Federal Law and Marijuana

Brian W. Barnes

Cooper & Kirk, PLLC

November 29, 2017

Overview

1. Federal law prohibits virtually every aspect of the marijuana business.
2. Although current Department of Justice policy is generally not to enforce federal law against marijuana businesses that operate in compliance with state law, this policy could change at any time.
3. Even absent a change in federal enforcement policy, anyone who facilitates violations of the federal drug laws faces potential civil liability under the federal racketeering statute, which is privately enforceable.

The Controlled Substances Act of 1970

1. When Congress enacted the Controlled Substances Act (“CSA”) in 1970, it found that “[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.” 21 U.S.C. § 801(2).
2. The CSA categorizes drugs according to a series of schedules, with the most dangerous and least useful drugs appearing on Schedule I. Schedule I drugs have “a high potential for abuse” and “no currently accepted medical use.” 21 U.S.C. § 812(b)(1).

Marijuana and Schedule I

1. When it enacted the CSA, Congress placed marijuana on Schedule I, thus determining that the drug has a high potential for abuse and no accepted medical use.
2. The CSA gives the Attorney General authority to remove drugs from Schedule I if justified by available scientific and medical evidence. 21 U.S.C. § 811.
    a. Administrations of both parties have repeatedly refused to reschedule marijuana and successfully defended this decision in court. *See, e.g.*, *Americans for Safe Access v. DEA*, 706 F.3d 438 (D.C. Cir. 2013); *Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131 (D.C. Cir. 1994).
    b. Most recently, the Obama Administration declined to reschedule marijuana in August 2016.

Federal Law Prohibits Virtually Every Aspect of the Marijuana Business

1. Because marijuana is a Schedule I drug, it is a federal offense to “manufacture, distribute, or dispense” the drug. 21 U.S.C. § 841(a)(1).
2. In addition to the CSA’s prohibitions on cultivation and sale, the CSA also prohibits a wide range of other activities connected to the operation of a marijuana business, including:
    a. Possessing “any equipment, chemical, product, or material” with the intention of using it to grow or process marijuana. 21 U.S.C. § 843(a)(6).
    b. Using the telephone, email, or mail to facilitate the manufacture or sale of marijuana or advertising marijuana for sale over the Internet. 21 U.S.C. § 843(b), (c)(2)(A).
    c. Leasing, renting, maintaining, managing, or controlling a place where marijuana is manufactured or sold. 21 U.S.C. § 856.
    d. Conspiring to violate any of the foregoing prohibitions. 21 U.S.C. § 846.

Marijuana and Money Laundering

1. Federal law broadly prohibits financial transactions involving proceeds derived from violations of the federal drug laws.
2. With limited exceptions, reinvesting the proceeds from a marijuana business in any enterprise that engages in interstate commerce violates the CSA. 21 U.S.C. § 854(a).
3. Money laundering statutes prohibit conducting a financial transaction involving funds derived from the sale of marijuana with the intent to promote the carrying on of a marijuana business. 18 U.S.C. § 1956(a).
4. For financial transactions involving more than $10,000, money laundering can be proven without any showing of intent to promote the carrying on of a marijuana business. 18 U.S.C. § 1957(a). Merely knowingly receiving a payment of more than $10,000 from a known marijuana business is federal money laundering.

Implications for the Gaming Industry

1. Leasing space to a business that sells marijuana or making space available for the use of marijuana violates the federal drug laws.
2. Any investment in a marijuana business would, at a minimum, constitute drug conspiracy and money laundering.
3. Given the prohibition on financial transactions involving more than $10,000 of proceeds from the sale of marijuana, it would be extremely difficult for a casino to host a convention for marijuana businesses without committing money laundering.

Department of Justice Enforcement Policy

1. In August 2013, the Department of Justice released the Cole Memorandum, which observers interpreted to mean that the federal government will not prosecute recreational marijuana businesses that comply with state law.
2. The Cole Memorandum permits prosecutions of state-authorized marijuana businesses that implicate "certain enforcement priorities," some of which States that have legalized marijuana have had great difficulty addressing:
    a. Preventing distribution to minors;
    b. Preventing diversion to States that prohibit marijuana;
    c. Preventing drugged driving and other adverse public health consequences.
3. Although federal prosecutors have not relied on these priorities to justify enforcement against the state-authorized marijuana industry so far, the Cole Memorandum could be interpreted to justify a broad crackdown.
4. By its terms, the Cole Memorandum does not have the force of law and could be amended or withdrawn at any time.

Rohrabacher-Farr Appropriations Rider

1. In December 2014, Congress passed an omnibus spending bill that included a rider that prevents the Department of Justice from spending money "to prevent . . . States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." 128 Stat. 2130, 2217 (2014).
2. The rider only applies to *medical* marijuana, and the Ninth Circuit has said that it does not legalize medical marijuana but merely places temporary limits on the Department of Justice's authority to bring enforcement actions. *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016).
3. Although Congress has renewed the Rohrabacher-Farr rider in short-term spending bills, the Trump Administration opposes further renewals. There is considerable uncertainty whether the rider will be extended in the next federal budget.

Operating a Marijuana Business is Federal Racketeering

1. Even if federal enforcement policy does not change, marijuana businesses, investors, and those who conspire to assist them face the risk of civil liability under the Racketeer Influenced and Corrupt Organizations Act (“RICO”).
2. RICO makes it unlawful for any person to conduct the affairs of an incorporated business or other enterprise through a pattern of “racketeering activity.” 18 U.S.C. § 1962(c).
3. RICO’s definition of “racketeering activity” includes violations of the federal drug laws as well as money laundering. 18 U.S.C. § 1961(1). Those who operate an incorporated business devoted to the cultivation and sale of marijuana easily satisfy most of the elements of a violation of RICO.

Civil RICO

1. RICO gives a private right of action to “[a]ny person injured in his business or property by reason of a violation” of the statute. 18 U.S.C. § 1964(c).
2. Successful civil RICO plaintiffs are entitled to recover treble damages and attorneys’ fees. These extraordinary remedies change the economics of such suits, creating a bounty for plaintiffs and lawyers who can prove an injury caused by a business’s racketeering activity.

New Vision Hotels v. Medical Marijuana of the Rockies

1. The plaintiff was a Holiday Inn franchisee faced with loss of high school ski team business due to the planned opening of nearby recreational marijuana shop.
2. In 2015, the plaintiff sued in federal court under RICO. The shop did not open because investors abandoned the project in response to the suit.
3. The plaintiff asserted RICO claims against an array of businesses that provided services to the planned marijuana shop and ultimately collected $70,000 in settlements from the shop's accountant and the underwriter of its tax surety bond.
4. In the wake of the suit, insurers stopped underwriting tax surety bonds for marijuana businesses. The Colorado Legislature was forced to repeal a statute that had made obtaining such bonds a condition of operating a licensed marijuana business.

Safe Streets Alliance v. Hickenlooper

1. The *Safe Streets* plaintiffs own property in Colorado that is adjacent to a marijuana cultivation facility that emits a pungent marijuana odor.
2. The plaintiffs filed a civil RICO suit in federal court in 2015, alleging that the facility's smell interferes with their use and enjoyment of their property and diminishes its value.
3. Foul odors, stigma, and reduced property values are very common problems caused by marijuana facilities.

The Tenth Circuit's *Safe Streets* Ruling

1. The district court initially dismissed the RICO claims, ruling that the plaintiffs had not sufficiently alleged an "injury to business or property" under RICO.
2. In June, the Tenth Circuit reversed, holding that the plaintiffs could prevail by showing any of the following injuries: (a) that the odor emitted by the facility interferes with use and enjoyment of the plaintiffs' property; (b) that the odor diminishes the market value of the plaintiffs' property; or (c) that the stigma associated with the facility diminishes the value of the plaintiffs' property. *Safe Streets Alliance v. Hickenlooper*, 859 F.3d 865, 884-91 (10th Cir. 2017).
3. The Tenth Circuit's opinion also reviewed the other elements of a civil RICO claim and explained how a typical marijuana business satisfies each of them. 859 F.3d at 881-84.
4. *Safe Streets* was the first civil RICO suit to be litigated, but since the Tenth Circuit's decision additional suits have been filed in Oregon and Massachusetts.

Civil RICO Conspirator Liability

1. RICO extends civil liability not only to those who operate businesses through a pattern of racketeering activity but also to those who conspire with them. 18 U.S.C. § 1964(d). Anyone who knowingly facilitates a business's commission of federal drug crimes is potentially liable.
2. The Supreme Court has said that the *Pinkerton* doctrine applies to civil RICO conspirators. *Salinas v. United States*, 522 U.S. 52, 63-64 (1997). Under this doctrine, conspirators are jointly and severally liable for *all* injuries caused by the conspiracy.
3. A Nevada business with a relatively minor role in a marijuana conspiracy could therefore be liable for injuries caused by the conspiracy in another state, even if the Nevada business's conduct did not directly cause the plaintiff's injuries.

RICO’s Implications for the Gaming Industry

1. Any financial relationship between a casino and a marijuana business potentially exposes the casino to suit under civil RICO.
2. Whether hosting a convention for marijuana businesses would be enough to make the casino liable as a conspirator under RICO would depend on the facts and the extent to which the casino actively facilitated conduct that violates the federal drug laws.
3. This is an emerging area of the law, and additional civil RICO suits against the marijuana industry are likely to be filed now that a federal court of appeals has said that such suits can succeed.

Conclusion

1. Despite changes to state law and the Department of Justice's current enforcement policy, operating a marijuana business remains illegal in Nevada and everywhere else in the United States.
2. Any association between the gaming industry and a marijuana business is virtually certain to involve violations of the federal money laundering and racketeering statutes.
3. Civil RICO suits are a growing threat to the marijuana industry and anyone who knowingly facilitates violations of federal law in this area.