Court of Appeals Holds that Medical Marihuana Dispensaries are Not Authorized by Michigan Medical Marihuana Act

Laura J. Garlinghouse
Foster Swift Municipal Law Bulletin
August 24, 2011

AUTHORS/ CONTRIBUTORS
Laura J. Genovich

PRACTICE AREAS
Municipal & Public Entity Law

The Michigan Court of Appeals issued a published opinion yesterday, August 23, 2011, holding that patient-to-patient sales of medical marihuana – which occur in medical marihuana "dispensaries" – are not permitted under the Michigan Medical Marihuana Act and are therefore public nuisances that must be enjoined. *State of Michigan v McQueen*, No. 301951.

In *McQueen*, two individuals opened a medical marihuana dispensary in Isabella County. The dispensary "facilitated" patient-to-patient transfers of medical marihuana by allowing members of the dispensary to rent lockers and make marihuana available to other members. All members were required to be qualifying patients or primary caregivers of patient members. A patient member was permitted to visit the dispensary, examine and select from various available strains of marihuana, and then purchase up to a certain amount of marihuana from the lockers. The dispensary kept a minimum 20% "service fee" for each sale of marihuana, which resulted in a highly profitable operation.

The State of Michigan sought an injunction against the individual operators of the dispensary, arguing that the dispensary was a public nuisance because it violated the Michigan Medical Marihuana Act ("MMMA") and was therefore a public nuisance under the Public Health Code ("PHC"). The trial court, after a two-day hearing, held that the dispensary complied with the MMMA because the patient-to-patient transfers constituted the "medical use" of marihuana.

The Michigan Court of Appeals reversed and held, as a matter of first impression, that the operation of the dispensary was *not* in compliance with the MMMA. The court first found that as a factual matter, the individuals who operated the dispensary were in possession of the medical marihuana stored in the lockers and were engaged in the selling of marihuana.

The court then concluded that patient-to-patient sales of marihuana are unlawful, despite the MMMA. The court reasoned that nothing in the MMMA actually legalizes the possession, use, or delivery of marihuana, which remains prohibited under the PHC. Rather, the MMMA sets forth "very limited circumstances in which persons involved with the use of marihuana, and who are thereby violating the PHC, may avoid criminal liability." *Id.* at 7. The MMMA's limited exemption from criminal liability applies only if the defendant is engaged in the "medical use" of marihuana in accordance with the MMMA.

Here, the court held that the dispensary was not engaged in the "medical use" of marihuana and therefore did not operate in accordance with the MMMA. Although the definition of "medical use" in the MMMA includes the delivery and transfer of marihuana, the court emphasized that the definition does not include the *sale* of marihuana – nor does any other provision of the MMMA authorize the sale of marihuana. The court concluded that the medical use of marihuana "does not include patient-to-patient sales," and the defendants therefore had no authority under the MMMA to operate a dispensary. Accordingly, the court held that the operation of a dispensary is not in accordance with the MMMA and is a public nuisance under the PHC that "must be enjoined." *Id.* at 16.

This decision provides clear guidance to municipalities and their residents about medical marihuana dispensaries. It is not yet known whether the operators of the dispensary will seek leave to appeal to the Michigan Supreme Court.

If you have any questions, please contact a member of the Foster Swift Municipal Law Team.