NAMSDL Case Law Update

March 15, 2017

In This Issue

This issue of the *NAMSDL Case Law Update* focuses on several recent court decisions and other ongoing cases of note involving marijuana laws and the use of marijuana. The *Update* includes two recent decisions by U.S. Courts of Appeal and one decision by the Supreme Court of Colorado. Topics addressed in the issue include viewpoint discrimination, the federal appropriations rider concerning marijuana prosecutions, contract enforceability, and federal preemption. Cases are divided by type of court (federal or state) and then listed in approximate descending order of appellate level. The next *NAMSDL Case Law Update* will address recent decisions involving novel psychoactive substances.

CASES IN THIS ISSUE

Paul Gerlich, et al. v. Steven Leath, et al., U.S. Court of Appeals for the Eighth Circuit, Case No. 16-1518, February 13, 2017, 847 F.3d 1005.

United States v. Alan Nixon, U.S. Court of Appeals for the Ninth Circuit, Case No. 16–50097, October 17, 2016, 839 F.3d 885.

United States vs. Schweder, et al., U.S. Court of Appeals for the Ninth Circuit, Case No. 16-10272.

Fourth Corner Credit Union vs. Federal Reserve Bank of Kansas City, U.S. Court of Appeals for the Tenth Circuit, Case No. 16 -1016.

Justin L. Smith, et al. vs. John W. Hickenlooper, U.S. Court of Appeals for the Tenth Circuit, Case No. 16-1095; *Safe Streets Alliance, et al. v. John W. Hickenlooper, et al.*, U.S. Court of Appeals for the Tenth Circuit, Case No. 16-1048.

Dharminder Mann v. Sara Gullickson, U.S. District Court for the Northern District of California, Case No. 15-CV-03630, November 2, 2016, 2016 WL 6473215.

Fourth Corner Credit Union vs. National Credit Union Administration, U.S. District Court for the District of Colorado, Case No. 1:15-CV-01634.

Feinberg, et al. vs. C.I.R., U.S. Tax Court (Denver, CO), Case No. 010083-13.

Patients Mutual Assistance Collective Corporation d/b/a Harborside Health Center v. C.I.R., U.S. Tax Court (San Francisco, CA), Case Nos. 29212-11, 30851-12, 14776-14.

People of the State of Colorado v. Robert Crouse, Supreme Court of Colorado, Case No. 14SC109, January 23, 2017, 388 P.3d 39.

Cristina Barbuto vs. Advantage Sales and Marketing, et al., Massachusetts Supreme Judicial Court, Case No. SJC-12226.

State of Colorado vs. Richard Kirk, Denver County (Co.) District Court, Case No. 14CR1853.

-Continued

Federal Cases

Paul Gerlich, et al. v. Steven Leath, et al., U.S. Court of Appeals for the Eighth Circuit, Case No. 16-1518, February 13, 2017, 847 F.3d 1005. A more detailed summary of this case is located in previous issues of *NAMSDL Case Law Update*. In 2014, the plaintiffs, two past presidents of the Iowa State University ("ISU") chapter of the National Organization for the Reform of Marijuana Laws ("NORML"), sued various ISU executives in a four-count complaint under civil rights law for alleged violations of their First and Fourteenth Amendment rights. The suit occurred after ISU's Trademark Office denied several NORML licensing requests (for T-shirt designs with ISU logos) because the designs included a cannabis leaf. In their Complaint, Plaintiffs alleged that: 1) new trademark guidelines established by ISU after NORML's requests were unconstitutionally overbroad; 2) the new guideless were unconstitutionally vague on their face; and 3) Plaintiffs suffered impermissible "viewpoint discrimination" at the hands of ISU. Both the Plaintiffs and the Defendants moved for summary judgment, each asserting that they were entitled to judgment as a matter of law. In January 2016, an Iowa federal district court granted in part, and denied in part, the motions for summary judgment. As part of the decision, the district court imposed limited injunctive relief in the Plaintiffs' favor, and ordered that "Defendants are hereby permanently enjoined from enforcing trademark licensing policies against Plaintiffs in a viewpoint discriminatory manner and from further prohibiting Plaintiffs from producing licensed apparel on the basis that their designs include the image of a similar cannabis leaf."

Defendants appealed the decision to the U.S. Court of Appeals for the Eighth Circuit. On appeal, the Eighth Circuit affirmed the decision. In reaching this conclusion, the Eighth Circuit held that Defendants' "rejection of NORML ISU's designs discriminated against that group on the basis of the group's viewpoint." According to the court, the "unique scrutiny" Defendants imposed on Plaintiffs' design submissions that were not imposed on other student groups evidenced the discrimination. The court also rejected Defendants' contention that the district court's injunction was too broad because it allowed NORML to use ISU trademarks in ways that violate ISU's neutral viewpoint guidelines. In the Eighth Circuit's view, NORML's proposed use of a cannabis leaf on T-shirts with ISU logos "does not violate ISU's trademark policies because the organization advocates for reform to marijuana laws, not the illegal use of marijuana."

United States v. Alan Nixon, U.S. Court of Appeals for the Ninth Circuit, Case No. 16–50097, October 17, 2016, 839 F.3d 885. In the underlying federal case filed in 2012, the defendant, Alan Nixon, pled guilty to aiding and abetting the maintenance of a drug-involved premise. A California federal district court sentenced him to three years of probation, which included a ban on the unlawful use of a controlled substance. While on probation, Congress enacted the appropriations bill that included a rider preventing the U.S. Department of Justice from using federal funds appropriated in the bill to keep states "from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Because of this, Defendant petitioned the California court to amend the terms of his probation to allow him to use marijuana for medicinal purposes as allowed by California law. The district court denied that motion, concluding that the rider has "no effect on the Court or the Probation Office, which is an arm of the Court." Instead, the court reasoned the use of marijuana is still illegal under federal law and that it "must impose as a condition of probation that a defendant not violate any law." Defendant appealed to the U.S. Court of Appeals for the Ninth Circuit, which affirmed the decision. According to the Ninth Circuit "the appropriations rider restricts only the DOJ's ability to use certain funds on particular prosecutions during a specific fiscal year."

-Continued

Accordingly, the court held that the district court did not abuse its discretion "by refusing to modify the conditions of Nixon's probation to allow him to possess and use marijuana for medical purposes in violation of federal law."

United States vs. Schweder, et al., U.S. Court of Appeals for the Ninth Circuit, Case No. 16-10272. A more detailed summary of this case is located in previous issues of *NAMSDL Case Law Update*. Federal prosecutors charged Defendant Bryan Schweder and 15 others for being part of an illegal marijuana growing operation. The case subsequently gained notoriety when the federal district court held a weeklong hearing in October 2014 concerning the constitutionality of the federal classification of marijuana as a Schedule I controlled substance. After the hearing, the court found the classification constitutional. Subsequently, all 16 defendants pled guilty to one or more of their charges prior to trial, with Defendant receiving the longest prison sentence of 13.5 years. In June 2016, Defendant filed an appeal to the U.S. Court of Appeals for the Ninth Circuit. In September 2016, the United States moved to dismiss the appeal on grounds that Defendant waived his right to appeal and collaterally attack his sentence and conviction as part of the plea agreement. As of March 2017, the parties are still in the midst of filing briefs and the Ninth Circuit has not set an oral argument date.

Fourth Corner Credit Union vs. Federal Reserve Bank of Kansas City, U.S. Court of Appeals for the Tenth Circuit, Case No. 16-1016. A more detailed summary of this case is located in previous issues of *NAMSDL Case Law Update*. The plaintiff, Fourth Corner Credit Union, is a credit union doing business in Colorado that intends to provide banking services to compliant state-licensed cannabis and hemp businesses. The Federal Reserve Bank of Kansas City ("FRB-KC") denied Plaintiff a master account on the basis that to do so would violate federal laws regarding marijuana. In July 2015, Plaintiff filed suit against FRB-KC in Colorado federal court, asserting that Defendant's grant of a master account is not a discretionary function but rather a mandatory one if the requesting entity is eligible to apply for federal deposit insurance. Defendant moved to dismiss the case against it for failure to state a claim, arguing that Colorado's grant of a credit union charter to Plaintiff violates federal law and that Plaintiff's requested relief would force Defendant to further or assist an illegal purpose. In January 2016, the district court dismissed the Complaint against the Defendant on the basis that the court could not use its equitable powers of relief to facilitate criminal activity, which would be the case if it were to rule in favor of the Plaintiff. Plaintiff appealed the decision to the U.S. Court of Appeals for the Tenth Circuit. The Tenth Circuit held oral argument in the matter in November 2016. To date, the court has not issued its ruling.

Justin L. Smith, et al. vs. John W. Hickenlooper, U.S. Court of Appeals for the Tenth Circuit, Case No. 16-1095; *Safe Streets Alliance, et al. v. John W. Hickenlooper, et al.*, U.S. Court of Appeals for the Tenth Circuit, Case No. 16-1048. A more detailed summary of these consolidated cases is located in previous issues of *NAMSDL Case Law Update* and *NAMSDL News*. In the *Smith* matter, six Sheriffs of Colorado counties and six Sheriffs of counties in neighboring states filed suit in Colorado federal court in March 2015 against the Governor of Colorado seeking an injunction against the application and enforcement of Colorado's marijuana legalization measure. The *Smith* Plaintiffs argued that Colorado's marijuana laws conflict with and impede execution of the federal Controlled Substances Act and international treaties, and federal law and federal policy preempts them. Similarly, in the *Safe Streets* matter, three other plaintiffs filed suit in the same federal court against sixteen parties, both private and state, including the Governor of Colorado. The *Safe Streets* Plaintiffs alleged that the Defendants violated their rights under the Racketeer

-Continued

Influenced and Corrupt Organizations Act, and that federal law preempts the Colorado constitutional amendment allowing the personal use of marijuana. In January 2016, the district court dismissed the state defendants from the *Safe Streets* case, reasoning that the federal Controlled Substances Act does not create a private right of action to preempt state law and, therefore, Plaintiffs cannot maintain a claim against them. Likewise, in February 2016, the district court granted the *Smith* Defendant's motion to dismiss on the basis that neither the Controlled Substances Act, the International Conventions, nor the Supremacy Clause give rise to a private right of action to enforce federal law regarding marijuana. Plaintiffs in both cases appealed the rulings to the U.S. Court of Appeals for the Tenth Circuit, which consolidated the cases for the appeal. Oral argument in the consolidated matter occurred in January 2017. To date, the Tenth Circuit has not issued a ruling.

Dharminder Mann v. Sara Gullickson, U.S. District Court for the Northern District of California, Case No. 15-CV-03630, November 2, 2016, 2016 WL 6473215. In 2014, the Plaintiff, Dharminder Mann, sold two businesses to the Defendant, Sara Gullickson: (1) a consulting business for state-regulated marijuana dispensary or cultivation licenses; and (2) a franchise hydroponic retail operation. Although the sale documents indicated that the businesses targeted patients and dispensaries involved in the medicinal use of marijuana, there was no evidence that either business grew or sold marijuana products. In 2015, Plaintiff filed a breach of contract lawsuit, alleging that Defendant failed to make payments required under the purchase agreement. In response, the Defendant moved for judgment as a matter of law, arguing that the federal prohibition on marijuana made the contract unenforceable. The federal district court disagreed and denied Defendant's motion, keeping the case on course for a trial. Deciding the case under California law, the district court first noted the state's stated interest in allowing qualified patients access to marijuana as compared to "less than clear" federal policy regarding Controlled Substances Act ("CSA") enforcement. Next, after reviewing California case law, the court concluded, "even where contracts concern illegal objects, where it is possible for a court to enforce a contract in a way that does not require illegal conduct, the court is not barred from according such relief." In the court's view, granting the relief sought by Plaintiff— full payment for the businesses— does not require the Defendant "to possess, cultivate, or distribute marijuana, or to in any other way require her to violate the CSA." The court also noted that Defendant might obtain a windfall—the ownership of two businesses without full payment—if the contract is not enforced. Accordingly, the court found that "given then federal government's wavering policy on medical marijuana" and "California's expressed policy interest in allowing qualified patients to obtain medical marijuana, the purported illegality here is not one the Court finds to mandate non-enforcement of the parties' contract."

Fourth Corner Credit Union vs. National Credit Union Administration, U.S. District Court for the District of Colorado, Case No. 1:15-CV-01634. A more detailed summary of this case is located in previous issues of *NAMSDL Case Law Update*. The plaintiff, Fourth Corner Credit Union, is a credit union doing business in Colorado that intends to provide banking services to compliant state-licensed cannabis and hemp businesses. In July 2015, Plaintiff filed suit against the National Credit Union Administration ("NCUA") seeking judicial review of the agency's rejection of its application for federal share deposit insurance. Plaintiff's application was allegedly rejected on the basis that the Defendant had "fundamental concerns about the inherent risks of [the plaintiff's] business model." Defendant moved to dismiss the case on grounds that the Plaintiff lacked standing to bring claims for declaratory relief, the court lacked jurisdiction, and the Plaintiff's due process claim lacked merit. In July 2016, the district court

-Continued

entered an Order granting in part and denying in part the motion. The court dismissed Plaintiff's due process and declaratory relief claims but allowed all other claims to proceed. In recent months, reported activity in the case has centered on discovery disputes. As of March 2017, no trial date has been set and the last docket activity in the case occurred in December 2016.

Feinberg, et al. vs. C.I.R., U.S. Tax Court (Denver, CO), Case No. 010083-13. A more detailed summary of this case is located in previous issues of *NAMSDL Case Law Update*. In 2013, the owners of a Colorado marijuana dispensary sued the Internal Revenue Service ("IRS") in U.S. Tax Court after the IRS disallowed business expense deductions because the business, while legal under Colorado law, violates federal criminal laws. As previously detailed in the *Case Law Update*, during the litigation, the taxpayers sought to avoid turning over certain business documentation requested by IRS, but lost that effort before both the Tax Court and the U.S. Court of Appeals for the Tenth Circuit. The parties tried the case-in-chief before the Tax Court in January 2017. Under a schedule set by the Tax Court, the parties will file post-trial briefs and replies between March and June 2017.

Patients Mutual Assistance Collective Corporation d/b/a Harborside Health Center v. C.I.R., U.S. Tax Court (San Francisco, CA), Case Nos. 29212-11, 30851-12, 14776-14. A more detailed summary of this case is located in previous issues of *NAMSDL Case Law Update*. Section 280E of the U.S. Tax Code disallows deductions for any trade or business that "consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act)." As a result, businesses involved in such operations may not deduct reasonable and necessary business expenses—other than the cost of goods sold— in calculating their taxable income. In recent years, the IRS has asserted that § 280E prevents marijuana suppliers and dispensaries from taking such deductions, even where state law allows the medicinal or recreational use of marijuana. In the three consolidated cases listed above, the Plaintiff, one of the largest marijuana dispensaries in the United States, disputes over $2.4 million in taxes that the IRS claims is owed due to its interpretation of § 280E. The parties tried the consolidated cases in June 2016. To date, the Tax Court has not issued a ruling.

State Cases

People of the State of Colorado v. Robert Crouse, Supreme Court of Colorado, Case No. 14SC109, January 23, 2017, 388 P.3d 39. Police arrested a Colorado man, the Defendant, for cultivating and possessing marijuana with the intent to manufacture in violation of state law. As part of the arrest, police seized 55 marijuana plants and 2.9 kilograms of marijuana product. A jury acquitted him of both charges. After trial, the Defendant, a registered medical marijuana patient in Colorado, asked the state court to require the police to return the marijuana and plants, pursuant to the provision in the Colorado constitution allowing the medicinal use of marijuana (Art. XVIII, § 14(2)(e)). This provision provides that "marijuana and paraphernalia seized by state or local law enforcement officials from a patient ... in connection with the claimed medical use of marijuana shall be returned immediately upon ... the dismissal of charges, or acquittal." The state opposed Defendant's request on grounds that returning marijuana requires police to "distribute" marijuana, in violation of federal law. The state trial court granted Defendant's request and a state intermediate appellate court affirmed. Upon review, the Supreme Court of Colorado reversed the decision. In reaching this conclusion, the court held that § 14(2)(e) is preempted by the Controlled Substance Act ("CSA"), as it is in "positive conflict" with the CSA and "the two cannot consistently stand together." The court did note that the

-Continued

CSA exempts state officers from civil or criminal liability if they are "lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." However, the court found that such conduct is "lawful" only if it complies with both federal and state law, which is not the case if law enforcement returns to a defendant an illicit substance under federal law.

Cristina Barbuto vs. Advantage Sales and Marketing, et al., Massachusetts Supreme Judicial Court, Case No. SJC-12226. A more detailed summary of this case is located in previous issues of *NAMSDL Case Law Update*. In September 2015, the Plaintiff, a Massachusetts woman, filed suit against her former employer for discriminatory employment practices after the employer terminated her for failing a pre-employment drug test. Plaintiff alleged she failed the test because of her off-premises use of marijuana for medicinal purposes allowed by Massachusetts law. In May 2016, the trial court dismissed five of Plaintiff's six causes of action, leaving only a claim that her employer interfered with her right to privacy by requiring drug testing via urinalysis. Plaintiff voluntarily dismissed her remaining cause of action and appealed the decision. In November 2016, the Massachusetts Supreme Judicial Court granted Plaintiff's motion for direct appellate review, thereby allowing the state's highest court to review the matter straight from the trial court. The Supreme Judicial Court framed the legal question at issue as "[w]hether the termination of an employee's employment based on her lawful use of medical marijuana outside the workplace violates [Massachusetts law] or is otherwise wrongful." Oral argument in the matter occurred in March 2017. To date, the court has not issued a decision.

State of Colorado vs. Richard Kirk, Denver County (Co.) District Court, Case No. 14CR1853. A more detailed summary of this case is located in previous issues of *NAMSDL Case Law Update*. The Defendant, a Colorado man, stood accused of killing his wife in 2014 while she called 911 worried about his state of mind. During the call, the wife reported that Defendant was behaving erratically and "totally hallucinating." In September 2015, Defendant changed his plea from "not guilty" to "not guilty by reason of insanity." Although Defendant never explained the reason for the change, some court filings containing psychological and medical evaluations suggested that Defendant planned to argue that his actions were, in whole or in part, clouded by intoxication from ingesting a marijuana edible. The court deemed Defendant mentally competent to stand trial in September 2016 and scheduled the trial for March 2017. In February 2017, Defendant pled guilty to second-degree murder, accepting a prison sentence of 25-30 years. Formal sentencing will occur in March 2017.

This project was supported by Grant No. G1599ONDCP03A, awarded by the Office of National Drug Control Policy. Points of view or opinions in this documents are those of the author and do not necessarily represent the official position or policies of the Office of National Drug Control Policy or the United States Government.