal law from the discussion, when the same court had firmly rejected the notion that local regulations can "legitimize" any medical marijuana dispensary in violation of federal law, is striking.

Secondly, the *Colvin* court framed the issue as: "If Colvin, a qualified patient was operating a legitimate medical marijuana cooperative, then he 'shall not solely on the basis of that fact be subject to state criminal sanctions under' section 11360 (transportation of marijuana)." Viewed through the prism of the *Mentch* analysis (see above), this issue framing identifies the operation of a "legitimate medical marijuana cooperative" as the conduct that triggers immunity under Section 11362.775. It can be argued that the "specific range of conduct" " which triggers the statutory immunity is the act of "associat[ing] within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes...".[146]

Finally, *Colvin* is somewhat at odds with a decision issued less than a week later, *City of Lake Forest v. Evergreen Holistic Collective* ("*Evergreen*")[147] (discussed extensively below). *Evergreen* interpreted the immunity conferred by Section 11362.775 to apply only to conduct, including transportation, which occurs at the cultivation site. *Colvin*, on the other hand, did not limit its interpretation of the transportation immunity in such a manner, seeming to hold that unlimited quantities of marijuana may be transported to and from "legitimate" cultivation sites/dispensaries. In this sense, the cases are difficult to reconcile.

People v. Wayman

Another recent court of appeal decision, *Wayman,* found that transportation of medical marijuana by a qualified patient is only lawful when the transportation is reasonably related to the patient's current medical needs.[148] Following *Trippet*, the court held that the amount of marijuana

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[144] *Id*. at 1041.

[145] *Id*.

[146] §11362.775

[147] (2012) 203 Cal.App.4th 1413.

[148] (2010) 189 Cal.App.4th 215.

involved, as well as the method, timing, and distance of the transportation, are determinative factors when deciding whether the transportation of marijuana is consistent with personal medical use and, thus, comports with the CUA.

The court upheld the defendant's conviction on DUI, transportation, and possession for sale charges because the marijuana was found separated in individual labeled baggies inside a backpack in the vehicle's trunk, and the jury was correctly instructed regarding the law governing transportation of marijuana. Although the defendant possessed a physician's recommendation to use marijuana, the court was unsympathetic to his explanation that he kept his supply in his car because he lived with his mother and she didn't want marijuana in the house. "It is one thing to give medical marijuana users the right to transport marijuana from the place they obtain it to the place they intend to use it. [Citation omitted.] But it is quite another to say that qualified users have an unfettered right to take their marijuana with them wherever they go, regardless of their current medical needs. The medical marijuana laws were never intended to be 'a sort of "open Sesame" regarding the possession, transportation and sale of marijuana in this state. (*Trippet*, *supra*, 56 Cal.App.4th at p. 1546, fn. omitted.)'"[149] The *Wayman* court also rejected the argument that Section 11362.765, subdivision (b)(1) immunized the defendant's conduct, stressing that the provision requires the transportation to be for the patient's personal medical use. In summing up, the court declared "nothing in the law allows a user to store his entire marijuana supply in his car and transport it wherever he goes, just to appease his mother."[150]

The Guidelines address transportation briefly, but do not analyze competing views of the scope of permissible conduct, including transportation, under Section 11362.775. For instance, the Guidelines state that collectives and cooperatives "should acquire marijuana only from their constituent members because only marijuana grown by a qualified patient or his/her primary caregiver may lawfully be transported by, or distributed to, other members of the collective."[151] "Collectives may cultivate and transport marijuana in aggregate amounts tied to their membership numbers."[152] "Any patient or caregiver exceeding individual possession guidelines should have supporting records readily available when transporting a group's marijuana."[153] In light of the current Attorney General's views regarding the continuing relevance of the Guidelines, more recent case law interpreting the MMP, and the fact that the Guidelines are not binding, these suggestions should not be relied upon as "the law."

As the *Colvin* case underscores, transportation of marijuana by members of cooperatives and collectives will likely be defended on the grounds that it is "authorized" by Section 11362.775 and the Guidelines. The *Colvin* court embraced this argument to the extent that the transportation was to a "legitimate" cooperative, but the *Evergreen* court recently held that all transportation must occur on site at the cooperative or collective. Thus, while cooperatives and

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[149] 189 Cal.App. 4th at 223
[150] *Id.*
[151] Guidelines, p.10
[152] *Id.*
[153] *Id.*

collectives may argue that they cannot always distribute marijuana to their members at the same location where it is cultivated, making transportation an integral part of their operations, *Evergreen*'s interpretation of Section 11362.775 (and, of course, even stricter readings of the statute) would not allow this conduct.

Another distinct transportation issue related to medical marijuana is the phenomenon of mobile dispensaries. "Mobile dispensary" generally refers to a marijuana delivery service for qualified patients. They typically offer various strains of marijuana and edible products for sale online and deliver to purchasers within a certain geographical area. Like storefront dispensaries, mobile dispensaries are not specifically authorized by state law and, while they may be businesses organized as collectives or cooperatives, they are by and large unregulated. In cities with dispensary bans, they may be viewed by dispensary operators and their clients as a convenient way to circumvent local law, with less overhead costs and risks.

Clearly, the operators of mobile dispensaries are not immunized from prosecution for transportation of marijuana under Section 11362.765. That statute, as stated above, only applies to qualified patients transporting marijuana for their own personal medical use and individual primary caregivers transporting marijuana to the qualified patient(s) they care for. To the extent that these "dispensaries on wheels" claim protection under Section 11362.775, it seems they are on shaky legal ground. A marijuana delivery service is a far cry from "associat[ing]...in order collectively or cooperatively to cultivate marijuana for medical purposes...".[154] Nonetheless, mobile dispensaries continue to operate "under the radar" in many parts of the state where they often manage to elude local regulations and law enforcement.

In sum, the legality of transportation is not a foregone conclusion and depends on a number of factors. In addition to the specific transportation immunities under Section 11362.765, the courts will likely continue to explore the nature and scope of immunity under Section 11362.775.

LAND USE REGULATION AND LOCAL CONTROL

Perhaps the most controversial issue, the one that has received the most judicial attention of late, is how cities should regulate the land uses and activities associated with medical marijuana.[155]

"Land use regulation in California historically has been a function of local government under the grant of police power contained in article XI, section 7 of the California Constitution."[156] Article XI, section 7 provides that, "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." The California Supreme Court "has recognized that a city's or county's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state."[157] "The power of cities and counties to zone land use in accordance with local conditions

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[154]Health and Saf. §11362.775

[155]The authors included more detail on the procedural aspects of these cases, as other City Attorneys may find the information useful in dealing with similar regulation and enforcement issues.

[156]*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151.

[157]38 Cal.4th at p. 1151 (quoting *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782).

is well entrenched."[158] "In enacting zoning ordinances, the municipality performs a legislative function, and every intendment is in favor of the validity of such ordinances."[159]

With those general principals in mind, we review the various decisions concerning medical marijuana regulation at the local level. Looking at the *published* case law as it exists today, cities have a good argument that medical marijuana activities can be regulated (and perhaps banned) using their local land use authority (although not every court has agreed).

City of Corona v. Naulls

The court of appeal in *Naulls*, affirmed the issuance of a preliminary injunction to close Ronald Naulls' marijuana distribution facility, which was operating without a valid zoning designation.[160] The court held that "where a particular use of land is not expressly enumerated in a city's municipal code as constituting a *permissible* use, it follows that such use is *impermissible*." Accordingly, "Naulls, by failing to comply with the City's various procedural requirements, created a nuisance *per se*, subject to abatement in accordance with the City's municipal code."[161]

Naulls had applied for a license to operate his business, the Healing Nations Collective ("HNC") within the City of Corona. The application alerted Naulls that all businesses must comply with applicable city codes. Naulls falsely described his business as a "miscellaneous retail establishment" that would sell "miscellaneous medical supplies." The City issued him a business permit on this basis. He later admitted to Corona city staff that HNC was a marijuana distribution facility.[162]

The City Attorney later informed Naulls on multiple occasions that his business license was invalid because "he had falsified his application, marijuana distribution facilities were not a permitted use under the City's municipal code and Specific Plan, and HNC failed to comply with the procedures required for establishing a 'similar use' zoning designation." Naulls did not comply. [163] The City sued, alleging his operation of HNC was a public nuisance in violation of Civil Code section 3479, "in that Naulls operated HNC in contravention of the City's business license and zoning laws.

The City obtained a preliminary injunction preventing Naulls from operating HNC pending trial. The City's planning director attested that "because a medical marijuana dispensary was not a permitted use in any of the zoning areas within the Specific Plan, any other specific plan, or any of the Code's zoning provisions, Naulls would have been required to amend the Specific Plan to include his requested use."[164] The trial court granted the City's motion, concluding that, because any non-enumerated land use was presumptively prohibited under the City's municipal code,

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[158] *IT Corp. v. Solano County Bd. Of Supervisors* (1991) 1 Cal.4th 81, 89.
[159] *Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 460.
[160] (2008) 166 Cal.App.4th 418.
[161] *Id*. at 433.
[162] *Id*. at 420-21.
[163] *Id*. at 421- 422.
[164] *Id*. at 423.

Naulls falsely procured his license and avoided the available Specific Plan amendment procedure; thus, Naulls' operation of HNC constituted a nuisance *per se.*[165]

The court of appeal upheld the trial court's issuance of the preliminary injunction, opining that "Naulls did not comply with the City's requirements, failing to take any steps to obtain approval before opening his doors for business. As a consequence, operation of HNC violated the City's municipal code and, as such, constituted a nuisance per se."[166] Importantly, the court of appeal rejected Naulls' argument that the trial court erred in finding that any use not enumerated in the City's zoning code was presumptively prohibited. The City's Specific Plan listed all permissible and impermissible uses within each zoning district; neither selling nor distributing medical marijuana was among them. A prospective licensee could apply for a Planning Commission determination of the proper zoning, if any, for such miscellaneous uses. Naulls thus needed to obtain a "similar use" determination or an amendment to the Specific Plan. He did neither. The court concluded:

> [B]y evading the procedures which applied to his situation, and with knowledge – as provided to him by a City representative both verbally and in writing – that a medical marijuana dispensary was not a permitted use, [Naulls] began operating [Healing Nations] in violation of various sections of the City's municipal code … Naulls and [Healing Nations] created a nuisance per se pursuant to section 1.08.020, subdivision (B).[167]

Thus, traditional zoning prevailed.

City of Claremont v. Kruse

In *Kruse*, the court specifically analyzed whether there was express or implied preemption by the CUA or the MMP that would prevent local regulations, such as zoning laws, from restricting the establishment of marijuana distribution facilities.[168] The court of appeal held:

> Zoning and licensing are not mentioned in the findings and declarations that precede the CUA's operative provisions. Nothing in the text or history of the CUA suggests it was intended to address local land use determinations or business licensing issues. *The CUA accordingly did not expressly preempt the City's enactment of the moratorium or the enforcement of local zoning and business licensing requirements*.[169]

The court's holding was not based solely on the existence of the city's temporary moratorium. Rather, the court plainly based its decision on the city's zoning and licensing authority found in Claremont's municipal code. Further, the court held that:

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[165] *Id*. at 424-25.
[166] *Id*. at 428.
[167] *Id*.at 432.
[168] (2009) 177 Cal.App.4th 1153, 1172-1176.
[169] 177 Cal.App.4th at 1175 (emphasis added).

> Neither the CUA nor the MMP compels the establishment of local regulations to accommodate medical marijuana dispensaries. The City's enforcement of its licensing and zoning laws . . . do not conflict with the CUA or the MMP.[170]

In *Kruse*, the marijuana distribution facility at issue violated Claremont's local municipal code and was therefore held to constitute a nuisance *per se*. The court stated, "[w]e find *Naulls* persuasive here. Kruse's operation of a medical marijuana distribution facility without the City's approval constituted a nuisance per se under section 1.12.010 of the City's municipal code and could properly be enjoined." Interestingly, the court also said that the operation of the marijuana distribution facility was properly enjoined as a nuisance *per se* because, "*notwithstanding California's medical marijuana laws*, the cultivation and distribution of marijuana remains illegal under the federal Controlled Substances Act."[171]

County of Los Angeles v. Hill

The *Hill* decision addressed the local regulation issue.[172] Martin Hill and the Alternative Medicinal Collective of Covina (together, "Hill") appealed from an order granting a preliminary injunction prohibiting them from dispensing marijuana anywhere in the unincorporated area of Los Angeles County without first obtaining the necessary licenses and permits that County ordinances required.[173] Hill contended that the County's ordinances were preempted by state law, inconsistent with state law, and unconstitutionally discriminated against medical marijuana dispensaries ("MMDs"). The court of appeal rejected the contentions and affirmed the injunction.

The court observed that, while the appeal was pending, the Legislature enacted Section 11362.768, "which specifically recognizes and partially regulates medical marijuana 'dispensaries' having 'a storefront or mobile retail outlet which ordinarily requires a local business license.'"[174] The court quoted the provision prohibiting medical marijuana entities or individuals from locating within a 600-foot radius of a school. (*Ibid*.) The court also quoted subdivisions (f) and (g), which provided: "'(f) Nothing in this section shall prohibit a city, county or city and county from adopting ordinances or policies that further restrict the location or

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[170] *Id*. at p. 1176.

[171] *Id*. at p. 1164 (emphasis added).

[172] (2011) 192 Cal.App.4th 861.

[173] The County adopted ordinances regulating medical marijuana dispensaries (MMD) in unincorporated areas of the County in June 2006. Notably, Los Angeles County Code ("LACC") section 22.56.196 provided: "The establishment and operation of any [MMD] requires a conditional use permit in compliance with the requirements of this section." (LACC, § 22.56.196, former subd. B.) *Id*., at p. 865.) The section also restricted dispensaries from locating within a 1,000 foot radius of "schools, playgrounds, libraries, places of religious worship, child care facilities, and youth facilities. . . ." (LACC, § 22.56.196, former subd. E.1.a.) Also, an MMD needed a business license to lawfully operate. (LACC, § 7.55.020.) The court added: "The County's zoning ordinance, LACC 22.28.110, states that an MMD may operate in a C-1 zone 'subject to the requirements of section 22.56.196' discussed above." 192 Cal.App.4th at 865. Furthermore, "County ordinances applicable to all businesses provide that a use that does not comply with the zoning code is a public nuisance (LACC § 22.60.350) and authorize the County to seek injunctions against businesses operating in violation of the zoning laws. (LACC, §§ 7.04.340, 22.60.350)."

[174] 192 Cal.App.4th at 866.

establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider. (g) Nothing in this section shall preempt local ordinances, adopted prior to January 1, 2011, that regulate the location or *establishment* of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider.'" [175] [176]

The court rejected Hill's argument that the County ordinances were totally preempted by the CUA and MMP because the two acts occupied the field of medical marijuana regulation, "because section 11362.83, a part of the [MMP], specifically states: 'Nothing in this article shall prevent a city or other local governing body from adopting and enforcing laws consistent with this article.'" [177] As for Hill's contention that the County's regulations "are invalid because they are inconsistent with state law[,]" the court similarly disagreed. Again, the court relied on section 11362.83 as the Legislature showing "*it expected and intended* that local governments [would] adopt additional ordinances."[178] Rather than impliedly barring the County from placing additional restrictions on the location of dispensaries, subdivision (b) needed to be read together with subdivision (f) as allowing local governments to "add further restrictions on the location and establishment of MMD's."[179]

The court also rejected Hill's contention that the County could not "use its nuisance abatement ordinances to enjoin the operation of MMD's in locations other than within 600 feet of a school because sections 11362.765 and 11362.775 provide that medical marijuana patients and their caregivers are not subject to 'criminal liability under Section 11570,' the 'drug den' abatement law." The court stated that "[t]he limited statutory immunity from prosecution under the 'drug den' abatement law provided by section 11362.775 [did] not prevent the County from applying its nuisance laws to MMD's that do not comply with its valid ordinances." The court explained that "[b]y its terms, the statute exempts qualified patients and their primary caregivers (who collectively or cooperatively cultivate marijuana for medical purposes) from nuisance laws '*solely on the basis* of [the] fact' that they have associated collectively or cooperatively to cultivate marijuana for medical purposes. (Italics added.)"[180] Significantly, "[t]he statute *does not confer on qualified patients and their caregivers the unfettered right to cultivate or dispense marijuana anywhere they choose.*" Section 11362.775 did not affect the County's "constitutional authority to regulate the particular manner and location in which a business may operate (Cal. Const., art. XI, § 7). . . ."[181]

As far as the County's alleged over-restriction of the establishment and location such that it was "practically impossible for such dispensaries to exist anywhere in the unincorporated areas of the

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[175] *Id*. (emphasis added).

[176] The court took judicial notice of the fact that on December 7, 2010, the County Board of Supervisors "banned MMD's in all zones in the County effective January 6, 2011 (L.A. Ord. No. 2010-0062). The ordinance provides that the ban shall remain in effect until and unless it is held 'unlawful' by the Court of Appeal or the California Supreme Court in which case the preexisting ordinances governing MMD's shall again be in effect. . . The validity of that ban is not before us and we do not address it." 192 Cal.App.4th at p. 866, fn. 4.

[177] 192 Cal.App.4th at 867.

[178] *Id*. at 868 (emphasis added).

[179] *Id*.

[180] 192 Cal.App.4th at 869.

[181] *Id*.

County[,]" the court found Hill's evidence did not support the argument. In particular, Hill's declaration contained insufficient facts to show that the County's fee for obtaining a conditional use permit was inconsistent with the CUA or MMP because Hill failed to produce evidence that "the County charges a higher fee to MMD's than it does to other businesses or that the fee applicable to MMD's is unreasonable."[182] Whether there were any locations within the unincorporated sections of the County where a medical marijuana association could exist without running afoul of the ordinance, the court pointed to the County's declaration's reliance on LACC section 22.28.110 "which permits MMD's to operate in C-1 zones. These commercial zones also contain liquor stores, bars and cocktail lounges, car washes, pet grooming businesses, theaters and many other common commercial enterprises."

Concerning the County's lack of approval of any permits for dispensary operation, the court explained that since the ordinances regulating dispensaries were adopted in June 2006, there had only been two applicants: one withdrew his application after being arrested on drug charges elsewhere, and the other was "denied a permit because the proposed MMD would have been adjacent to single-family residences."[183]

Finally, the court was unpersuaded by Hill's contention that the County ordinances violated the Equal Protection Clause of the 14th Amendment to the United States Constitution "by not allowing the dispensaries to operate in the same zones as pharmacies." Dispensaries and pharmacies were "not 'similarly situated' for public health and safety purposes and therefore need not be treated equally."[184] The court cited *Ross v. RagingWire Telecommunications, Inc.*, *supra*, to rebut Hill's contention; the CUA did not give "marijuana the same status as any legal prescription drug . . . because the drug remains illegal under federal law . . . even for medical users . . . ."[185] Thus, the County had a rational basis for zoning dispensaries differently than pharmacies because "similar risks are not associated with the location of pharmacies. . . ."[186] Specifically, the County's expert testimony showed that most dispensaries are "cash only" businesses "and the large amounts of cash and marijuana make MMD's, their employees and qualified patients 'the target of a disproportionate amount of violent crime' including robberies and burglaries." Dispensaries "also attract loitering and marijuana smoking on or near the premises which negatively affect the 'quality of life' in the neighborhood."[187] And the County was justifiably concerned that dispensaries would attract an illegal resale market for marijuana given the use of marijuana for nonmedical purposes. The court thus affirmed the order granting the County's motion for a preliminary injunction.[188]

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[182] *Id*. at 870.

[183] *Id*. at 871.

[184] *Id*.

[185] *Id*., at fn. 10.

[186] *Id*. at 872.

[187] *Id*. at 871.

[188] *Id*. at 872.

Here is where the decisions become significantly more complicated. Particularly in the last several years, the appellate courts have issued inconsistent opinions, leaving cities to question the scope of their local land use authority with respect to medical marijuana activities.

City of Riverside v. Inland Empire Patient's Health and Wellness Center, Inc.
Inland Empire Center was decided in late 2011.[189] In this case now before the California Supreme Court (and therefore not citable), the Fourth Appellate District, Division Two, held that a local government could ban medical marijuana dispensaries altogether.[190] Riverside's zoning code expressly prohibits medical marijuana dispensaries.[191] The zoning code also prohibits any use that is prohibited by state or federal law and any violation of Riverside's municipal code is deemed a public nuisance. The court of appeal affirmed the trial court's determination Inland Empire Center's facility violated Riverside's zoning code, and was therefore a public nuisance subject to abatement.[192]

The court of appeal rejected Inland Empire Center's argument that the Riverside dispensary ban is preempted by state law preemption: "Where, as here, there is no clear indication of preemptive intent from the Legislature, we presume that Riverside's zoning regulations, in an area over which local government traditionally has exercised control, are not preempted by state law."[193] The court analyzed California's medical marijuana laws and Riverside's municipal code provisions and concluded that under Riverside's Municipal Code, "Inland Empire Center's

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[189](2011) 200 Cal.App.4th 885, review granted and opinion superseded sub nom. *City of Riverside v. Inland Empire Patient's Health & Wellness Center, Inc*. (Cal. 2012) 136 Cal.Rptr.3d 667.

[190]The California Supreme Court has also granted review of *People of the State of California v. G3 Holistic, Inc.* ("*G3 Holistic*"). The *G3 Holistic* decision was issued by the same Court of Appeal and on the same date (November 9, 2011) as the *Inland Empire Center* decision. The *G3 Holistic* case involved a civil abatement action against the G3 Holistic dispensary which the trial court had found to be a nuisance in violation of the City of Upland's zoning ordinance. The dispensary appealed, contending that the City's ban on medical marijuana dispensaries was preempted by state law. The appellate court upheld Upland's dispensary ban, concluding, as it did in *Inland Empire Center*, that a ban is not preempted by state law. As in *Inland Empire Center*, the court held that zoning and business licensing ordinances prohibiting dispensaries as an unenumerated use, such as Upland's, are not inconsistent with the CUA and MMP.

In all material respects, the court's analysis in *Inland Empire Center* and *G3 Holistic* is the same. The court held that Upland's zoning ordinance does not duplicate, contradict or expressly occupy the field of state law, and squarely rejected appellant's assertion that Section 11362.768 only restricts the location of dispensaries, but does not authorize complete bans. The *Evergreen* decision issued by Division Three of the same appellate district embraced the very contentions that were rejected in *Inland Empire Center* and *G3 Holistic*. Thus, when the California Supreme Court eventually issues its decision in these three medical marijuana cases [perhaps, including *Evergreen*], there should be definitive guidance on these contradictory appellate positions.

[191]200 Cal.App.4th at 892.

[192]200 Cal.App.4th at 892.

[193]*Id*. at 894-895 (citing *Kruse*, *supra*, 177 Cal.App.4th at 1169).

MMD is a zoning violation, constituting a public nuisance which is amenable to abatement and injunctive relief by civil action."[194]

As for state law preemption, the court conducted a thorough analysis of the Riverside ordinance under well-established standards for state law preemption of a municipal ordinance. Specifically, the court concluded that "Riverside's zoning ordinance does not duplicate, contradict, or occupy the field of state law legalizing medical marijuana."[195]

First, Riverside's ban "does not 'mimic' or duplicate state law and can be reconciled with the CUA and MMP." Notably, "[t]he CUA does not create a constitutional right to obtain marijuana, or allow the sale or nonprofit distribution of marijuana cooperatives."[196] Moreover, "[t]he CUA and MMP do not provide individuals with inalienable rights to establish, operate, or use MMD's." And these statutes "do not preclude local governments from regulating MMD's through zoning ordinances." "[T]he CUA and MMP [do not] prohibit cities and counties from banning MMD's."[197] "The operative provisions of the CUA and MMP[A] do not speak to local zoning laws."[198] Indeed, "the MMP does not restrict or usurp in any way the police power of local governments to enact zoning and land use regulations prohibiting MMD's."[199]

The court of appeal rejected Inland Empire Center's argument that "because section 11362.775 exempts an operator of an MMD from liability for nuisance, Riverside's zoning ordinance, a ban against medical marijuana dispensaries and declaring them a nuisance, is preempted by state law." The court held "a municipality can limit *or prohibit* MMD's through zoning regulations and prosecute such violations by bringing a nuisance action and seeking injunctive relief." (Emphasis in original.) As a result, there is no state law preemption because "Riverside's zoning ordinance banning MMD's does not duplicate or contradict the CUA and MMP[A] statutes."[200]

Second, the *Inland Empire Center* court found that "the CUA and MMP do not expressly state an intent to fully occupy the area of regulating, licensing, and zoning MMD's, to the exclusion of all local law."[201] The court noted that, in *Kruse*, Claremont's temporary moratorium on MMD's was permissible because "'[t]he CUA does not authorize the operation of a medical marijuana dispensary [citations], nor does it prohibit local governments from regulating such dispensaries.'" To the contrary, "the CUA expressly states that it does not supersede laws that protect individual and public safety[.]"[202]

As for the claim that the MMP preempts the Riverside ordinance, the court said that "the MMP expressly allows local regulation." The court agreed with the *Kruse* court that neither the text

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[194] *Id*. at 897.
[195] *Id*. at 898.
[196] *Id*. (citing *Kruse*, *supra*, at 1170-1171).
[197] *Id*.
[198] *Id*. (citing *Kruse*, *supra*, at 1172-1173, 1175).
[199] *Id*. at 899.
[200] *200 Cal.App.4th* at 899- 900 (emphasis added).
[201] *Ibid*.
[202] *Ibid*.

nor the history of the MMP "'precludes the City's adoption of a temporary moratorium on issuing permits and licenses to medical marijuana dispensaries, *or the City's enforcement of licensing and zoning requirements applicable to such dispensaries*.'" (Emphasis added.)[203] The court also held "the CUA and MMP[A] do not expressly preempt Riverside's zoning ordinance regulating MMD's, including banning them."[204]

Third, the *Inland Empire Center* court concluded that the City's ordinance "does not enter an area of law fully occupied by the CUA and MMP by legislative implication." Recognizing judicial reluctance to find implied preemption, the court, again, turned to *Kruse* to determine that "[t]he subject matter of the Riverside zoning ordinance banning MMD's has not been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern[.]"[205] In fact, "neither the CUA nor MMP[A] 'addresses, much less completely covers, the areas of land use, zoning and business licensing.'" The court concluded that the CUA and MMP[A] did not prevent Riverside "from enacting zoning ordinances prohibiting MMD's in the city."[206] The court further noted that, in any event, immunity under the MMP was only available to lawful dispensaries, and that "[a]n MMD operating in violation of a zoning ordinance prohibiting MMD's is not lawful."[207]

As for "state law tolerating local action," the *Inland Empire Center* court stated that "[t]he CUA and MMP[A] do not provide 'general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action[.]'"[208] The *Kruse* court had noted that each of the two medical marijuana statutory schemes contain language showing that state law would tolerate local action: "The CUA expressly provides that it does not 'supersede legislation prohibiting persons from engaging in conduct that endangers others' (§ 11362.5, subd. (b)(2)); and the MMP[A] states that it does not 'prevent a city or other local governing body from adopting and enforcing laws consistent with this article' (§ 11362.83)."[209]

The court in *Inland Empire Center* also found persuasive a new addition to the MMP, Section 11362.768, enacted in 2010. In quoting *County of Los Angeles v. Hill*, *supra*, the *Inland Empire Center* court observed that the *Hill* court had "noted that 'the Legislature showed it expected and intended that local governments adopt additional ordinances' regulating medical marijuana." Subdivisions (f) and (g), in particular, "made clear that local government may regulate dispensaries." *Hill*, *supra*, 192 Cal.App.4th at p. 868.) Thus, "[p]reemption by implication of legislative intent may not be found here. . . ." [210]

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[203] *Id*. at 901 (quoting *Kruse*, *supra*, at p. 1175). The Court of Appeal, Fourth Appellate District, Division Three, mistakenly distinguished *Kruse*, *supra*, in both *Qualified Patients* and *Evergreen* on the incorrect claim that *Kruse* involved only a moratorium and not zoning or other land use regulation.
[204] *Id*. at 901.
[205] *Id*. (citing *Kruse*, *supra*, at p. 1168-1169 [citations omitted]).
[206] *Id*. at 902- 903 (quoting *Kruse*, *supra*, at p. 1175).
[207] *Id*. at 903.
[208] *Id*. (quoting *Kruse* at 1169, 1176; *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 898).
[209] *Id*. (quoting *Kruse*, *supra*, at p. 1176).
[210] *Inland Empire* at 903-904.

Finally, the *Inland Empire Center* court concluded that Inland Empire Center had not established "the third *indicium* of implied legislative intent to 'fully occupy' the area of regulating MMD's." Specifically, "Inland Empire Center has not shown that any adverse effect on the public from Riverside's ordinance banning MMD's outweighs the possible benefit to the city."[211] The court wrote that "'[n]either the CUA nor the MMP compels the establishment of local regulations to accommodate medical marijuana dispensaries. The City's enforcement of its licensing and zoning laws and its temporary moratorium on medical marijuana dispensaries do not conflict with the CUA or the MMP.'"[212] The court rejected Inland Empire Center's attempt to distinguish *Kruse* and *Naulls* because the cases involved only temporary moratoriums, stating that the *Kruse* court's preemption analysis applied to the *Inland Empire* case.

In response to Inland Empire Center's argument that subdivisions (f) and (g) of section 11362.768 do not authorize local governments to enact ordinances banning dispensaries, the court looked to the ordinary, common meaning of the terms "ban," "restrict," "restriction," "regulate," and "regulation." "Applying these definitions, [the court] conclude[d] Riverside's prohibition of MMD's in Riverside through enacting a zoning ordinance banning MMD's is a lawful method of limiting the use of property by regulating and restricting the location and establishment of MMD's in the city. [Citation] *A ban or prohibition is simply a type or means of restriction or regulation*."[213]

Concluding that Riverside's ordinance banning MMDs in the City was "valid and enforceable," the court determined that Inland Empire Center's medical marijuana facility constituted a municipal code violation and therefore a "nuisance per se subject to abatement." The *Inland Empire* court stated that "where the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made . . . ."[214] As Inland Empire Center's dispensary constituted a municipal code violation and nuisance per se, "[t]he trial court therefore did not abuse its discretion in granting Riverside injunctive relief . . . ." The court thus affirmed the judgment.

City of Lake Forest v. Evergreen Holistic Collective ("*Evergreen*")
Evergreen is the most recent published decision on the state law preemption issue.[215] The City of Lake Forest had filed a nuisance abatement action against Evergreen Holistic Collective, alleging that it constituted a *per se* public nuisance under Civil Code Section 3480 because medical marijuana dispensaries are not enumerated as a permitted use under the City's zoning code. The trial court granted the City's request for a preliminary injunction on that basis.

The court of appeal reversed, holding that "local governments may not prohibit medical marijuana dispensaries altogether, with the caveat that the Legislature authorized dispensaries only at sites where medical marijuana is 'collectively or cooperatively … cultivate[d]' (§

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[211] *Id*. at 904, quoting *Kruse*, *supra*, at p. 1169.

[212] *Id*. (quoting *Kruse*, *supra*, at p. 1176; *Sherwin-Williams*, *supra*, at p. 898).

[213] *Id*. at 905-906 (emphasis added).

[214] *Id*., at 906 (quoting *Kruse*, *supra*, at 1163-1164).

[215] (2012) 203 Cal.App.4th 141 (petition for California Supreme Court review filed on April 9, 2012).

1362.775.)"[216] Relying on a stated purpose of the CUA "[t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes," and one of the express legislative purposes of the MMP is to "enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects," the court determined that California law allows for dispensaries as a matter of statewide concern and cities cannot ban marijuana dispensaries.[217]

In the *Evergreen* court's view, Section 11362.775 "place[s] such projects beyond the reach of nuisance abatement under section 11570, if predicated solely on the basis that the project involves medical marijuana activities." The court also concluded that this section precludes nuisance abatement claims under the more general nuisance statute, Civil Code Section 3479.[218] In holding that cities may not prohibit dispensaries based on cities' zoning laws, the court determined that such a ban amounts to a "local contradiction of state law on a matter of statewide concern" and is, thus, preempted. The court characterized the contradiction as "[S]ection 11362.775 authorizes lawful MMD's, but the City prohibits them." The court opined that Civil Code Section 3482, which provides that nothing done under statutory authority can be deemed a nuisance, "applies to prevent a nuisance prosecution" of dispensaries at collective or cooperative cultivation sites.[219]

The court further concluded that members of medical marijuana cultivation projects are exempt from criminal sanctions and nuisance abatement in connection with "medical marijuana activities" at the cultivation site, including sales and distribution. The court interpreted Section 11372.775 as "expressly" identifying and immunizing activities which are otherwise prohibited by the statutes enumerated therein: marijuana possession (§11357), cultivation (§11358), possession for sale or distribution (§11359), transportation (§11360), maintaining a place for the sale, use, or distribution of marijuana (§11366), and using property to grow, store, or distribute marijuana (§11366.5).[220] In reaching this holding, the court rejected the City's more narrow reading of Section 11362.775 as immunizing only the specified conduct of associating to collectively or cooperatively cultivate medical marijuana—not distribution or other activities. This more limited reading of the statute would appear to be more consistent with the California Supreme Court's analysis in *Mentch.*[221]

The *Mentch* court considered section 11362.765, containing language similar to that in Section 11362.775. The *Mentch* court rejected the defendant's broad interpretation of Section 11362.765 and emphasized that its immunity provisions applied only to the conduct specified in the statute, not to all of the conduct encompassed in the listed criminal statutes: "[T]o the extent he went beyond the immunized range of conduct…he would, once again, subject himself to the full force of the criminal law."[222] Despite the close similarities between Sections 11362.765 and

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[216] *Id*. at p. 1424.
[217] *Id*. at 1435-1436.
[218] *Id*. at 1436-1437.
[219] *Id.* at 1448- 1449.
[220] *Id.* at 1436.
[221] 45 Cal.4th 274.
[222] 45 Cal.4th at 292.

11362.775, the *Evergreen* decision does not discuss or cite to *Mentch* in its analysis of the scope of immunities afforded under Section 11362.775.

The court further sought to distinguish precedent, specifically *Naulls*, *Kruse*, and *Hill*. These cases affirmed cities' broad authority to use nuisance abatement to enjoin dispensaries established in violation of their local licensing and zoning laws. The court of appeal instead focused on the common underlying principle that "local ordinances that are 'applicable to all businesses' [citation omitted], such as the requirement of a business license, validly apply to medical marijuana dispensaries and furnish grounds for injunctive relief when violated. Such provisions are facially neutral concerning medical marijuana dispensaries and do not purport to bar them, contrary to Section 11362.775, 'solely on the basis' of dispensary activities the Legislature determined are not a nuisance.

In contrast, Lake Forest did not require a business license and instead attempted to rely on its alleged *per se* nuisance bar against dispensaries.[223] The court further attempted to distinguish *Kruse* and *Naulls* on the premise that they involved temporary moratoria on medical marijuana dispensaries only, and *Hill* on the basis that it concerned the dispensary's "code violations," not the county's subsequent ban on dispensaries.

Finally, the *Evergreen* court noted that *Kruse* "did not address Civil Code section 3482 and, like the City here, did not confront the contradiction inherent in a local ordinance that designates as a nuisance dispensary activities the Legislature has determined in section 11362.775 are not, 'solely on the basis' of those activities, a nuisance. We therefore find the analysis in *Kruse* incomplete and unpersuasive on the issue presented here."[224]

The court interpreted the recent amendment to the MMP of Section 11362.768 as making it "clear by its repeated use of the term 'dispensary' that a dispensary function is authorized by state law." Thus, the statute is not "authority for local government to ban medical marijuana dispensaries."[225] The court primarily focused on subdivisions (f) and (g), stressing the Legislature did not use the words "ban" or "prohibit," in addition to "restrict" and "regulate" in the statute. The court, however, did not address the use of the term "establishment," which arguably authorizes cities to restrict the *establishment* of medical marijuana dispensaries by prohibiting them.

People ex rel. Carmen A. Trutanich v. Jeffrey K. Joseph ("*Joseph*")
The most recent published decision is *Joseph*," published on April 18, 2012. *Joseph* involved a dispensary ("Organica") located on the border of Los Angeles and Culver City. In upholding the trial court judgment granting the motion for summary judgment and permanent injunctive relief brought by the City Attorneys of Los Angeles and Culver City, the court affirmed the cities' authority to rely on the Narcotics Abatement Law (Section 11570 *et seq*.) and Public Nuisance Law (Civil Code Section 3479) and the Unfair Competition Law to abate unlawful medical marijuana dispensaries as nuisances *per se*. This holding is in direct contrast to the *Evergreen*

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[223] 203 Cal.App.4th at 1454.
[224] *Id*.
[225] *Id.* at 1450-1451.

decision, which expressly rejected municipal reliance on these two laws to combat illegal dispensaries.

The *Joseph* court also found that the cities met their burden on summary judgment to show violation of the Unfair Competition Law.[226] Moreover, in marked contrast to *Evergreen* and other case law, the court found that Section 11362.775 only immunizes group cultivation, not sales and not distribution, and further held that only primary caregivers may receive reimbursement under Section 11362.765. The League filed a letter in support of publication of the *Joseph* decision because of the opinion's broad support of local governments' authority to utilize a variety of legal remedies under state law to combat dispensaries their communities.[227]

THE CASE FOR REGULATION AND LOCAL CONTROL

Maintaining local control over medical marijuana activities is of utmost importance to California's cities. Thus, we will attempt to explain the arguments supporting local regulation, as the law exists today, including the authority to ban dispensary operations.

One of the MMP's stated goals is to enhance medical marijuana access for patients and caregivers through collective, cooperative cultivation projects; yet, the law itself provides little guidance for how this can be accomplished. No portion of the MMP has garnered more attention, and more controversy, than this objective. Without clear legislative guidance, California cities and counties, medical marijuana advocates, the Attorney General, and the courts have all struggled with defining the scope and limits of "collective, cooperative cultivation."

It is no secret that, since the MMP was adopted in 2003, sophisticated medical marijuana operations have proliferated throughout the state, ranging from retail dispensaries and storefront collectives, to massive cultivation centers. Law enforcement agencies throughout California have identified dispensaries as both hubs and magnets for illegal activity, such as murders, assaults, armed robberies, burglaries, trespassing, and other crimes. Law enforcement agencies have also found that marijuana purchased from retail dispensaries is often re-sold for non-medicinal uses both inside and outside California. In cities where dispensaries or collectives continue to operate, there are increasing citizen complaints about dispensaries including their second-hand marijuana smoke, noise and loitering. Thus, it should be no surprise that marijuana dispensaries require some form of municipal regulation. While each city will need to decide its own regulatory approach, it is worth reviewing various regulatory methods and challenges commonly faced by cities.

Municipal regulation of dispensaries raises two fundamental questions: (1) are cities even authorized to regulate in this area; and (2) if so, how far can those regulations go? Those questions can be handled in turn.

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[226] Bus. & Prof. Code §17200 et seq.

[227] The *Joseph* decision was ordered published on April 18, 2012.

As discussed above, cities and counties that regulate collectives have been met with many challenges from medical marijuana advocates that such regulations are preempted by the CUA and MMP, are inconsistent with these state laws, and otherwise unlawfully interfere with patients' "rights" to obtain their medication. More recently, some advocates contend that municipal regulations are preempted by the federal CSA. These arguments have, for the most part and until recently, been rejected by the courts.

In this constantly evolving area of the law, we look to the remaining *reported* decisions and recent statutory amendments to the MMP to determine the scope of the municipal regulatory authority.[228] Following the California Supreme Court's grant of review of *Pack, G3,* and *Inland Empire* on January 18, 2012, there has been no reported appellate decision precluding local ordinances allowing medical marijuana collectives. There has been one published decision, *Evergreen*, preventing municipalities from enacting outright bans against dispensaries.

As explained above, article XI, section 7 of the California Constitution provides police power authority to make and enforce within a city all local, police, sanitary, and other ordinances and regulations not in conflict with general laws. Clearly, cities have the authority to enact zoning and other regulations for the public safety and welfare. The issue is how can cities can exercise that authority without running afoul of state and federal preemption.

The leading case on federal preemption is *Pack*, discussed extensively above. The earlier reported cases on federal preemption, *Kha*, *San Diego NORML*, *Qualified Patients*, all conclude that various aspects of the CUA and MMP are not preempted under federal law. Cities wishing to regulate collectives should be aware that the California Supreme Court will ultimately decide the limits of municipal regulation and federal preemption in *Pack,* and, perhaps, in *G3 Holistic* and *Inland Empire*. Additionally, cities should remain cautious that the United States Department of Justice will enforce the federal CSA regardless of the outcome of the pending cases before the California Supreme Court.

Additionally, some argue that Government Code Section 37100 precludes local regulation of medical marijuana dispensaries and collectives, as all use of marijuana is illegal under federal law. This section provides that a city's legislative body may pass ordinances not in conflict with the Constitution and laws of California or the United States. In *dicta*, the *Evergreen* court rejected the notion that Section 37100 requires "lockstep local mirroring of federal law," finding that the supremacy of federal law under the United States Constitution does not extend to dictating the contents of state or local law.[229]

Although the *Pack* decision turns on federal preemption, the court also noted Section 11362.83, which states: "Nothing in this article shall prevent a city or other local governing body from

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[228]Within one month of the California Supreme Court granting review of those three cases, two more reported decisions were issued by the courts of appeal in *Evergreen* and *Colvin, supra*.

[229]203 Cal.App.4th at 1444, fn 8.

adopting and enforcing laws consistent with this article."[230] The court observed that the provision "has been interpreted to permit cities and counties to impose greater restrictions on medical marijuana collectives than those imposed by the MMP."[231]

By its terms, Section 11362.83 allows a city or county to regulate the establishment of dispensaries and their location so long as those regulations are consistent with the provisions of the MMP.[232] As noted in *Kruse*, state law "does not create 'a broad right to use marijuana without hindrance or convenience [citation omitted],' or to dispense marijuana without regard to local zoning and business licensing laws."[233] Thus, it is reasonable to argue that the MMP contemplates, rather than precludes, local regulation of dispensaries. The *Hill* court agreed that, by including Section 11362.83 in the MMP, the Legislature showed it expected and intended that local governments can adopt additional ordinances. To hold otherwise would be to attribute to the Legislature the sanctioning of useless and redundant acts by local governments.[234]

Assembly Bill 1300, which amended Section 11362.83, became effective on January 1, 2012. The amendment further clarifies that the MMP in no way limits a local government's power to adopt and enforce its own laws:

> Nothing in [the MMP] shall prevent a city or other local governing body from adopting and enforcing any of the following: (a) Adopting local ordinances that regulate the location, operation, or establishment of a medical marijuana cooperative or collective; (b) The civil and criminal enforcement of local ordinances described in subdivision (a); and (c) Enacting other laws consistent with this article.[235]

On September 20, 2011, the Governor confirmed local control over marijuana dispensaries under A.B. 1300 when he vetoed S.B. 847,[236] stating: "I have already signed AB 1300 that gave cities and counties authority to regulate medical marijuana dispensaries – an authority I believe they already had. [] This bill [S.B. 847] goes in the opposite direction by preempting local control and prescribing the precise locations where dispensaries may not be located. *Decisions of this kind are best made in cities and counties, not the State Capitol*."[237]

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[230]The court noted the amendment to section 11362.83, which, according to the court "clarifies the state's position regarding local regulation of medical marijuana collectives, [but which] has no effect on our federal preemption analysis." 199 Cal.App.4th at 1081, fn. 9.
[231]*Id*. at 1080 (citing *Hill*, *supra*, 192 Cal.App.4th at 867-868).
[232]177 Cal.App.4th at 1169.
[233]*Id*. at 1176.
[234]192 Cal.App.4th at 867.
[235]§ 11362.83 (as amended by A.B. 1300).
[236]S.B. 847 proposed to amend Section 11362.768 to provide a distance requirement between residential uses and a marijuana cooperative, collective, dispensary, operator, establishment, or provider.
[237]Governor's Veto Message to the Senate on Senate Bill No. 847 (Sept. 20, 2011) <http://gov.ca.gov/docs/SB_0847/Veto_Message.pdf> (emphasis added).

Additionally, the *Pack* court further referenced subdivisions (f) and (g) of Section 11362.768 in support of the same proposition: no state preemption of local control to regulate medical marijuana activities.

If there was ever doubt about the Legislature's intention to allow local regulation, the newly enacted Section 11362.768, made it even more apparent that local government may regulate collectives. Subdivisions (b) and (f) provide that cities and counties must prohibit collectives from operating within 600 feet of a school, and may add further restrictions on the location and establishment of MMD's.[238] Subsection (g) further exempts from preemption all "local ordinances, adopted prior to January 1, 2011, that regulate the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider."

More specifically, Section 11362.768 restricts the location of medical marijuana cooperatives, collectives, dispensaries, operators, establishments, or providers who possess, cultivate, or distribute medical marijuana under the Medical Marijuana Program Act. Specifically, they cannot be located "within a 600-foot radius of a school."[239] The statute further specifies the entities and individuals to which this code section shall apply and which ones are exempt. Notably, it does not apply to "a licensed residential medical or elder care facility."[240] The section applies "only to a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider that is authorized by law to possess, cultivate, or distribute medical marijuana and that has a storefront or mobile retail outlet which ordinarily requires a local business license."[241]

Section 11362.768 also addresses the ability of a city to adopt ordinances. With respect to the Legislature's intention to allow local governments to regulate marijuana distribution facilities, these two subsections of Section 11362.768 are of particular relevance.

Subdivision (f) unequivocally established the Legislature did not preempt cities and counties from exercising their land use authority over marijuana distribution facilities by stating:

> (f) Nothing in this section shall prohibit a city, county, or city and county from adopting ordinances or policies that *further* restrict the location or *establishment* of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider. [Emphasis added.]

The Legislature left little doubt that a local government has the authority to adopt more restrictive ordinances governing the location of marijuana distribution facilities, not just to schools, but in the first instance. Further, by using the word "establishment," there is a strong argument that the Legislature meant to affirm a locality's right not to permit marijuana distribution facilities at all. The plain meaning of subsection (f) is, among other things, to permit local governments to determine whether they wish to allow marijuana distribution facilities in their jurisdiction.

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[238] *Hill*, *supra*, 192 Cal.App.4th at 868.
[239] See also *Id*. at 866.
[240] § 11362.768, subd. (d).
[241] § 11362.768, subd. (e).

Subdivision (g) also provides:

> (g) Nothing in this section shall preempt local ordinances, adopted prior to January 1, 2011, that regulate the location or establishment of a medical marijuana cooperative, collective, dispensary, operator, establishment, or provider.

As in subsection (f), the Legislature made it clear that there is no preemption of local government land use authority. By expressing its intention not to preempt pre-January 1, 2011, ordinances that regulate the establishment of marijuana distribution facilities, the Legislature "grandfathered" in schemes that effectively prohibit the operation of such facilities. Stated simply, Section 11362.768 demonstrates the Legislature's recognition that localities may have already taken different approaches to regulation of marijuana distribution facilities or may wish to do so in the future, and, as to their location or establishment, the Legislature intended no preemption.

The legislative history is also helpful in making the argument for local regulatory authority. When it was first introduced, A.B. 2650 did not expressly address its effect upon local land use ordinances.[242] Its legislative history reflects concerns that the bill might unduly restrict local regulatory authority. For example, the first Assembly Committee report stated that "[s]ince the passage of SB 420 in 2003, much of the medical marijuana regulation has been determined by local jurisdictions better equipped to resolve issues related to the unique nature of its city or county,"[243] and even medical marijuana supporters criticized that "[t]his legislation usurps the authority of local governments to make their own land-use decisions."[244]

> Furthermore, local land use decisions are best made by City Councils and County Boards of Supervisors based on the individual circumstances in the Community. Usurping this local authority with an arbitrary statewide limit will interfere with the ability of local governments to use their discretion in developing the kinds of regulations that are already proven to protect legal patients and the community at large. Land use issues related to these associations should continue to be made at the local level – just like those for other legal businesses or organizations.[245]

The Bill's author responded by clarifying that A.B. 2650's preemptive intent was limited. Notably, it was to "provide local jurisdictions necessary guidance while allowing them to construct a more restrictive ordinance."[246] The author incorporated this intent into the two savings clauses, subdivisions (f) and (g) of proposed Section 11362.768, quoted above, which

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[242]Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 8, 2010.
[243]Assem. Pub. Saf. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 8, 2010.
[244]Assem. Pub. Saf. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 15, 2010, p. 6, quoting Marijuana Policy Project comment letter.
[245]*Id*. at p. 7, quoting Americans for Safe Access comment letter.
[246]Assem. Com. On Appropriations, analysis of Assem. Bill. No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 15, 2010, p. 1.

remain in the statute as adopted.[247] These provisions effectively favor restrictive local regulations by allowing local governments "to construct a more restrictive ordinance" at any time, but "set[ting] a January 1, 2011 deadline for adopting any local ordinance that is less restrictive than AB 2650."[248]

Subsequent committee reports offered detailed discussions of the local police power and questioned whether any state interference with that plenary authority was appropriate in this area.[249] Significantly, it was never suggested during the legislative process that the existing provisions of the MMP preempt local authority to regulate marijuana-related land uses. Rather, the legislative committee reports repeatedly stressed the breadth of the local police power in this area and the desirability of minimizing state interference.[250] The Legislature acted on this understanding, crafting the provisions of A.B. 2650 to preserve local authority to enact more restrictive ordinances. These efforts would have been pointless, and the savings clauses (f) and (g) mere surplusage, if the MMP already preempted more restrictive local regulations upon marijuana-related land uses. A.B. 2650's savings clauses demonstrate the Legislature's unwillingness to intrude upon local government power to more closely regulate marijuana-related land uses.

The *Evergreen* court recently rejected the above statutory interpretations. What does *Evergreen* mean for cities' ability to regulate medical marijuana dispensaries? *Evergreen* stands for (at least) two propositions: (1) Cities may not completely ban medical marijuana dispensaries; and (2) Dispensaries are authorized only at sites where medical marijuana is collectively or cooperatively cultivated. Assuming, then, that *Evergreen* is or even continues to be binding authority, cities whose ordinances either prohibit dispensaries or allow for them in a manner that does not require collective/cooperative cultivation at the dispensary sites may eventually need to revisit those ordinances.

At first glance, the *Evergreen* opinion, *supra*, changes the playing field with respect to local regulation; however, on closer examination, the impact could be more narrow in scope. The reason is most collectives do not cultivate all, or even most, of their marijuana on-site and thus, would not fall under the *Evergreen* court's protection for certain collectives distributing locally-grown medical marijuana.

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[247]Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended May 28, 2010, p. 3; Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010, p. 3.

[248]Sen. Loc. Gov. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess. as amended Jun. 10, 2010, p. 3; Assem. Com. On Appropriations, analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Apr. 15, 2010, p. 1. See also Sen. Pub. Saf. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess., as amended Jun. 10, 2010, p. 4.

[249]Sen. Loc. Gov. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010; Sen. Pub. Saf. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010.

[250]See, e.g., Sen. Loc. Gov. Com., analysis of Assem. Bill No. 2650 (2009-2010 Reg. Sess.) as amended Jun. 10, 2010, p. 3 ("Local land use decisions that strike a delicate balance between protecting school children and ensuring that patients and caregivers can obtain medical marijuana are best made by city and county officials . . . The Committee may wish to consider whether AB 2650 substitutes an arbitrary, one-size-fits-all standard for local officials' informed judgments about their communities.")

The *Evergreen* decision does not rule out all municipal regulation. For example, the *Evergreen* court expressly did "not consider, for example, a municipal regulatory scheme that permits, subject to specified conditions, medical marijuana dispensaries at cooperative or collective cultivation projects *in certain zoning districts but not in others* within the local jurisdiction… Arguably, such a scheme may be consistent with California medical marijuana law because it does not bar dispensary activities authorized by Section 11362.775 'solely on the basis' that they occur at a collective or cooperative, but instead based on their location in a prohibited zoning district when a permissive district in the jurisdiction is available instead."[251] Such a scheme would likely not run afoul of *Evergreen* because permissible dispensaries would be allowed somewhere within the municipality.

Although the *Evergreen* court attempted to distinguish *Kruse*, it notably found the prior decision to be "incomplete" and "unpersuasive" on the issue before the court. Moreover, the court's analysis in *Kruse* is, in many respects, starkly at odds with the *Evergreen* court's analysis.

For instance, in *Kruse*, the court rejected defendant's reliance on the same language from the CUA ("t]o ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes") upon which the *Evergreen* court partially based its finding that California law allows dispensaries as a matter of statewide concern. The *Kruse* court concluded that this language did not support an argument that the CUA granted a broad right to obtain medical marijuana. Citing to *Ross v. RagingWire Telecommunications, Inc.*, *supra*, the *Kruse* court followed the California Supreme Court's "determin[ation] that the 'limited' right granted by the CUA was the right of a patient or primary caregiver to possess or cultivate marijuana for the patient's personal medical use upon the approval of a physician without becoming subject to criminal liability. (*Ross*, at p. 929.)"[252] The statement of voter intent in the CUA "on which defendants rely as the basis for claiming that the availability of medical marijuana is a matter of statewide concern, does not create 'a broad right to use marijuana without hindrance or inconvenience' (*Ross*, *supra*, 42 Cal. 4th at p. 928), or to dispense marijuana without regard to local zoning and business licensing laws."[253]

The *Kruse* decision states that Claremont's zoning and moratorium on medical marijuana dispensaries was not preempted by the CUA or MMP.[254] Medical marijuana dispensaries, as a land use, are not mentioned in the text or history of the CUA or MMP. The CUA decriminalizes possession and cultivation of marijuana for personal medical use. The MMP provides affirmative defenses and arrest immunity for certain use and cultivation of medical marijuana, as well as the possession for sale, transportation or furnishing, maintaining a location for selling, and managing a location for storage or distribution, of marijuana - activities essential to the collective cultivation and distribution of the crop. Neither law addresses the licensing of medical marijuana collectives, nor do they expressly prohibit local governments from regulating such collectives.

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[251] *Evergreen*, *supra,* 203 Cal.App.4th at 1452-1453 (emphasis in decision).

[252] *Kruse*, *supra*, 177 Cal.App.4th at 1174.

[253] *Id*. at 1175.

[254] 177 Cal.App.4th at 1168.

Simply, the *Kruse* court found that nothing in the text or history of the law precluded the City's adoption of a temporary moratorium on issuing permits and licenses to medical marijuana dispensaries, or the City's enforcement of licensing and zoning requirements applicable to such dispensaries. Neither the CUA nor the MMP compel the establishment of local regulations to accommodate medical marijuana dispensaries. Neither statute addresses, much less completely covers the areas of land use, zoning and business licensing. Thus, the City's temporary moratorium on medical marijuana dispensaries and zoning was a valid, local regulation.[255]

The now unpublished decision in *Inland Empire Center* also followed the analysis in *Kruse*, finding that the CUA and MMP do not preclude local governments from regulating collectives through zoning ordinances and business licensing laws. The court also found that the CUA and MMP do not expressly mandate that dispensaries shall be permitted within every city and county, nor do the laws prohibit cities and counties from banning dispensaries. The operative provisions of the CUA and MMP do not directly speak to local zoning laws.[256] Given *Inland Empire Center's* direct analysis of this issue, we expect the Supreme Court to opine on this position.

Another example of the divergent legal analyses of the two courts, which could reasonably be viewed as a "split," can be found in this holding from *Kruse*: "Neither the CUA nor the MMP compels the establishment of local regulations to accommodate medical marijuana dispensaries. The City's enforcement of its licensing and zoning laws and its temporary moratorium on medical marijuana dispensaries do not conflict with the CUA or the MMP."[257] It is difficult to square this holding with that in *Evergreen* requiring cities to accommodate medical marijuana dispensaries at cultivation sites and prohibiting reliance on zoning laws to preclude such uses.

As noted, when opinions of the courts of appeal conflict, the trial court must apply its own wisdom to the matter and choose between the opinions.[258] As a practical matter, a Superior Court ordinarily will follow an appellate opinion emanating from its own district even though it is not bound to do so. Superior courts in other appellate districts may pick and choose between conflicting lines of authority. This dilemma will endure until the Supreme Court resolves the conflict, or the Legislature clears up the uncertainty by legislation.[259] Thus, assuming a split in authority, superior courts throughout the state may choose between the *Kruse* and *Evergreen* opinions.

Another important consideration is the strong likelihood the California Supreme Court will either grant review of the *Evergreen* decision or order its depublication. Given the court's decision to review two other recent published appellate decisions concerning cities' ability to ban or regulate medical marijuana dispensaries (*Pack* and *Inland Empire), and* insofar as the decisions in *Inland Empire* and *G3 Holistic (unpublished)* squarely held that cities can ban collectives, some action by the Supreme Court seems inevitable.

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[255] 177 Cal.App.4th at 1176.
[256] 200 Cal.App.4th 885.
[257] *Id*. at 1176.
[258] *McCallum v. McCallum* (1987) 190 Cal. App. 3d 308, 315, fn. 4.
[259] *Id*.

It has come to the authors' attention that many cities throughout the state that have bans on dispensaries have received a letter from Americans for Safe Access urging cities to rescind their bans in light of the *Evergreen* decision. As cities await the Supreme Court's ruling on pending request for review and/or depublication, it may be prudent to adopt a "wait and see" approach and refrain from taking legislative action premised on an assumption that *Evergreen* is and will remain binding authority.

Another reason many cities want to consider banning the use is the federal government's recent increase in enforcement, discussed below. The federal government has adopted the position that state and local laws which license the large-scale cultivation and manufacture of marijuana stand as an obstacle to federal enforcement efforts. With all of the legal uncertainty and federal enforcement activity, many cities are eager to adopt bans prohibiting the use. For now, cities should wait to see what the California Supreme Court decides on *Evergreen* before changing their regulations as the law is just too uncertain.

Regulation Issues

Cities that allow one or more dispensaries tend to rely upon the Guidelines. A few courts have recognized the Guidelines as allowing for dispensaries that qualify as "cooperatives" or "collectives" and otherwise comply with state law, as interpreted by the Attorney General.[260] For example, *Evergreen*, in *dicta*, discussed the validity of a potential municipal regulatory scheme that would permit, subject to specified conditions, medical marijuana dispensaries at cooperative or collective cultivation projects in certain zoning districts but not in others within the local jurisdiction. Among other factors, *Evergreen* suggests that such a scheme would have to be evaluated against the Legislature's intent to permit locally-grown, locally-accessible medical marijuana for patients, including those whose medical condition may not allow them to travel far, nor allow their primary caregivers to leave their side for long. Again, it is unclear whether the *Evergreen* decision will continue as precedent now that the City of Lake Forest has petitioned the California Supreme Court to review the case.

In the meantime, cities continue implementing various regulatory options. The most obvious methods for regulating the distribution of medical marijuana are through a zoning ordinance or regulatory business license ordinance — or a combination of both. Some cities require that collectives obtain a conditional use permit, while others have found that the business license is the preferred mechanism for local control. For example, after a few years of regulating collectives, the City of West Hollywood wanted to examine a dispensary operator's criminal background and did not want the use to run indefinitely with the land through a conditional use permit. Consequently, the city's medical marijuana collectives are a permitted use in certain commercial zoning districts subject to distancing requirements from sensitive uses and other collectives, with a cap of four facilities operating at one time.

West Hollywood consulted with existing collective operators to draft the operating requirements in its regulatory business license ordinance.[261] The requirements include criminal background

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[260] *People v. Hochanadel* (2009) 176 Cal.App.4th 347, 363.
[261] West Hollywood Municipal Code Chapter 5.70.

checks, compliance with the Guidelines, security requirements, limitations on operating hours, and a requirement that marijuana not be consumed on site. Also, collectives cannot occupy a space larger than 4,000 square feet, may not issue doctor recommendations on-site and are subject to limitations on the source of the collective's marijuana. The city holds bimonthly meetings with law enforcement and collective operators to address any negative impacts associated with the operations.

Other cities effectively regulate collectives by requiring a use permit and imposing strict distancing requirements and operating standards.[262] For example, Arcata also subjects each collective to an annual performance review.

Los Angeles' experience has been unique in many respects. After passing an ordinance to regulate collective cultivation in 2010, the city was hit with over 40 lawsuits filed by approximately 100 dispensaries. While the legal battle played (and continues to play) out, the City Attorney's Office proceeded to try various approaches to shutting down illegal dispensaries, which were multiplying at an alarming rate. These enforcement mechanisms include the Narcotics Abatement Law,[263] which authorizes "the city attorney of any incorporated city," to bring an action "in the name of the people."[264] Remedies under this law include injunctive relief, civil penalties, investigative costs, and attorneys' fees.[265]

The Unfair Competition Law, Business and Professions Code Section 17200 *et seq*., is another enforcement tool successfully utilized by the Los Angeles City Attorney's Office. The statutory scheme applies to any "unlawful, unfair or fraudulent business act or practice" and can be used, *inter alia*, by a city attorney or city prosecutor under certain circumstances. It provides for both injunctive relief,[266]and a civil penalty of $2500 per violation. Los Angeles has also relied on the "Sherman Law,"[267] which primarily applies to drug labeling violations. For instance, the failure to include a label indicating the manufacturer and quantity of contents constitutes a violation under this law.[268] Finally, Los Angeles recently used Civil Code Section 3486, a narcotics eviction pilot program available to specified cities and counties, including Long Beach, Palmdale, San Diego, Oakland and Sacramento.

Most cities that permit collectives have determined that the distancing requirement and a cap on the number of facilities are an effective ways to prevent an over-concentration of this use. The combination of effective regulatory mechanism and the working relationship with collective

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[262]See e.g., Arcata Municipal Code Section 9.42.105; Santa Cruz Municipal Code Section 24.12.1300; and Malibu Municipal Code Section 17.66.120.

[263]§11570 (providing, in pertinent part, "Every building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance...is a nuisance.")

[264]§11571.

[265]The *Evergreen* court expressly disapproved reliance on Section 11570. Los Angeles, however, has used it successfully on several occasions.

[266]Bus.& Prof. §17204

[267]Sherman Food, Drug & Cosmetics Law, § 109875 *et seq*.

[268]§111340.

operators has also proven to meet the goals of supporting access to medical marijuana while controlling negative impacts and the proliferation of collectives in a city.

Cities must also review business license applications carefully to ensure that dispensaries are not requesting permits under the guise of a pharmacy, plant nursery, retail store, or other similar use. Once operating, it is much more difficult to shut an illicit use down.

DEPARTMENT OF JUSTICE ENFORCEMENT OF THE CSA

While cities fight to preserve local control, the federal government has become increasingly more concerned with California's medical marijuana program. Since the passage of Proposition 215 in 1996, California cities that do not want to allow these establishments have, for the most part, been on their own in their efforts to confront the proliferation of marijuana distribution facilities. Local prosecutors lacked either the support or resources to prosecute commercial operations. Also, the controversial Guidelines are problematic for California's district attorneys as the Guidelines are admittedly outdated and based on the Legislature's vague and incomplete medical marijuana laws.

Moreover, many observers on both sides of the medical marijuana debate, believed that the United States Department of Justice would continue to largely ignore California's burgeoning medical marijuana industry. In October, 2009, United States Attorney General Eric Holder announced the Department of Justice would not focus its resources in states with medical marijuana laws.[269] Indeed, some city law enforcement officials have noted that the explosive growth in marijuana distribution facilities began shortly after Eric Holder made an earlier informal announcement in March, 2009, and that following his formal memorandum in October, 2009, the dispensary numbers accelerated at an even faster pace.

All of that dramatically changed on October 7, 2011, when the four California-based United States Attorneys announced coordinated federal enforcement actions targeting the commercial marijuana industry in California. In a press conference widely reported throughout California and the United States, each of the four United States Attorneys explained their joint announcement:

Benjamin Wagner, United States Attorney for the Eastern District of California, said: "Large commercial operations cloak their moneymaking activities in the guise of helping sick people when in fact they are helping themselves. Our interest is in enforcing federal criminal law, not prosecuting sick people and those who are caring for them. We are making these announcements together today so that the message is absolutely clear that commercial marijuana operations are illegal under federal law, and that we will enforce federal law."[270]

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[269] United States Department of Justice, *Memorandum for Selected United States Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana,* October 19, 2009, http://blogs.justice.gov/main/archives/192

[270] http://www.justice.gov/usao/cae/news/docs/2011/10-07-11CalifMarijuanaEnforcement.html

Andre Birotte Jr., the United States Attorney for the Central District of California, stated: "The federal enforcement actions are aimed at commercial marijuana operations, including marijuana grows, marijuana stores and mobile delivery services - all illegal activities that generate huge profits. The marijuana industry is controlled by profiteers who distribute marijuana to generate massive and illegal profits."[271]

Laura Duffy, the United States Attorney for the Southern District of California, said: "The California marijuana industry is not about providing medicine to the sick. It's a pervasive for-profit industry that violates federal law. In addition to damaging our environment, this industry is creating significant negative consequences, in California and throughout the nation. As the number one marijuana producing state in the country, California is exporting not just marijuana but all the serious repercussions that come with it, including significant public safety issues and perhaps irreparable harm to our youth."[272]

Melinda Haag, the United States Attorney for the Northern District of California, commented: "Marijuana stores operating in proximity to schools, parks, and other areas where children are present send the wrong message to those in our society who are the most impressionable. In addition, the huge profits generated by these stores, and the value of their inventory, present a danger that the stores will become a magnet for crime, which jeopardizes the safety of nearby children. Although our initial efforts in the Northern District focus on only certain marijuana stores, we will almost certainly be taking actions against others. None are immune from action by the federal government."[273]

Immediately preceding the announcement, letters were sent to property owners and lien holders of properties where commercial marijuana stores and grows are located. The letters contained warnings the recipients risk losing their property and any rents received.

In the populous Central District, the enforcement actions focused on the City of Lake Forest and surrounding cities in southern Orange County, as well as upon two other target areas in adjacent Los Angeles and Riverside counties. Months earlier, Lake Forest's City Attorney had written a letter requesting the help of the United States Attorney, Andre Birotte. The letter explained how the City of Lake Forest had commenced civil nuisance abatement actions against all known dispensaries and obtained preliminary injunctions only to have each one immediately stayed by the court of appeal. Indeed, the court of appeal issued stay orders that prevented the city from obtaining preliminary injunctions against two dispensaries operating within 600 feet of a school in violation of Section 11362.768.[274]

In the City of San Diego, federal law enforcement officials issued a 77-count indictment alleging numerous marijuana sales to underage persons. In the joint press conference, Laura Duffy showed photos of packaged marijuana looking like candy and other snack products.

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[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] As of this time, there is still no final resolution by the court of appeal on the two writ proceedings by the dispensaries.

Not only are the four United States Attorneys and their respective offices enforcing the CSA, but the federal DEA and the IRS, too, are increasing their attacks on commercial marijuana operations: "The DEA and our partners are committed to attacking large-scale drug trafficking organizations, including those that attempt to use law to shield their illicit activities from federal law enforcement and prosecution. Congress has determined marijuana is a dangerous drug and that its distribution and sale is a serious crime. It also provides a significant source of revenue for violent gangs and drug organizations. The DEA will not look the other way while these criminal organizations conduct their illicit schemes under the false pretense of legitimate business."[275]

As if to dispel any notion the four United States Attorneys were acting on their own, United States Deputy Attorney General James Cole stated: "The actions taken today in California by our U.S. Attorneys and their law enforcement partners are consistent with the Department's commitment to enforcing the Controlled Substances Act (CSA), in all states. The Department has maintained that we will not focus our investigative and prosecutorial resources on individual patients with serious illnesses like cancer or their immediate caregivers. However, U.S. Attorneys continue to have the authority to prosecute significant violations of the CSA, and related federal laws."

Today the federal enforcement actions continue in the following three main categories:

1. Civil asset forfeiture lawsuits against property owners whose buildings are used for marijuana distribution, which includes, in some cases, marijuana sales in violation of local ordinances;

2. Issuance of warning letters to property owners and "lienholders of properties" where marijuana sales are taking place;[276] and

3. Criminal cases against commercial marijuana operations.

At this time, it is uncertain how far the United States Department of Justice will go in closing medical marijuana operations in California. As the *Pack* court cautions, cities and their officials should be aware of the risks of federal enforcement.

CONCLUSION

No matter where one stands on the issue of medical marijuana, most everyone can agree that California's medical marijuana laws are uncertain. One of the purposes of the CUA was to "encourage the state and federal government to implement a plan to provide for the safe and affordable distribution of medical marijuana." That has not yet happened. While the California Supreme Court can provide needed guidance in *Pack, G3 Holistics*, *Inland Empire* and, possibly,

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[275]Victor Song, Chief, IRS Criminal Investigation, said: "IRS Criminal Investigation is proud to work with our enforcement partners and lend its financial expertise to this effort. We will continue to use the federal asset forfeiture laws to take the profits from criminal enterprises." *Ibid.*

[276]For an example of Department of Justice letters (redacted) to property owners in Colorado see http://www.justice.gov/dea/pubs/states/newsrel/2012/den011212.pdf

Evergreen, the federal government's increased enforcement of the CSA puts the future of California's existing medical marijuana law into question.

Until California and the federal government come to an understanding on medical marijuana, California's cities will continue to be caught in the middle of the conflicting federal and state law and policies. For this reason, cities must be able to fully exercise their own respective police power and land use authority.

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