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**MEMORANDUM**

**Date:** October 26, 2011
**From:** Ad Hoc Medical Marijuana Committee, City Attorneys' Department
**Re:** ***Pack v. City of Long Beach* – Analysis**

*This memorandum is provided for general information only and is not offered or intended as legal advice. Readers should seek the advice of an attorney when confronted with legal issues and attorneys should perform an independent evaluation of the issues raised in this memorandum.*

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## INTRODUCTION

The following is an analysis of *Pack v. Superior Court of Los Angeles County (City of Long Beach*), 2011 WL 4553155 (Cal.App. 2 Dist.), prepared by the Ad Hoc Medical Marijuana Committee of the City Attorneys' Department. Questions that may be raised by the opinion are also included.

## FACTS

The City of Long Beach (City) enacted a comprehensive regulatory scheme governing medical marijuana collectives. Under the ordinance, the City charged application fees, and, because the ordinance prohibited any collective from operating within 1,000 feet of another collective, held a lottery to determine which locations could potentially operate. When enacted, the ordinance expressly provided that no collective could commence or continue operations without a permit. To obtain a permit, collectives were subject to numerous operational requirements and location restrictions. To date, the City has not issued any permits.

## PROCEDURAL POSTURE

Plaintiffs were members of medical marijuana collectives who sought to enjoin enforcement of the City's ordinance, arguing that the ordinance went beyond decriminalization and permitted conduct prohibited by the federal Controlled Substance Act (CSA). The trial court denied the preliminary injunction, declining to address the federal preemption argument and instead finding that plaintiffs could not request such a finding when the plaintiffs themselves were in violation of the same federal law. Plaintiffs filed a petition for writ of mandate in the Court of Appeal, Second District, Division 3. That Court granted the writ petition as to the permit provisions of

the ordinance and remanded the matter to the trial court to determine whether any remaining provisions could be severed and given effect, and whether any of the remaining provisions conflict with state law.

## ISSUE

The Court of Appeal framed the issue as being "whether the City's ordinance, which permits and regulates medical marijuana collectives rather than merely decriminalizing specific acts, is preempted by federal law."[1]

## HELD

In a case of first impression, the Court concluded that, to the extent the City's ordinance permits collectives, it stands as an obstacle to the purposes of the CSA and is preempted by federal law. The ordinance's permit provisions, including its "substantial" application and renewal fees and lottery system, impermissibly authorize the operation of collectives. One provision, which requires permitted collectives to have samples of their marijuana analyzed by an independent laboratory, is preempted under conflict preemption principles because it requires collectives to violate the CSA by distributing marijuana for testing.

## ANALYSIS

The Court reviewed the CSA, Compassionate Use Act (CUA), and Medical Marijuana Program Act (MMPA). The Court noted that the CSA contains a provision governing preemption, and relied on that provision in its analysis. The Court further noted that the CUA "simply decriminalizes" certain conduct for state law purposes, and thus is not preempted by the CSA, citing *Qualified Patients Ass'n v. City of Anaheim,* 187 Cal. 4th 734,757 (2010). The Court described the MMPA as an expansion of the immunities provided by the CUA,[2] including arrest immunity for those who participate in the voluntary identification card system. It also limited the amount of marijuana that may be possessed, and decriminalized the collective or cooperative cultivation of marijuana. The Court later relies on the distinction between decriminalization and "authorization" or "permission" in its conclusion that the City's ordinance is preempted by federal law.

In its preemption analysis, the Court reviewed the four types of federal preemption: express, conflict, obstacle and field preemption. Express and field preemption were eliminated as sources

[1] The larger issue is whether any state, county or municipality can regulate medical marijuana collectives without violating the CSA, which was enacted to prevent illicit drug diversion.

[2] The additional immunities provided under the MMPA are triggered "solely on the basis of" specified conduct by specified individuals. To the extent that the conduct goes beyond that, it is not immunized or decriminalized. *People v. Mentch,* 45 Cal. 4th 274 (2008)

of preemption because of 21 U.S.C. § 903.[3] Conflict preemption is established when it is impossible to simultaneously comply with two laws, in this case the CSA and the City's ordinance. Citing *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th, 798, 823 (2008), the reviewing Court determined that "the federal CSA would preempt any state or local law which fails the test for conflict preemption." Thereafter, the Court acknowledged that other courts "concluded that the federal CSA's preemption language bars consideration of obstacle preemption" while another court "concluded that the federal CSA preempts conflicting laws under both conflict and obstacle preemption." Addressing these divergent views, the Court reasoned that "the federal CSA can preempt state and local laws under both conflict and obstacle preemption." In so doing, the Court maintained that it had "not driven a legal wedge – only a terminological one – between 'conflicts' that prevent or frustrate the accomplishment of a federal objective and 'conflicts' that make it 'impossible' for private parties to comply with both state and federal law."

That said, in the limited area of medical marijuana testing, the Court applied conflict preemption. Specifically, the Court found the City's requirement that collectives have samples of their medical marijuana tested at an independent laboratory to ensure that it is free from pesticides and contaminants was preempted by the CSA because this provision required collectives to distribute marijuana for testing. The Court was not persuaded by the argument that the ordinance did not compel any person who did not desire to possess or distribute marijuana to do so.[4]

The Court expressly disagreed with,

> their colleagues who, in two other appellate opinions, 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 . . . [and] as far as Congress is concerned, there is no such thing as medical marijuana.

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[3] Section 903 provides: "No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which 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 subchapter and that State law so that the two cannot consistently stand together."

[4] In a troubling footnote, and while acknowledging that the issue was not before them, the Court noted that the City's ordinance might require certain city officials to violate federal law by aiding and abetting a violation of the CSA. The Court then points to a letter written by US Attorneys for the Eastern District to the Governor of Washington, in which the U.S. Attorneys warn that state employees may not be immune from liability under the CSA for the employees' implementation of certain legislative proposals for marijuana growers and dispensaries. The Court did not engage in an analysis of aiding and abetting, which requires, *inter alia*, a specific intent to facilitate the commission of a crime by another and the requisite intent of the underlying substantive offense, both of which, arguably, would not be present in the state employee implementing a state regulatory scheme. *Conant v. Walters*, 309 F. 3d 629, 635 (9th Cir. 2002).

The Court ultimately relied on obstacle preemption to conclude that the City's permit scheme is preempted where it authorized, rather than decriminalized, the possession and cultivation of medical marijuana. In contrast, the Court, in footnote 30, acknowledged that "the MMPA sometimes speaks in the language of authorization, when it appears to mean only decriminalization . . . [and that] any preemption analysis should focus on the purposes and effects of the provisions of the MMPA, not merely the language used." The City was determining which collectives were permissible and which were not by requiring collectives to meet certain conditions and pay fees. Possession of a City permit would allow certain collectives to operate, while those without permits could not operate; thus, the Court concluded that the permit was equivalent to authorization.

The Court was also concerned with the City's application and renewal fees, and the fact a lottery was held to determine which collectives might ultimately be granted a permit. Such action, the Court concluded, authorized operation and was preempted. In light of this reasoning, the Court placed "some weight" on a February 1, 2011, letter issued by the U.S. Attorney for the Northern District of California to the Oakland City Attorney regarding that city's consideration of a licensing scheme for medical marijuana. The letter explained, "Congress placed marijuana in Schedule I of the Controlled Substance Act (CSA) and, as such, growing, distributing, and possessing marijuana in any capacity, other than as part of a federally authorized research program, is a violation of federal law regardless of state laws permitting such activities." Still, the Court stopped short of rendering any opinion as to federal preemption of the MMPA, but instead focused on provisions of the City's ordinance.

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 premises, imposed limitations on collectives, and thus did not authorize activity prohibited by the CSA. Further locational restrictions, imposed as a limitation on the operation of collectives, would not be federally preempted. However, the latter restrictions 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.

## QUESTIONS

1. Can a city require a permit as a condition of operating a collective in that city?

No. The *Pack* Court viewed the issuance of a permit as authorization to operate a collective, and such authorization is an obstacle to enforcement of the CSA, and therefore preempted. The Court in two footnotes (18 and 31) points to the practical result of the City's ordinance: because of the fees, alarm and other equipment installation requirements, and locational restrictions, the only kind of collectives allowed would be "large dispensaries that require patients to complete a form summarily designating the business owner as their primary caregiver and offer marijuana in exchange for cash 'donations'-the precise type of dispensary believed by the Attorney General likely to be in violation of California law." The Court contrasts this commercial model with a

small collective "of four patients and/or caregivers growing a few dozen plants," suggesting that such an enterprise is more keeping with state law. The Court notes that the large-scale dispensary is disapproved both in the Attorney General Guidelines and the U.S. Attorney Letters. However, given the Court's conclusion that it is the City's authorization that triggers federal preemption, it is unclear how a city could "permit" even a small collective, even though this Court seemed inclined to view small collectives differently.

2. Can a city impose a business tax on collectives?

Taxes were not at issue in *Pack*. However, cities that impose a higher tax rate specifically on medical marijuana collectives may want to evaluate that practice in light of *Pack*. The Court references the Attorney General Guidelines' confirmation of the state's taxation of medical marijuana transactions and requirement that those engaging in such transactions obtain a seller's permit. This, according to the Guidelines, does not allow "unlawful sales" but rather merely "provides a way to remit" any taxes due. (Footnote 11.) To the extent that a local tax on collectives is part of a permitting scheme, it would appear to be preempted under *Pack*. Also, to the extent that such taxation could be viewed as encouraging large-scale commercial operations, *Pack*'s analysis suggests that obstacle preemption may be found.

3. Can a city impose zoning restrictions?

Maybe. The Court does not address zoning separately, nor does it analyze any cases which discuss the traditional power of cities to zone. In providing the background for the case, the Court says "The city's ordinance not only restricts the location of medical marijuana collectives, (citations omitted), but also regulates their operation by means of a permit system (citations omitted)." The Court notes that there is a distinction between not making an activity unlawful, and making the activity lawful. Further, the Court remanded the locational restrictions to the trial court to determine whether they could be interpreted to stand apart from the permit process. "These restrictions, imposed strictly as a limitation on the operation of medical marijuana collectives in the City, would not be federally preempted." It appears that cities can tell collectives where they can't be, but not where they can be.

4. Can a city include collectives and dispensaries as an "allowed" or "enumerated" land use in its code?

Probably not. Although *Pack* does not directly address this issue, its analysis logically seems to disfavor any authorization or allowance of collectives, even if not in the form of permits. If city action "goes beyond decriminalization into authorization" of conduct prohibited by the CSA, it likely runs afoul of *Pack*.

Nowhere in the opinion does the Court address the Tenth Amendment to the U.S. Constitution, which provides that all powers not delegated by the U.S. Constitution to the United States nor prohibited by it to the states are reserved to the states or the people; the authority to make land use regulations is based on this reservation of power. 9 Miller & Starr, Cal Real Estate section

25.2 (3d ed. 2009). In California, zoning is a local matter exercised by the cities pursuant to the police powers set forth in article XI, section 7 of the California Constitution. *Id.*

*Pack* also did not address California Government Code section 37100, which provides: "The legislative body [of a city] may pass ordinances not in conflict with the Constitution and laws of the State or the United States." This statute is clearly consistent with the Court's decision and appears to reinforce that an ordinance which permits conduct in violation of either federal or state law cannot stand.

5. Can a city impose public safety-related restrictions or prohibitions?

Probably. The Court noted that there are provisions of the City's ordinance that identified prohibited conduct without regard to the issuance of permits. Thus, it appears that making certain conduct unlawful is probably not preempted by the federal CSA.

6. Is there a true split in authority with the Fourth District Court of Appeal such that a city could cautiously ignore *Pack*?

When opinions of the Court of Appeal conflict, the trial court must apply its own wisdom to the matter and choose between the opinions. *McCallum v. McCallum*, 190 Cal. App. 3d 308, 315, fn. 4, (1987).

> 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.

*Ibid.*

The *Pack* Court disagrees with what the Fourth District Court "implied" with respect to obstacle preemption in *Qualified Patients Ass'n v. City of Anaheim*, 187 Cal. App. 4th 734 (2010) and *County of San Diego v. San Diego NORML*, 165 Cal. App. 4th 798 (2008). In *Qualified Patients*, the Fourth District said:

> . . . a city's compliance with state law in the exercise of its regulatory, licensing, zoning, or other power with respect to the operation of medical marijuana dispensaries that meet state law requirements would not violate conflicting federal law. . . . [T]he fact that some individuals or collectives or cooperatives might choose to act in the absence of state criminal law in a way that violates federal law does not implicate the city in any such violation . . . governmental entities do not incur aider and abettor

> or direct liability by complying with their obligations under the state medical marijuana laws.

*Id*. at 759-760. This statement is at odds with the *Pack* Court at footnote 27, wherein the Court states that there may be an issue of city officials aiding, abetting or facilitating a violation of federal law when approving and issuing a permit. Further, the Fourth District rejected the argument that the MMPA, specifically Health and Safety Code section 11362.775 (providing immunity from certain drug related offenses for qualified patients, ID card holders, and primary caregivers who collectively and cooperatively associate to cultivate marijuana for medical purposes), is preempted under a theory of obstacle preemption.

Finally, the Fourth District in *County of San Diego* concluded that the state's identification card program was not preempted as an obstacle to the CSA because the CSA combats recreational drug use, and does not regulate a state's medical practices. *County* at 826-827. Although the Second and Fourth Districts analyzed the issue of obstacle preemption differently, the Fourth District was not confronted with a permitting scheme in either *County of San Diego* or *Qualified Patients*. Thus, it appears that no conflict presently exists with respect to whether cities may permit collectives.

7. If a city has already permitted collectives, what should it do?

*Pack* says the permit scheme is preempted. One view is that such ordinances are preempted, and thus no longer enforceable, in the same way that a city could not enforce, for example, an illegal lodging ordinance if a court ruled that ordinance unconstitutional. To the extent that, under this view, a permitting ordinance is "null and void" as a matter of law, there is case law which suggests otherwise. In *Travis v. County of Santa Cruz*, 33 Cal. 4th 757, 775-776 (2004), the state Supreme Court stated:

> Plaintiffs suggest that preemption by state law renders a local ordinance not only unenforceable but also 'null and void,' and that consequently in this case 'there is no applicable limitations period because there is essentially no ordinance.' Plaintiffs' claims would thus be timely whenever brought. Plaintiffs cite no authority for this approach, and we have discovered none. Nor does it appeal as a matter of logic. A preempted ordinance, while it may lack any legal effect or force, does not cease to exist; if it did cease to exist, any challenge to it would have no object.

Though *Travis* involved state preemption and the applicable statute of limitations, the Court's analysis is germane. Following its logic, a city council may decide to formally repeal an ordinance which permits or otherwise authorizes collectives or dispensaries based on preemption by federal law, rather than deem it null and void by operation of law. Such an ordinance could expressly provide that any permits issued under the repealed ordinance are void and without legal force or effect.

Another view is that each individual issued permit must be revoked, with notice, so that the permitee is provided due process. Usually this involves some type of appeal hearing. A possibility to consider under this scenario, however, is: What if the hearing body or officer restores the permit to the collective? While such a decision would be inconsistent with *Pack*, collectives would likely argue that, under state law, they have a "right" to exist under the CUA and MMPA. In fact, such arguments are likely to be made regardless of the mechanism a city uses to "disallow" permitted collectives based on the *Pack* ruling. While a court would probably reject such arguments, based on abundant case law finding that state law does not require cities to allow collectives or dispensaries, cities should certainly anticipate them. *See City of Claremont v. Kruse*, 177 Cal. App. 4th 1153 (2009), *City of Corona v. Naulls*, 166 Cal. App. 4th 418 (2008), *County of Los Angeles v. Hill*, 192 Cal. App. 4th 861 (2011).

8. What should a city do with existing zoning provisions?

The city should review the language used to create the zoning restrictions. It appears under *Pack* that if the restrictions operate as a limitation, those restrictions are not preempted. If the zoning provisions are written in a manner that authorizes or allows or permits collectives, they are likely preempted. The main body of the Court's opinion focuses on limitation versus authorization, and seems to imply that the drafting of the right "prohibitory" language will save such ordinances from a preemption problem. However, the Court also says, in footnote 30, that any preemption analysis should focus on the purposes and effect of the provisions, not merely the language used. In that footnote, the Court is discussing the MMPA and how the MMPA sometimes speaks in authorization language when it appears to mean only decriminalization. If the language in your city's ordinance really means only decriminalization, you may be able to use this footnote. However, a similar argument was made as to the "permit" in the *Pack* case, and that argument was rejected by the Court, as the only way one could operate was with a permit. Therefore, it was, again, authorization and not decriminalization.

9. Does *Pack* apply to Charter cities?

*Pack* says "yes" (footnote 24). *Pack* comes to this conclusion by noting that regulation of medical marijuana is a matter of state and national interest.

10. If a city is contemplating regulation or has started the process of considering an ordinance to permit collectives, what should it do?

The city should re-evaluate its position and not move forward. The city should consider limitations, rather than a permitting scheme. (But see question and answer number six.)

Opinion: http://www.courtinfo.ca.gov/opinions/documents/B228781.PDF
Long Beach Ordinance:http://www.longbeach.gov/civica/filebank/blobdload.asp?BlobID=30310