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Created: July 2008

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Updated: October 2008

A report of trends in the California rental housing industry.

Medical Marijuana
Where There's Smoke There's Litigation

Over a decade has passed since Proposition 215, the Compassionate Use Act (CUA) was passed by the California voters (November 1996). The CUA gives a person who uses marijuana for medical purposes (with a physician's recommendation) a defense to certain state criminal charges involving the drug, such as possession or cultivation.[1] These activities, however, remain illegal under federal law, even for medical users who rely upon the CUA.

Most rental agreements prohibit illegal activity generally and the use of drugs specifically. However, owners of residential rental property are faced with disabled residents who seek an accommodation for their medical marijuana use or residents with a prescription who are growing marijuana on their balconies. These situations often first come to the owner's attention when neighboring residents complain about marijuana smoke on the premises.

To date, federal and state court judges have sided with property and business owners who have refused services or accommodations to individuals who smoke and/or possess marijuana for medical purposes. The California Legislature continues to grapple with this topic and the state courts continue to receive complaints from individuals who claim they have the legal right to use marijuana. Guidelines recently issued by the State Attorney General state that medical marijuana use is prohibited where "smoking is prohibited by law."[2] This is significant, as more local ordinances regulating smoking in and around rental units are passed. Residential rental property owners with tenants or applicants who wish to possess, use, or grow medical marijuana on the premises, should consult with counsel on how best to proceed.

Below is an overview of the recent cases that shed some light on how this issue continues to evolve.

Federal Law May Be Enforced Even If Medical Marijuana Does Not Cross State Lines

In 2005, the U.S. Supreme Court held that Congress has the authority to prohibit local cultivation and use of marijuana, notwithstanding the fact that it is allowed by state law. The defendants in *Gonzales v. Raich* argued that the federal government had no authority to regulate

CALIFORNIA APARTMENT ASSOCIATION

980 Ninth Street, Suite 200
Sacramento, CA 95814

800.967.4222
877.999.7881 fax
www.caanet.org
info@caanet.org

marijuana that is produced and consumed locally because it does not cross state lines. The court held that Congress' power to regulate interstate markets for medicinal substances encompasses the portion of those markets that are supplied by drugs produced and consumed locally because the Constitution authorizes the regulation not only of interstate commerce, but of activities that substantially affect interstate commerce. As a result, compliance with California's Compassionate Use Act is not a defense to a federal marijuana related crime.

Fair Employment and Housing Act (FEHA) Does Not Require Reasonable Accommodation for Medical Marijuana in the Employment Context

A recent California Supreme Court employment case, *Ross v. Ragingwire Telecommunications*, suggests that the CUA does not require an owner to allow the growing, smoking and/or possession of medical marijuana in residential rental property as a reasonable accommodation for a disabled person. In that case, the employee was fired when a drug test revealed his marijuana use, which had been prescribed by his physician for chronic pain. The Court held that:

> California's voters merely exempted medical uses and their primary caregivers from criminal liability under two specifically designated state statutes. Nothing in the text or history of the CUA suggests the voters intended the measure to address the respective rights and duties of employers or employees.

The court further held that "FEHA does not require employers to accommodate the use of illegal drugs" and that the CUA does not give "the plaintiff a right to use marijuana free of hindrance or inconvenience, enforceable against third parties."[3] The same reasoning could be applied to a case where an applicant or resident seeks an accommodation for medical marijuana use in rental housing. However, it is unclear whether a sheriff in a particularly pro-medical marijuana community would carry out an eviction in those circumstances.

Housing Authority Not Required To Allow Illegal Drug Use as Reasonable Accommodation

In 2006, a federal district court in Washington State held that a housing authority was not required to make a reasonable accommodation to allow a Section 8 tenant to use medical marijuana pursuant to Washington State law. The court held that the housing authority had no duty to accommodate an illegal drug user because "reasonable accommodations do not include requiring [the housing authority] to tolerate illegal drug use or risk losing HUD funding for doing so. This case, *Assenberg v. Anacortes Housing Authority*, has been appealed to the 9th Circuit Federal Court of Appeals, which jurisdiction includes California.

Pot Clubs File Suit against DEA over Threatening Letters to Their Landlords

The ability and/or duty of commercial landlords to evict pot clubs is currently being litigated in federal court. In 2007, the DEA sent letters to California landlords who rent to marijuana dispensaries pointing out that "federal law takes precedence over state law" and that the CUA offers no defense against potential penalties of 20 years in prison and property forfeiture. In response, some pot clubs have closed, expecting eviction. However, some property owners when attempting eviction have had the clubs fight back, with mixed results. In January 2008, a group of clubs sued the DEA in federal court, alleging a violation of the clubs' civil rights and seeking an injunction against future letters. (*Union of Medical Marijuana Providers v. United*

States Drug Enforcement Agency) The Union is also fighting evictions of pot clubs that are prompted by the DEA letter. One of these cases, *Parthenia v. Todays Healthcare*, is currently on appeal. The Los Angeles Superior Court had ruled that the landlord could evict because federal law preempts state law. At this point, there is no evidence that the DEA's strategy will be expanded to residential landlords whose tenants possess or grow medical marijuana for personal use.

Medical Marijuana ID Card Program is Not Preempted by Federal Law

In July, the Fourth District Appellate Court issued a ruling in *County of San Diego v. San Diego National Organization for Reform of Marijuana Laws*, a challenge to a California law passed subsequent to the CUA that requires counties to issue medical marijuana cards and keep those on file. San Bernardino and San Diego had refused to issue the cards and filed suit. The Court ruled that California may require cities to issue the cards because federal law does not require states to impose criminal penalties for marijuana and is silent on the ability of states to provide identification cards.

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[1] The California Attorney General recently issued medical marijuana guidelines which state "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. Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use, August 2008. Available at ttp://ag.ca.gov/cms_attachments/press/pdfs/n1601_medicalmarijuanaguidelines.pdf

[2] See note 1.

[3] State legislation (AB 2279 (Leno, D-San Francisco) that would have protected medical marijuana users from discrimination in employment was vetoed by the Governor in September 2008.