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## Are "Legal" Marijuana Contracts "Illegal"?

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## ARE “LEGAL” MARIJUANA CONTRACTS “ILLEGAL”?

LUKE SCHEUER<sup>\*</sup>

America is currently in the midst of a “legal” marijuana business boom. In states which have legalized marijuana thousands of businesses have been created and are being openly operated despite the continued prohibition on their main product by the federal Controlled Substances Abuse Act. As a regular part of their business, these companies enter into contracts which violate the CSA, for example, every time they sell their main product. These businesses, and their stakeholders, rely upon the enforceability of these contracts in order to regulate their relationships. However, under the “illegality” or public policy defense to the enforcement of contracts these contracts are arguably all void and unenforceable. Under the traditional understanding of this defense not only will an illegal contract not be enforced but any consideration paid will not even be returned. This defense is grounded in the public policy against encouraging illegal behavior and is a product of state law. Should courts apply it to the marijuana industry which has been legalized also under state law when it clearly is not against the public policy of states which have legalized marijuana to allow for the sale of marijuana? This article explores the effects of the conflict between federal and state marijuana laws on these businesses’ ability to enter into legally enforceable contracts. This article argues that marijuana contracts do not in fact violate public policy and therefore should be enforced despite their illegality. Nevertheless, courts should exercise restraint in enforcing these agreements, particularly in applying equitable remedies such as specific performance, so as to avoid forcing individuals to violate federal law.

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“The explicitly stated purpose of these loan agreements was to finance the sale and distribution of marijuana. This was in clear violation of the laws of the United States. As such, this contract is void and unenforceable.”<sup>1</sup>

“It is the public policy of the state of Colorado that a contract is not void or voidable as against public policy if it pertains to lawful activities authorized by ... the state constitution and ... [Colorado’s legal marijuana laws].”<sup>2</sup>

## INTRODUCTION

It is well understood in the field of contract law that if you enter a contract to buy heroin, pay your drug dealer, and then your drug dealer does not deliver the drugs as promised that you cannot go to court and enforce your contract with the drug dealer.<sup>3</sup> In fact, not only will a court not order the drug dealer to turn over your heroin, they will not even order that the drug dealer return your money to you.<sup>4</sup> This is because the contract you entered into violates public policy against the enforcement of illegal contracts.<sup>5</sup> Specifically this contract would violate the prohibition on heroin sales found in the federal Controlled Substances Abuse Act (the “CSA”).<sup>6</sup>

What happens if instead of heroin, you contract to buy marijuana, and the state in which you entered this contract is one of the 23 states plus the District of Columbia<sup>7</sup> that has “legalized”<sup>8</sup> marijuana on some level? Can this contract be enforced? On the one hand, the very law which criminalizes the sale of heroin, the CSA, is the same law which criminalizes the sale

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<sup>1</sup> Hammer v. Today's Health Care II, CV2011-051350 (Apr. 17, 2012) (in which an Arizona court refused to uphold the validity of a contract in which money was loaned to a Colorado marijuana business).

<sup>2</sup> C.R.S.A. § 13-22-601.

<sup>3</sup> See Hammer *supra* note \_\_\_\_.

<sup>4</sup> See *id.* at 4 (“[T]his is not all, for one who enters into such a contract is not only denied enforcement of his bargain, he is also denied restitution for any benefits he has conferred under the contract.”); Farnsworth *supra* note \_\_\_\_ § 5.9 (“Courts generally do not grant restitution under agreements that are unenforceable on grounds of public policy.”)

<sup>5</sup> See Williston on Contracts § 19:11 (4th Ed.).

<sup>6</sup> 21 U.S.C. § 812 Schedule I (b)(10) (2012). This article will focus its discussion of the CSA’s prohibition of marijuana but there are other federal laws which criminalize aspects of marijuana businesses. See e.g., Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (2012); Continuing Criminal Enterprise Statute, 21 U.S.C. § 848 (2012);

<sup>7</sup> State Marijuana Laws Maps, <http://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html>.

<sup>8</sup> The term “legal” is in quotations to reflect the fact that marijuana is illegal in many jurisdictions including at the federal level. So as not to be cumbersome, this Article will hereinafter refer to the “legal” marijuana industry simply as the marijuana industry with the intent that it not include sellers of marijuana who are not attempting to comply with state marijuana laws. This article will not directly take a stance on whether the legalization of marijuana is a good or bad policy decision, instead it will focus on the best ways to promote and protect this industry given the current split between federal and state marijuana laws.

of marijuana and the sale of marijuana is illegal no matter what the state may say.<sup>9</sup> Therefore, these contracts should still be unenforceable. On the other hand, many states have specifically legalized marijuana's sale despite the federal prohibition.<sup>10</sup> Therefore it is clearly not against the public policy of these states to allow the sale of marijuana. Since contract law, including the defense to a contract's enforcement that the contract violates public policy, is a product of state law, it can be argued that nothing is "illegal" for purposes of upholding state public policy in states which have legalized marijuana.<sup>11</sup> In addition, the federal government has signaled through policy and lack of enforcement that it no longer considers it an important public policy to enforce a marijuana prohibition, at least in states which have legalized it.<sup>12</sup> This article will argue that when the public policy behind marijuana's legalization is weighed against its federal prohibition that a court should find that legalization is supported by the stronger policy.<sup>13</sup> Therefore contracts that involve marijuana businesses should be enforced even if these contracts violate the CSA.

However, it is not a simple matter to ask courts to uphold marijuana contracts despite their violation of the CSA. Should a court order a marijuana business to deliver marijuana in compliance with a contract and in doing so force the marijuana business to violate the CSA and potentially expose the business' stakeholders<sup>14</sup> to criminal liability? Alternatively, a court could exercise its discretion to limit the remedies available for the violation of a marijuana contract to damages and not make specific performance available.<sup>15</sup> Denying this remedy undermines the abilities to use certain types of contracts which depend on equitable remedies such as shareholder agreements which are meant to regulate the relationships between marijuana investors and in which monetary damages alone would often be an inadequate remedy. This article will explore some of the complicated implications of asking a court to uphold and enforce contracts which violate federal law.

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<sup>9</sup> 21 U.S.C. § 812 Schedule I (C)(10) (2012), *see* *Gonzales v. Raich*, 545 U.S. 1, 27, 34 (2005) (holding that the federal government has the right to criminalize the sale of marijuana under the Commerce Clause); Ingold, *infra* note \_\_ (quoting a Colorado state court invalidating a marijuana contract "[a]ny state authorization to engage in the manufacture, distribution or possession of marijuana creates an obstacle to full execution of federal law... Therefore, Colorado's marijuana laws are preempted by federal marijuana law."); Thomas C. Horne, State of Arizona Attorney General Opinion, (August 6, 2012) <http://www.scribd.com/doc/102201478/Attorney-General-Opinion-II2-001-Re-Preemption-of-the-AMMA-Proposition-203-Pri> (concluding that Arizona's medical marijuana act is preempted by federal law to the extent it authorizes "any cultivating, selling, and dispensing of marijuana").

<sup>10</sup> Boyette & Wilson, *infra* note \_\_.

<sup>11</sup> *See infra* section IIA.

<sup>12</sup> *See infra* section IA.

<sup>13</sup> *Northern Ind. Pub. Serv. CO. v. Carbon County Coal Co.*, 799 F.2d 265, 273 (1986) ("the defense of illegality ... is not automatic but requires... a comparison of the pros and cons of enforcement...")

<sup>14</sup> This article will use the generic term "stakeholders" to refer to anyone with an interest in marijuana businesses including equity holders, managers, employees etc.

<sup>15</sup> *Schreck v. T & C Sanderson Farms, Inc.* 37 P.3d 510, 514 (2001).

The answer to these questions have huge implications for the booming field of marijuana businesses.<sup>16</sup> Thousands of marijuana businesses have opened in legal marijuana states to the point where they are challenging Starbucks for ubiquity.<sup>17</sup> These businesses, their stakeholders and customers depend on contracts to regulate their relationships. If these contracts are not enforceable, these relationships will be far less stable and will hurt the industry's ability to grow and flourish.<sup>18</sup> This in turn will decrease the chance that the state policy goals which drove legalization will be achieved. This article seeks to add to the growing body of literature examining the effects of the conflict between federal and state marijuana law on the business of marijuana. This literature includes discussion of the problems marijuana businesses have with federal taxes,<sup>19</sup> the ethical problems of being a lawyer advising a marijuana business,<sup>20</sup> and the struggles marijuana businesses have in using business entity law protections.<sup>21</sup> The issue of whether marijuana businesses can enforce contracts has been raised by others,<sup>22</sup> but the issue of

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<sup>16</sup> Matt Ferner, *Here's How Fast The Marijuana Industry Is Growing, In 5 Charts*, (January 1, 2015) [http://www.huffingtonpost.com/2015/01/29/marijuana-industry-growth-charts\\_n\\_6565604.html](http://www.huffingtonpost.com/2015/01/29/marijuana-industry-growth-charts_n_6565604.html) (noting that "[l]egal marijuana is the fastest-growing industry in the United States."); Christopher Ingraham, *The marijuana industry could be bigger than the NFL by 2020*, (October 24, 2014) <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/10/24/the-marijuana-industry-could-be-bigger-than-the-nfl-by-2020/>.

<sup>17</sup> Thomas Hendrick, *Colorado has more MMJ dispensaries than Starbucks*, (May 6, 2013) <http://kdvr.com/2013/05/03/mmj-map/> (noting that marijuana dispensaries outnumber Starbucks in the Colorado); *How Many Marijuana Dispensaries are in California?*, ARTICLESBASE (Jan. 26, 2011), <http://www.articlesbase.com/medicine-articles/how-many-marijuana-dispensaries-are-in-california-4109979.html>, archived at <http://perma.cc/EC2Y-4WX6> (noting that there were over 2,500 dispensaries in California in early 2011); *Denver Pot Dispensaries: 390; Colo. Starbucks: 208*, ABC 7NEWS DENVER (Jan. 5, 2010, 7:45 AM), <http://www.thedenverchannel.com/news/denver-pot-dispensaries-390-colo-starbucks-208>, archived at <http://perma.cc/A3KB-YER4> (noting that in 2010 (prior to the boom of recreational marijuana) there were 390 dispensaries in Denver alone versus only 208 Starbucks); Benac & Caldwell, *infra* note \_\_ (noting that while there are 112 Starbucks in Los Angeles, there had been as many as 1,000 marijuana dispensaries before a ballot measure restricted the number down to 135).

<sup>18</sup> This article will not take a direct stance on the merits of legalizing marijuana. Instead it will proceed under the understanding that marijuana businesses are operating under certain states' laws and that those states have an interesting in seeing this industry succeed.

<sup>19</sup> Phil Hackney, *A Response to Professor Leff on Tax Planning for Marijuana Dealers*, 99 Iowa L. Rev. Bull. 25 (2014); Benjamin M. Leff, *Tax Planning for Marijuana Dealers*, 90 IOWA L. REV. 523 (2014); Edward Roche, *Federal Income Taxation of Medical Marijuana Businesses*, 66 Tax Law. 429 (2013); Ben Rooney, *This Colorado pot shop made \$3.6 million last year*, (Jan 7, 2015) <http://finance.yahoo.com/news/colorado-pot-shop-made-3-220700799.html> (noting that a marijuana shop was not able to deduct \$200,000 in rent on its tax returns).

<sup>20</sup> Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders*, 91 OR. L. REV. 869, 880–86 (2013).

<sup>21</sup> Luke Scheuer, *The "Legal" Marijuana Industry and its Challenge for Business Entity Law*, 6 Wm. & Mary Bus. L. Rev. 511 (2015); Luke Scheuer *The Worst of Both Worlds: The Wild West of the "Legal" Marijuana Industry*, 35 N. Ill. U. L. Rev. 557 (2015).

<sup>22</sup> Erwin Chemerinsky, Jolene Forman, Allen Hopper and Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 96 (2015) (discussing the "profound legal uncertainty" over whether marijuana contracts will be enforced); Sam Kamin, *The Limits of Marijuana Legalization in the States*, 99 Iowa L. Rev. Bull. 39, 46 (2014); Juliette Fairley, *Marijuana CEOs Face Invalidation of Contracts Until Congress Acts*, (Dec 9, 2014) <https://www.mainstreet.com/article/marijuana-ceos-face-invalidation-of-contracts-until-congress-acts> (noting that federal courts are bound to invalidate marijuana related contracts); Adam Foster, *Enforceability of Marijuana Contracts in Colorado—Background and Recent Developments*, (June 12, 2015)

marijuana contract enforceability has not been developed in depth. Collectively these articles seek to help marijuana business tread, as best as possible, the murky path between illegal and legal conduct while the larger debate over marijuana plays out between the federal government and the states.

## I. THE MARIJUANA INDUSTRY'S "LEGAL" STATUS

### A. THE CURRENT STATE OF MARIJUANA LAWS IN THE UNITED STATES

The history of marijuana regulation in the United States goes back centuries,<sup>23</sup> however for this article's purpose, the relevant time period starts in 1970 when the federal government passed the CSA and listed marijuana as a schedule 1 drug.<sup>24</sup> This essentially acted as a total prohibition of marijuana for medicinal or recreational use and this act continues to be legally enforceable to this day.<sup>25</sup> States began to challenge this prohibition in the 1990s when California voters passed the nation's first medical marijuana law.<sup>26</sup> By 2015 the list of states that have legalized marijuana on some level has grown to 23 plus the District of Columbia.<sup>27</sup> This includes four states, Colorado, Washington, Oregon and Alaska, which legalized recreational marijuana.<sup>28</sup>

With the increasing number of states that have legalized marijuana, as well as growing popular support for its legalization<sup>29</sup> the federal government has slowly backed off rigorous enforcement of its marijuana prohibition.<sup>30</sup> Without actually changing the CSA, the executive

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<http://www.hobanandfeola.com/firm-overview/attorneys/c-adam-foster/enforceability-of-marijuana-contracts-in-colorado-background-and-recent-developments/>.

<sup>23</sup> Tom Head, *Marijuana Laws in the United States*, (June 12, 2015)

<http://civilliberty.about.com/od/drugpolicy/tp/Marijuana-History-Laws-United-States.htm> (noting that in 1619 a Virginia statute required farmers to grow hemp (related to cannabis)).

<sup>24</sup> 21 U.S.C. § 812 Schedule I (C)(10) (2012).

<sup>25</sup> *Id.*

<sup>26</sup> Melissa Griffin-Caen, *Why California Wasn't the First State to Legalize Recreational Marijuana*, CBS SF BAY AREA (Nov. 17, 2014, 10:08 AM), <http://sanfrancisco.cbslocal.com/2014/11/17/pot-why-california-wasnt-the-first-to-legalize-recreational-use-marijuana-cannabis-washington-dc-colorado-alaska/>.

<sup>27</sup> Chris Boyette & Jacque Wilson, *It's 2015: Is Weed Legal in Your State?*, CNN (Jan. 7, 2015, 8:09 AM), <http://www.cnn.com/2015/01/07/us/recreational-marijuana-laws/>.

<sup>28</sup> *State Marijuana Laws Map*, GOVERNING, (Feb 24, 2015), <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html>.

<sup>29</sup> Lydia Saad, *Majority Continues to Support Pot Legalization in U.S.*, (November 6, 2014)

<http://www.gallup.com/poll/179195/majority-continues-support-pot-legalization.aspx> (indicating that in 2014 a majority of Americans support the legalization of marijuana, a substantial increase in support since 1969 when only 12% of Americans supported legalization); Justin McCarthy, *More Than Four in 10 Americans Say They Have Tried Marijuana* (July 22, 2015), [http://www.gallup.com/poll/184298/four-americans-say-tried-marijuana.aspx?utm\\_source=tagrss&utm\\_medium=rss&utm\\_campaign=syndication](http://www.gallup.com/poll/184298/four-americans-say-tried-marijuana.aspx?utm_source=tagrss&utm_medium=rss&utm_campaign=syndication) (finding that 44% of American now admit to having used marijuana, up from 4% who admitted it in 1969).

<sup>30</sup> See Jack Healy, *Groundwork Laid, Growers Turn to Hemp in Colorado*, N.Y. TIMES (last modified Aug. 8, 2013), [http://www.nytimes.com/2013/08/06/us/groundwork-laid-growers-turn-to-hemp-in-colorado.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/08/06/us/groundwork-laid-growers-turn-to-hemp-in-colorado.html?pagewanted=all&_r=0), archived at <http://perma.cc/B8J7-U558> (noting that the total number of marijuana plants seized by federal authorities has "dropped sharply in recent years. In 2012, federal officials reported that 3.9 million cannabis plants had been destroyed under D.E.A. eradication efforts. A year earlier, officials said they had eradicated 6.7 million plants."); Matt Ferner, *DEA Raids 2 Los Angeles Medical Marijuana Dispensaries*, (October 24, 2014) <http://www.huffingtonpost.com/2014/10/24/dea-raid-medical-marijuana-los->

branch has articulated a policy of not going after marijuana businesses that are complying with state regulations.<sup>31</sup> On the campaign trail in 2008, President Obama said “I’m not going to be using Justice Department resources to try to circumvent state laws on this issue.”<sup>32</sup> For the most part he has followed this stance, with the federal government backing off arresting individuals and closing businesses for growing marijuana in states where it is legal. In a series of letters addressed to United States Attorneys, the justice department issued guidance on marijuana enforcement priorities.<sup>33</sup> In the latest of these letters, Deputy Attorney General James Cole notes that “Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime... The Department of Justice is committed to enforcement of the CSA...”<sup>34</sup> Despite this strongly worded defense of the CSA the memo makes clear that wholesale enforcement of the CSA’s marijuana prohibition is in fact no longer a priority. Instead it articulates the following enforcement priorities:

“[p]reventing distribution of marijuana to minors; [p]reventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; [p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states; [p]reventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; preventing violence and the use of firearms in the cultivation and distribution of marijuana; [p]reventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; [p]reventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana product on public lands; and [p]reventing marijuana possession or use on federal property.”<sup>35</sup>

Notably absent from this list is a priority to stop the sale of marijuana generally or to shut down marijuana businesses. Instead it states that it relies “on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.”<sup>36</sup> Of course this means that for states which have legalized marijuana, there will be no state enforcement and as a consequence no enforcement of the CSA in these areas at all. Complicating this analysis is the fact this does not mean that no states are enforcing the CSA, in fact marijuana arrests are up in states which have not legalized marijuana, especially states bordering Colorado, where police say

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angeles\_n\_6038926.html (noting that two raids conducted on marijuana businesses in Los Angeles were about the specific practices of those marijuana businesses and not about the fact that simply sold marijuana).

<sup>31</sup> C.J. Ciaramella, *Justice Department and Obama Reverse Stance on Medical Marijuana Raids*, DAILY CALLER (July 1, 2011, 2:47 PM), <http://dailycaller.com/2011/07/01/justice-department-and-obama-reverse-stance-on-medical-marijuana-raids/>, archived at <http://perma.cc/AS7G-CRW4> (quoting Attorney General Eric Holder as saying “[f]or those organizations that are doing so sanctioned by state law, and doing it in a way that is consistent with state law, and given the limited resources that we have, that will not be an emphasis for this administration.”)

<sup>32</sup> C.J. Ciaramella, *Justice Department and Obama Reverse Stance on Medical Marijuana Raids*, DAILY CALLER (July 1, 2011, 2:47 PM), <http://dailycaller.com/2011/07/01/justice-department-and-obama-reverse-stance-on-medical-marijuana-raids/>, archived at <http://perma.cc/AS7G-CRW4>.

<sup>33</sup> James M. Cole, *Memorandum For All United States Attorneys*, (August 29, 2013) <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*



marijuana is flowing over the border into their states.<sup>37</sup> In addition, marijuana arrests, while dramatically declined, are still continuing in even legalized states such as Colorado, often because of confusion by police or the public over exactly what is legal.<sup>38</sup> Aside from making enforcement a non-priority, the Obama administration has made some policy changes to try to help marijuana businesses including changes by the Treasury Department that would make it easier for these businesses to open and maintain a bank account<sup>39</sup> and to no longer require U.S. Public Health Service reviews of research studies into the potential health benefits of marijuana which should make these studies easier to conduct.<sup>40</sup> This more tolerant view of marijuana has started to permeate down the legal system, a recent raid in California resulted in nearly 100,000 marijuana plants being destroyed.<sup>41</sup> After the raid, which did not involve the DEA, police defended it by saying that it was about marijuana farmers illegally using 500,000 gallons of water per day, a major environmental problem in drought stricken California.<sup>42</sup> Whether this was truly the reason for the raid, in the past a major marijuana raid would not have needed any secondary justification. Some district attorneys have begun funneling marijuana offenders into prison alternatives such as treatment programs.<sup>43</sup> Congress has been much slower to change its marijuana policy, in part because it has been controlled by the Republican Party which, in general, has been less favorable towards legalization.<sup>44</sup> However, some within the Republican Party have begun to change their stance on marijuana as evidenced by a recent Senate Appropriations panel vote that would stop the federal government from blocking state medical

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<sup>37</sup> Jon Gettman, *Arresting Developments: Marijuana Arrests on the Rise in 17 states*, (November 26, 2014) [http://www.huffingtonpost.com/jon-gettman/arresting-developments-ma\\_b\\_5890824.html](http://www.huffingtonpost.com/jon-gettman/arresting-developments-ma_b_5890824.html); John Ingold and Eric Gorski, *More Colorado Pot is Flowing to Neighboring States, Officials Say*, (September 3, 2013) [http://www.denverpost.com/breakingnews/ci\\_24008061/more-colorado-pot-is-flowing-neighboring-states](http://www.denverpost.com/breakingnews/ci_24008061/more-colorado-pot-is-flowing-neighboring-states), (noting that between 2009 and 2012 there had been a 300% increase in Colorado marijuana seized that was destined for other states).

<sup>38</sup> Steven Nelson, *Colorado Marijuana Arrests Continue Despite Legalization: Hundreds Were Charged for Possession of Less than 2 Ounces of Weed in 2013*, (Jan 13, 2014) <http://www.usnews.com/news/articles/2014/01/13/colorado-marijuana-arrests-continue-despite-legalization>, (citing an overall dramatic decrease in marijuana arrests, but noting that they had not stopped entirely in Colorado).

<sup>39</sup> Keri Geiger, Jesse Hamilton and Elizabeth Dexheimer, *Banks Keep Distance from Marijuana Business and Its Unbanked Billions*, (May 12, 2015) <http://www.insurancejournal.com/news/national/2015/05/12/367987.htm>.

<sup>40</sup> Steve Nelson, *Major Pot Research Barrier Goes Up in Smoke*, (June 22, 2015) <http://www.usnews.com/news/articles/2015/06/22/major-pot-research-barrier-goes-up-in-smoke>.

<sup>41</sup> Josh Karkinson, *Police Say the Biggest Pot Raid in Years Wasn't Really About Pot: Forget the Drug War—the Main Battle Now in the Emerald Triangle May Be Drought*, (June 30, 2015) <http://www.motherjones.com/environment/2015/06/emerald-triangle-marijuana-raid-water-drought>; Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 802 (2012) (referring to the district attorney in Philadelphia's changed policy to funnel "low-level marijuana offenders" into a "drug-abuse class" as opposed to prosecuting them as misdemeanors with a potential thirty-day jail sentence.)

<sup>42</sup> Karkinson *supra* note \_\_\_. (critics of the raid noted that the wine industry also illegally uses water but was not raided, nor its vines ripped out. Nevertheless, the fact that the police felt the need to justify their action was notable.)

<sup>43</sup> Luna *supra* note \_\_\_.

<sup>44</sup> Steve Gorman, *Delaware [sic] Governor Signs Bill Decriminalizing Pot: Report*, (June 23, 2015) [news.yahoo.com/delaware-governor-signs-bill-decriminalizing-pot-report-043806298.html](http://news.yahoo.com/delaware-governor-signs-bill-decriminalizing-pot-report-043806298.html) (noting that the vote to decriminalize marijuana fell strictly on party lines with no support from Republicans in Delaware); Grant Schulte, *Nebraska, Oklahoma Sue Neighboring Colorado Over Marijuana Legalization*, (December 18, 2014) <http://www.slttrib.com/news/1966408-155/story.html> (noting that Nebraska and Oklahoma, both Republican controlled states, asked the Supreme Court to strike down Colorado's marijuana laws).

marijuana laws.<sup>45</sup> Under the Consolidated and Further Continuing Appropriations Act (“Cromnibus Act”) the federal government is barred from using funds to prevent a state that has legalized marijuana “from implements [its] own [law] that authorize[s] the use, distribution, possession, or cultivation of medical marijuana.”<sup>46</sup> This measure must be re-passed each year and so does not add long term comfort to marijuana businesses but nevertheless signals a more favorable attitude towards marijuana by this branch of government.<sup>47</sup> Another vote by the Senate Appropriations Committee recently voted to allow marijuana businesses access to federal banking services.<sup>48</sup> The vote was mainly along party lines but three Republican senators did give their support.<sup>49</sup>

Despite making these marijuana policy changes, marijuana still remains a serious federal crime and nothing protects marijuana business stakeholders from widespread prosecution other than current executive branch policy which could change at any time. In particular certain presidential candidates have expressed a much harder line stance on marijuana than President Obama has. For example New Jersey Governor Chris Christie has vowed to “crack down” on legalized marijuana if he is elected president.<sup>50</sup> He says “[i]f you’re getting high in Colorado today, enjoy it... As of January 2017, I will enforce the federal laws.”<sup>51</sup> Depending on who is elected as the next president, marijuana businesses could find themselves in a lot of trouble.<sup>52</sup> A Republican controlled house can also slow down the legalization process. When Washington DC decided to legalize marijuana the Republican controlled Congress passed a spending bill barring the District of Columbia from allotting any money to enact it.<sup>53</sup> Republicans have also recently voted against easing the federal restrictions on marijuana medical research.<sup>54</sup> Even if federal

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<sup>45</sup> *Republican-Controlled Senate Appropriations Panel Backs State Medical Marijuana Laws*, (June 11, 2015) <http://www.usnews.com/news/politics/articles/2015/06/11/gop-controlled-hill-panel-backs-state-medical-marijuana-laws>.

<sup>46</sup> Cromnibus Act, Pub. L. 113-235, § 538 (2014).

<sup>47</sup> Sean Williams, *In Case You Missed It, Congress Just Passed an Important Marijuana Provision*, (June 20, 2015) <http://www.fool.com/investing/general/2015/06/20/in-case-you-missed-it-congress-just-passed-an-impo.aspx>.

<sup>48</sup> James Higdon, *Congress’ Summer Flight With Marijuana: How Congress turned on the DEA and embraced Weed*, (July 30, 2015) <http://www.politico.com/magazine/story/2015/07/dea-marijuana-120674.html#.VbuLL7fD-Hs>. (also noting that the Senate has this year voted to allow the Veterans Administration to recommend medical marijuana as a treatment for veterans.)

<sup>49</sup> *Id.*

<sup>50</sup> Dylan Stableford, *Chris Christie Would Crack Down on Legalized Marijuana as President*, (June 8 2015) <https://www.yahoo.com/politics/christie-would-crack-down-on-legalized-marijuana-121023583856.html>; Z. Byron Wolf, *Chris Christie Vows to ‘Crack Down’ on Marijuana as President*, (April 16, 2015) <http://www.cnn.com/2015/04/16/politics/chris-christie-marijuana/index.html>.

<sup>51</sup> Terrence Dopp, *Smoke That Pot Now, Christ Christie Tells Users in States That Allow it*, (July 28, 2015) <http://www.bloomberg.com/politics/articles/2015-07-28/smoke-that-pot-now-christie-tells-users-in-states-that-allow-it?cmpid=yahoo>.

<sup>52</sup> Dylan Stableford, *Where the 2016 Presidential Candidates Stand on Marijuana*, (April 20, 2015) <https://www.yahoo.com/politics/where-the-2016-presidential-candidates-stand-on-116920750826.html> (noting that presidential candidate Jeb Bush also opposed legal marijuana while other candidates such as Rand Paul support decriminalization).

<sup>53</sup> *Washington DC’s hopes for legal marijuana crushed by Congress*, (Dec 10, 2014) <http://www.theguardian.com/travel/2014/dec/10/washington-dc-legal-marijuana-hope-crushed-by-congress>.

<sup>54</sup> Aaron Davis, *House Republicans Say No to Marijuana Federal Studies of Medical Marijuana*, (July 9, 2015) [http://www.washingtonpost.com/politics/house-republicans-say-no-to-allowing-federal-studies-of-medical-marijuana/2015/07/09/01029cda-262d-11e5-b77f-eb13a215f593\\_story.html](http://www.washingtonpost.com/politics/house-republicans-say-no-to-allowing-federal-studies-of-medical-marijuana/2015/07/09/01029cda-262d-11e5-b77f-eb13a215f593_story.html).

policy continues to slowly grow more tolerant of marijuana, until this conflict between federal and state marijuana laws is resolved, marijuana businesses will operate in a legal grey zone in which they are able to openly do business, but are at constant risk of criminal prosecution.<sup>55</sup> In addition, marijuana businesses will continue to suffer from a multitude of other legal challenges including difficulty using the financial,<sup>56</sup> insurance,<sup>57</sup> tax,<sup>58</sup> business entity<sup>59</sup> and bankruptcy<sup>60</sup> systems.

## B. GROWTH OF “LEGAL” MARIJUANA AS AN INDUSTRY

Despite this host of formidable legal challenges, the marijuana industry has been growing rapidly.<sup>61</sup> Commentators have noted that even with “a draconian tax regime” which makes marijuana businesses pay taxes on 100% of their gross income the industry is able to survive

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<sup>55</sup> Aside from congress revising the CSA, some have speculated that the U.S. Supreme Court could strike down the prohibition on marijuana based on the number of states which have legalized it in addition to the federal government’s failure to enforce it. See Paul Ausick, *Will Marijuana Use Become Legal Nationwide?* (June 28, 2015) <http://247wallst.com/consumer-products/2015/06/28/now-that-same-sex-marriage-is-the-law-of-the-land-is-legal-marijuana-next/>.

<sup>56</sup> Geiger, Hamilton and Dexheimer *supra* note \_\_ (noting that despite changes to Treasury Department policy, marijuana businesses still do not have access to normal banking services); Paul Ausick, *Few Banks, Credit Cards Want Marijuana Industry Business*, (May 18, 2015) <http://247wallst.com/consumer-products/2015/05/18/few-banks-credit-cards-want-marijuana-industry-business/> (noting that “[t]he country’s biggest banks, like JPMorgan and Wells Fargo, will not accept deposits from businesses involved in the marijuana business, saying that because marijuana sales remain in violation of federal law they will not take the chance. Smaller banks have tried to serve marijuana businesses, but they have run up against high reporting requirements and regulatory expenses.” In addition, credit cards companies have been refusing to allow for credit or debit transactions resulting in marijuana businesses building up huge piles of cash.)

<sup>57</sup> See Amelia Templeton, *Lloyd’s Ends Long Relationship With Oregon Cannabis Businesses*, (June 4, 2015) <http://ijpr.org/post/lloyds-ends-long-relationship-oregon-cannabis-businesses>.

<sup>58</sup> See, e.g., *Olive v. Commissioner*, No. 13-70510 (July 9, 2015) (finding that a marijuana business cannot deduct ordinary or necessary business expenses because its trade is prohibited by Federal law and must pay taxes on 100% of their gross income); Rooney, *supra* note \_\_ (noting a marijuana shop’s inability to deduct \$200,000 in rent of its tax returns); Leff, *supra* note \_\_ (noting that marijuana business must currently pay taxes on gross rather than net profits, making it far more difficult for these businesses to be run profitably).

<sup>59</sup> Scheuer *supra* note \_\_.

<sup>60</sup> Jim Christie, *Appeal in Marijuana Bankruptcy That Went Up in Smoke*, REUTERS LEGAL, (Jan. 8, 2015, 11:00:00) [https://a.next.westlaw.com/Document/Ifc0fde40972511e4af50e96fe042baa9/View/FullText.html?originationContext=docHeader&contextData=\(sc.Category\)&transitionType=Document&docSource=fe3c22ff286947c28aeda3d070730366&firstPage=true&CobaltRefresh=67363](https://a.next.westlaw.com/Document/Ifc0fde40972511e4af50e96fe042baa9/View/FullText.html?originationContext=docHeader&contextData=(sc.Category)&transitionType=Document&docSource=fe3c22ff286947c28aeda3d070730366&firstPage=true&CobaltRefresh=67363). (noting that a federal court dismissed a Chapter 13 case because the plan of reorganization was funded by proceeds from a marijuana business. The court stated: “A state citizen that chooses to defy one federal law puts himself in an awkward position when he seeks relief under another federal statute - especially when granting that relief directly involves a federal court in administering the fruits and instrumentalities of federal criminal activity . . .” *Id.*); Fairley *supra* note \_\_ (noting that “[w]ithout bankruptcy protection, marijuana businesses are not allowed to dissolve or disappear without paying back debt obligations and instead face debt collection by judgment enforcement, which includes placing liens on real estate, garnishing wages, seizing property and freezing bank accounts.”); *In re Medpoint Management, LLC* Case No: 2:14-bk-15234-DPC (2015) (dismissing a marijuana business’ involuntary bankruptcy case because the creditors who brought the case knew of the marijuana nature of the business and therefore had unclean hands.)

<sup>61</sup> Matt Ferner, *Legal Marijuana is the Fastest-Growing Industry in the U.S.: Report*, (January 28, 2015) [http://www.huffingtonpost.com/2015/01/26/marijuana-industry-fastest-growing\\_n\\_6540166.html](http://www.huffingtonpost.com/2015/01/26/marijuana-industry-fastest-growing_n_6540166.html).

because it is “insanely profitable.”<sup>62</sup> In fact, it is currently the fastest growing industry in the United States.<sup>63</sup> In the first year that Colorado legalized recreational marijuana, sales were approximately \$700 million in that state alone.<sup>64</sup> In total, the market for legal marijuana grew from \$1.5 billion to \$2.7 billion, a seventy-four percent increase, in 2014.<sup>65</sup> It is also a booming area of job growth.<sup>66</sup> Most marijuana businesses are small,<sup>67</sup> in fact the industry has garnered some political support on this basis.<sup>68</sup> However, there are some businesses with assets in the tens or even hundreds of millions of dollars.<sup>69</sup> While the conflict between federal and state marijuana law is almost certainly a temporary issue, the question of how this industry is to deal with its effects until it is resolved will have a great impact on its development and its stakeholders. In particular, many potential stakeholders who have significant assets will avoid this industry so as to not put their outside assets at risk. This is why the insurance and banking industry has been reluctant to service marijuana businesses.<sup>70</sup> It is also probably why the tobacco industry has not

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<sup>62</sup> Paul Caron, *9<sup>th</sup> Circuit: Marijuana Dispensaries Cannot Deduct Business Expenses, Must Pay Taxes on 100% of Their Gross Income*, (July 11, 2015) [http://taxprof.typepad.com/taxprof\\_blog/2015/07/9th-circuit-marijuana-dispensaries-cannot-deduct-business-expenses-must-pay-taxes-on-100-of-their-gr.html](http://taxprof.typepad.com/taxprof_blog/2015/07/9th-circuit-marijuana-dispensaries-cannot-deduct-business-expenses-must-pay-taxes-on-100-of-their-gr.html).

<sup>63</sup> Id; Bob Knudsen, *Colorado Marijuana Prices See Huge Drop, Drug Cartels Reeling*, (June 23, 2015) [www.examiner.com/article/colorado-marijuana-prices-see-huge-drop-drug-cartels-reeling](http://www.examiner.com/article/colorado-marijuana-prices-see-huge-drop-drug-cartels-reeling) (noting that despite a significant drop in the price of marijuana due to competition, “businesses are still reporting massive growth in sales numbers as long time residents, new transplants, and pot tourists flock to the state by the thousands, fueling a huge economic boom, with all the good and bad that can bring with it. In fact, the biggest problem in Denver right now is that the city is growing so fast right now that nobody can keep up with it. Homes can’t be built fast enough, rents are rising too quickly, and infrastructure is struggling to keep up with a city that could start bursting at the seams soon.”) George Budwell, *Is 1 Drug Really Outselling Legalized Marijuana?*, THE MOTLEY FOOL (Jan. 19, 2015), <http://www.fool.com/investing/general/2015/01/19/is-1-drug-really-outselling-legalized-marijuana.aspx> (“[The marijuana] industry is poised to become one of the fastest-growing industries of all time.”).

<sup>64</sup> Rebecca Trager, *Chemists in Demand as Marijuana Industry Shows High Growth*, (March 25, 2015) <http://www.scientificamerican.com/article/chemists-in-demand-as-marijuana-industry-shows-high-growth/>.

<sup>65</sup> Ferner, *supra* note \_\_\_\_.

<sup>66</sup> See Jonah Bennet, *Job Growth in the Cannabis Industry Continues, 200,000 Positions Expected*, (January 16, 2015) <http://dailycaller.com/2015/01/16/job-growth-in-the-cannabis-industry-continues-200000-positions-expected/>.

<sup>67</sup> Colorado limits ownership of a marijuana dispensary in the state to residents of Colorado, this has the effect of keeping the businesses small and halting the development of national companies. See BUSINESSNAMEUSA.COM, *How to Start a Marijuana Dispensary in Colorado* (Apr. 10, 2013, 12:00 AM), <http://www.businessnameusa.com/view/How%20to%20Start%20A%20Marijuana%20Dispensary%20in%20Colorado.aspx> (listing requirements for opening a marijuana dispensary).

<sup>68</sup> See Joey Bunch, *Colorado Pot Lobby Loud, Clear on Regulations, as Government Listens*, THE DENVER POST (Dec. 26, 2014), [http://www.denverpost.com/potanniversary/ci\\_27174815/colorado-pot-lobby-loud-clear-regulations-government-listens](http://www.denverpost.com/potanniversary/ci_27174815/colorado-pot-lobby-loud-clear-regulations-government-listens) (noting that the pot lobby had won over Republican support in Colorado because both the pot industry and Republicans want to promote small business ownership).

<sup>69</sup> See Dan Ritter, *Who Will Get High Off the Marijuana Gold Rush?*, WALL ST. CHEAT SHEET (Apr. 30 2013), <http://wallstcheatsheet.com/stocks/who-will-get-high-off-the-marijuana-gold-rush.html/?a=viewall>, archived at <http://perma.cc/S9RV-N376>; See, e.g., Alex Akesson, *Small Cap Hedge Funds Show Interest in Edible Marijuana Products from Latteno*, HEDGE.CO.NET (May 15, 2013), <http://www.hedgeco.net/news/05/2013/marijuana-hedge-fund-launches-edibles.html>, archived at <http://perma.cc/9LGF-64LG>; Jonathan Kaminsky, *Ex-Microsoft Manager Plans to Create First U.S. Marijuana Brand*, REUTERS (May 30, 2013, 3:14 PM), <http://www.reuters.com/article/2013/05/30/usa-marijuana-idUSL2N0EB0YA20130530>, archived at <http://perma.cc/3UH4-W5CR>; Eric Russell, *Medical Marijuana Group Submits Financing Plan to State*, BANGOR DAILY NEWS (Aug. 15, 2011, 6:48 PM), <http://bangordailynews.com/2011/08/15/business/medical-marijuana-group-submits-financing-plan-to-state/>, archived at <http://perma.cc/T9P5-SJ56>.

<sup>70</sup> See Geiger, Hamilton and Dexheimer *supra* note \_\_\_\_; Templeton *supra* note \_\_\_\_.

gotten involved, despite being an obvious new market for them.<sup>71</sup> While this creates an opportunity for small businesses to grow,<sup>72</sup> an opportunity lacking in many other industries in America at the moment,<sup>73</sup> many small business owners may not understand the consequences of contract illegality and their businesses could suffer a nasty shock if they one day find their agreements cannot be enforced in a court. A large tobacco company will have lawyers advising it at every step, but many small businesses skip regular legal consultation because of cost or effort.

In addition, perhaps as a consequence, the marijuana industry is operating with something of a “wild west” mentality at the moment.<sup>74</sup> Marijuana is now being grown to increase its strength, it is also being combined with food products to make for a stronger high.<sup>75</sup> This is being done with no Food and Drug Administration oversight, as any other product marketed as a drug would have to have.<sup>76</sup> Further, a recent report out of Oregon has shown that marijuana products in that state tested positive for illegally high levels of pesticide and other chemicals, some of which are not meant to be consumed.<sup>77</sup> Some of the pesticides and chemicals found in marijuana products are linked to cancer.<sup>78</sup> The presence of these chemicals were not disclosed to consumers who were, in some cases, using marijuana to treat illnesses such as cancer.<sup>79</sup> Disclosure of THC levels in edible marijuana products has also been shown to be inaccurate in many cases.<sup>80</sup> This unprofessionalism is dangerous to consumers and can hurt the industry’s reputation over time.<sup>81</sup>

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<sup>71</sup> See *Will Big Tobacco Jump on the Marijuana Movement?*, CBS NEWS (Dec. 19, 2012, 10:32 PM), [http://www.cbsnews.com/8301-201\\_162-57560164/will-big-tobacco-jump-on-the-marijuana-movement/](http://www.cbsnews.com/8301-201_162-57560164/will-big-tobacco-jump-on-the-marijuana-movement/), archived at <http://perma.cc/7KGW-VD3J> (discussing the hesitation of the tobacco industry to move into the marijuana market).

<sup>72</sup> See Rooney *supra* note \_\_ (giving the example of one marijuana business that made \$3.6 million in revenue and grew from 5 employees to 40 in its first year of operations).

<sup>73</sup> See Derek Thompson, *The Mysterious Death of Entrepreneurship in America*, The Atlantic (May 12, 2014), <http://www.theatlantic.com/business/archive/2014/05/entrepreneurship-in-america-is-dying-wait-what-does-that-actually-mean/362097/>.

<sup>74</sup> David Rheins, *High Hopes for Cannabis Careers in the Wild West*, AOL JOBS (Jan. 2, 2014, 10:00 AM), <http://jobs.aol.com/articles/2014/01/02/high-hopes-for-cannabis-careers-in-the-wild-west/> (“In Colorado and Washington it is truly the Wild West. Unlike the end of alcohol prohibition 80 years ago, there are no established marijuana brands, or brand loyalties. Marketing teams in Denver and Seattle, and across the country, are busy creating the first MJ brand identities and consumer experiences from scratch. Exciting innovations are taking place in packaging, marketing and product creation.”); Scheuer *supra* note \_\_ *The Worst of Both Worlds*.

<sup>75</sup> Boffey *supra* note \_\_; Adrienne LaFrance, *Was Marijuana Really Less Potent in the 1960s?*, THE ATLANTIC (Mar. 6, 2015), <http://www.theatlantic.com/technology/archive/2015/03/was-marijuana-really-less-potent-in-the-1960s/387010/>.

<sup>76</sup> See Lars Noah, *The Coming Pharmacogenomics Revolution: Tailoring Drugs to Fit Patients’ Genetic Profiles*, 43 JURIMETRICS J. 1, 4 (2002). “Sponsors of new drugs typically have to enroll thousands of subjects in randomized controlled trials (RCTs) in order to generate the necessary data” for FDA approval. *Id.*

<sup>77</sup> Noelle Crombie, *A Tainted High: Lax State Rules, Inconsistent Lab Practices and Inaccurate Test Results Put Pesticide-Laced Pot on Dispensary Shelves*, (June 11, 2015) [www.oregonlive.com/marijuana-legalization/pesticides/](http://www.oregonlive.com/marijuana-legalization/pesticides/).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (“One lab owner recently stopped testing for a pesticide that kept showing up in cannabis products, saying bad results aren’t good for business.”)

<sup>80</sup> *Id.*

<sup>81</sup> This is especially true considering marijuana edibles can include much higher levels of THC than would be consumed through smoking. Boffey *supra* note \_\_; See REUTERS, *Surge in Marijuana Ills Causes Cries for Stricter Control*, YAHOO! HEALTH (Jan. 6, 2015), <https://www.yahoo.com/health/surge-in-marijuana-ills-causes-cries-for->

The industry promotes itself, in part on the belief that marijuana is natural<sup>82</sup> and less harmful than alcohol or tobacco, which is loaded with chemicals.<sup>83</sup> Consumers may consequently not realize they are consuming a product that may in fact be laced with dangerous chemicals. Unprofessionalism can also hurt society on the retail level if marijuana businesses do not follow rules on who they can sell to. There has reportedly been a 66% increase in marijuana abuse by teenagers in Colorado since 2011, teenagers who should not be getting the product are apparently getting it more easily now that businesses are openly selling.<sup>84</sup> Some who object to the growth of the marijuana industry have argued that dispensaries are “just not following what small amounts of rules there are on the books ...”<sup>85</sup> One way of addressing these problems in the marijuana industry would be to bring more professionals into the industry who would have the training needed to grow product and sell it responsibly. Aside from the abstract legal argument that the public policy defense should not apply to marijuana contracts, while only a small part of the analysis, reforming contract analysis to make marijuana contracts enforceable could help promote the incorporation of these professionals into the industry.

## II. THE MARIJUANA INDUSTRY AND CONTRACT LAW

For the thousands of businesses and all their stakeholders operating in the marijuana marketplace, the ability to rely upon contract law to enforce their mutual obligations are just as important as for other industries. The ability to form contracts is integral to long term planning and relationship building for businesses and helps promote their stability. “[A] contract enables parties to project exchange into the future and to tailor their affairs according to their individual needs and interests ...”<sup>86</sup> Contracts do not simply enforce long term relationships, without contracts many relationships between marijuana business stakeholders will break down and many types of transactions simply will not happen. Marijuana companies form contracts with suppliers, with employees, with customers, with service providers, and with investors, among others. All these stakeholders depend on the enforceability of their agreements in order to make exchanges that depend on non-simultaneous exchange. If a business pays a farmer in advance for their product, so that the farmer can buy seed and supplies for example, and the farmer decides not to deliver, then this sort of relationship will stop happening in the future which will cut down on the success of these businesses and hurt the economy. If you cannot depend on contracts then the only sort of agreements you can rely on are ones where no executory action must take place, contracts in which each side completes their end of the bargain at the same time, such as a cash

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stricter-107307309887.html (noting that Colorado and Washington “have been flooded with dangerous products, from infused candies and concentrates, many far stronger than what might have been smoked in the 1960s.”)

<sup>82</sup> *Id.* (claiming that “Casual use [of marijuana] by adults poses little or no risk for healthy people.”)

<sup>83</sup> Maren Sahpiro, *No High Risk: Marijuana May Be Less Harmful Than Alcohol, Tobacco*, (February 26, 2015) <http://www.nbcnews.com/storyline/legal-pot/no-high-risk-marijuana-may-be-less-harmful-alcohol-tobacco-n312876>.

<sup>84</sup> Boffey, Philip M. *What Science Says About Marijuana*. The New York Times, (July 30, 2014) [http://www.nytimes.com/2014/07/31/opinion/what-science-says-about-marijuana.html?\\_r=0](http://www.nytimes.com/2014/07/31/opinion/what-science-says-about-marijuana.html?_r=0). This increase in marijuana use by teenagers is troubling when combined with evidence that marijuana causes teenagers brains to go through abnormal development. In addition marijuana use in teens has been linked to increased risk of suicide and are more likely to use other illegal drugs. Chris Boyette and Jacque Wilson, *It’s 2015: Is weed legal in your state?* (Jan 7, 2015) <http://www.cnn.com/2015/01/07/us/recreational-marijuana-laws/>.

<sup>85</sup> Benac & Caldwell, *supra* note \_\_\_\_.

<sup>86</sup> Williston on Contracts § 1:1 (4th ed.)

for product sale. When both parties are performing at the same time, there is no need to rely upon the other side's future ability or willingness to perform. But even these contracts will present problems if a court will not enforce them. Since marijuana is a sale of a good, it falls under the Uniform Commercial Code ("U.C.C."),<sup>87</sup> but many of the contracts marijuana businesses will enter will be for services (such as employment agreements) and will fall under the common law. Both the U.C.C. and the common law offer remedies that will not be available if a court refuses to enforce contracts such as the ability to return or reject defective or non-conforming products.<sup>88</sup> This will potentially expose the public to harm as it delegitimizes the marijuana industry and gives protection to unscrupulous businesses which prey upon this legal grey zone.

#### A. THE PUBLIC POLICY/ILLEGAL CONTRACT DEFENSE TO CONTRACT ENFORCEMENT

The defense that contracts are not enforceable if they pertain to an illegal subject is centuries old.<sup>89</sup> The grounds for this defense are not that the defendant in the contract deserves to escape liability.<sup>90</sup> Instead it is that the court does not want to assist the plaintiff in their wrongful conduct.<sup>91</sup> As commentators have noted, this defense is not based so much on the fact that the contract has an illegal purpose as the fact that enforcement of the contract would violate the public policy of the jurisdiction in which it is to be enforced.<sup>92</sup> As such, contract luminaries such as Farnsworth and Williston argue that the defense should be termed "public policy" and the term "illegality" is incorrect and should not be used.<sup>93</sup> The Restatement (Second) of Contracts ("Restatement") also does not use the term illegal but instead relies upon the fact that the contract violates some public policy.<sup>94</sup> The reason for this distinction is that the term "illegal" is "misleading insofar as it suggests that some penalty is necessarily imposed on one of the parties, apart from the court's refusal to enforce the agreement."<sup>95</sup> This distinction is important because if contracts are unenforceable any time they would require or result in a violation of a law, then all marijuana contracts will be unenforceable. However if contracts are unenforceable only when they violate public policy, including violating public policy by violating a law, then these contracts might be saved by a court finding that the policy behind legalization outweighs the policy behind respecting federal prohibition.<sup>96</sup> Despite these contract experts' efforts, many courts continue to use the illegality term when voiding contracts<sup>97</sup> and void "illegal" agreements

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<sup>87</sup> U.C.C. § 2-102.

<sup>88</sup> See e.g., U.C.C. § 2-601-616.

<sup>89</sup> *Holman v. Johnson*, 98 Eng. Rep. 1120, 1121 (K.B. 1775) ("No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.")

<sup>90</sup> Allan Farnsworth, *Contracts*, 3<sup>rd</sup> Ed. § 5.1 (citing *Coppell v. Hall*, 74 U.S. (7 Wall.) 542 (1868) ("The defense is allowed, not for the sake of the defendant, but of the law itself."))

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* Restatement (Second) of Contracts § 178 (1981).

<sup>93</sup> Farnsworth *supra* note \_\_; Williston on Contracts § 12:1 (4th ed.)

<sup>94</sup> Restatement *supra* note \_\_.

<sup>95</sup> Farnsworth *supra* note \_\_.

<sup>96</sup> Restatement *supra* note \_\_ ("A promise or other term of an agreement is unenforceable on grounds of public policy if ... the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.")

<sup>97</sup> E.g. *Isles Wellness, Inc. v. Progressive Northern Ins. Co.*, 725 N.W.2d 90, 92-3 (2006); *Geffen v. Moss*, 53 Cal.App.3d 215, 222 (1975); Williston *supra* note \_\_ § 12:1

without weighing any competing public policies.<sup>98</sup> In the marijuana contract instance, because contracts involving the sale of marijuana are clearly illegal even if a penalty is never enforced<sup>99</sup> it will be doubly tempting to use the term illegal instead of the more cumbersome public policy language. Weighing competing public policies will take more work from courts but will ultimately result in a better application of this defense even if a court decides to void a contract for violating the CSA.

Instead of simply voiding any “illegal” contract, the Restatement offers the following factors to consider in weighing the voiding of a contract because of its violation of public policy versus enforcement of the contract. In favor of enforcement are “(a) the parties’ justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term.”<sup>100</sup> Against this analysis courts must weigh the public policy against enforcement. Factors in considering this are,

- (a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term.<sup>101</sup>

By going through these factors, a court will be forced to consider the consequences of voiding marijuana contracts and may determine, as is argued below, that the weight is greater on the side of enforcement than it is on voiding marijuana contracts in respect to the CSA when the CSA itself is no longer being seriously enforced.

## 1. POLICY BEHIND NOT ENFORCING ILLEGAL CONTRACTS

To the extent we think of this defense as a “public policy” defense, it is not difficult to understand that it would go against the public policy to enforce agreements that violate most laws. If a state has a public policy against murder, than a contract in which an assassin is hired to kill someone promotes the violation of the public policy. A court should not need to spend much time discussing the public policy against promoting murder in making the decision to void the contract in which the assassin is hired. In addition, public policy can be violated even though a contract does not directly result in a violation of the law but simply promotes or increases the chance of law breaking. In *Bovard v. American Horse Enterprises, Inc.*, a court found that a contract for the sale of a business that manufactured drug paraphernalia (e.g. bongs and roach clips) was unenforceable because it was against public policy despite not being against the law at the time of the lower court’s decision to manufacture this paraphernalia.<sup>102</sup> The court reasoned that the state had a public policy against the use and transfer of marijuana and that this implied a

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<sup>98</sup> See e.g., *Total Medical Management, Inc. v. U.S.*, 105 F.3d 1314, 1321 (1997) for a typical example of the treatment of this defense. The court analyzes the contract’s illegality so far as to establish that it does in fact break a law, but does not consider the strength of the policy supporting that law.

<sup>99</sup> 21 U.S.C. § 812 Schedule I (C)(10) (2012).

<sup>100</sup> Restatement *supra* note \_\_\_\_

<sup>101</sup> *Id.*

<sup>102</sup> 201 Cal.App.3d 832, 841 (1988).



public policy against the manufacture of goods that promoted marijuana's use.<sup>103</sup> Of course, this decision was made prior to state legalization of marijuana itself but since the sale of marijuana itself much more directly violates the CSA than does the sale of drug paraphernalia, this holding would seemingly require a voiding of all marijuana contracts. While not a marijuana case, in *Yoo v. Jho*, a court found that a contract for the sale of a business that sold counterfeit goods was unenforceable and reversed the lower court's decision that provided partial rescission to the buyer.<sup>104</sup> It found that the buyer knew the store sold counterfeit goods; the buyer was interested in the counterfeit goods and continued selling them after purchasing the business, thus making the object of the business purchase agreement illegal and against the public policy of the state.<sup>105</sup> The court stated that even if the consideration for the sale of the business did not include the inventory, the business was sold as a going concern and that at least part of the consideration, including the customer base that came to the store to buy counterfeit goods, was unlawful and made the contract unenforceable.<sup>106</sup> Applied to the sale of a marijuana business this same analysis would void the sale even if the business was being sold without any of the marijuana inventory. In sum, the public policy defense is based on the court's unwillingness to promote the illegal behavior at the heart of the contract.

If the public policy defense voids "illegal" contracts because the underlying illegality violates public policy, then what should a court do when the underlying illegality does not violate public policy? In other words, should "illegality" by itself void a contract if the contract technically violates a law but there is no public policy support behind that law? Let us imagine an example to illustrate. Imagine a state passed a law in the 19<sup>th</sup> century that forbade an unmarried man and woman from cohabitating under the belief that this was immoral behavior and that this law applies to men and women sharing a living space even if not sexually involved. Further imagine that this law has not been enforced in a very long time and that despite many openly cohabitating men and women there is no public or police desire to currently see this law enforced. In fact other state laws arguably provide support for such cohabitation by, let us again imagine, providing rental or food subsidies to poor families even if the couple is not married. Would a rental agreement in which a man and woman agreed to live together be illegal in this state? Technically yes in that it promotes the violation of this law. Should it be voided due to its violation of the state's public policy? Even putting aside the constitutionality of this law the answer should be no. As Farnsworth states

"[i]f the agreement involves the commission of a serious crime or tort, it may be clear that unenforceability is warranted; and if the agreement involves only a trivial contravention of policy, it may be clear that unenforceability is unwarranted. In doubtful cases, however, the court's decision must rest on a

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<sup>103</sup> *Id.*

<sup>104</sup> 147 Cal.App.4<sup>th</sup> 1249, 1257 (2007).

<sup>105</sup> *Id.* at FN 1.

<sup>106</sup> *Id.* at 1256.

delicate balancing of factors for and against enforcement of the particular agreement. Enforcement should not be refused unless the potential benefit in deterring misconduct or avoiding an inappropriate use of the judicial process outweighs the factors favoring enforceability.”<sup>107</sup>

Here a court would need to balance the value of enforcing an agreement versus the public policy of respecting this cohabitation law. In terms of the factors discussed in section II.A. above, the parties are justified in expecting their agreement to be enforced in that this antiquated cohabitation law is no longer enforced and does not reflect currently accepted social values, further the parties would forfeit their property interest if the agreement is not enforced. On the other side, there is no longer any strength to support a moral improvement law such as in our example and the misconduct, to the extent there is any, is technical at best. Despite the fact that this agreement supports a violation of the law, it seems a ridiculous result to void it in the name of supporting this policy which the legal system no longer supports. The public policy that drove the state to paternalistically pass this law in the 19<sup>th</sup> century simply does not reflect social values today. Our society has evolved over time and a law which has stayed on the books but is no longer respected or enforced should not stand in the way of enforcement of contracts.

## 2. APPLICATION OF THE PUBLIC POLICY DEFENSE TO MARIJUANA AGREEMENTS

Unfortunately the cohabitation example given above differs from the marijuana context in that the CSA is much more strongly supported by the government even if it is not as strongly supported as it once was. The CSA is neither an antiquated relic nor a law with no public policy arguments to support it. In addition, the support for enforcement of a marijuana contract is not as strong as for a rental agreement in that marijuana is still illegal in the majority of states. So how should courts weigh these competing interests under the Restatement test?

On first blush the first factor, “the parties’ justified expectations...”<sup>108</sup> in the enforcement of their agreement seems to offer very weak support for the enforcement of marijuana contracts. In the vast majority of cases, parties know, or should know, that marijuana is still prohibited by the CSA and so there is little justified expectation in the enforceability of the contract. But this is a self-fulfilling factor in that if courts start enforcing marijuana contracts, by not voiding them, then this expectation value will obviously start to increase and so this is something of a vicious circle for marijuana businesses. They cannot expect their contracts to be enforced because courts will not enforce them. Courts will not enforce them, in part, because the marijuana business cannot reasonably expect the contract to be enforced. At some point this cycle has to be broken if the marijuana contract deserves to be enforced. Also as marijuana becomes more freely purchased and sold, marijuana businesses operate ever more openly, and more states across the

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<sup>107</sup> Farnsworth *supra* note \_\_ § 5.1.

<sup>108</sup> Restatement *supra* note \_\_

U.S. legalize marijuana,<sup>109</sup> the cultural expectation by non-marijuana stakeholders will lean increasingly towards a belief that enforcement is justified. After all, for the average citizen who is not in this industry, if they can buy marijuana on any street corner openly in front of a police officer without fearing arrest, they probably have an expectation that their contract is legitimate. So the strength of this factor should increase as marijuana gains more cultural acceptance. The second factor, “any forfeiture that would result if enforcement were denied...”<sup>110</sup> is arguably the same as for all contracts. There can be significant forfeitures if marijuana contracts are not enforced just as with any contract. A loan made to a marijuana business that is voided results in no less of a forfeiture for the lender and windfall for the marijuana business than a loan which would be voided against any other business. How much, and the nature of any, forfeiture is highly dependent on the individual contract but the forfeiture does not change in the marijuana context and there certainly are marijuana contracts which will result in substantial forfeitures if not enforced. The third factor, “any special public interest in the enforcement of the particular term”<sup>111</sup> is arguably strongly in favor of the enforcement of marijuana contracts since states are actively pursuing and promoting its sale. This factor will be given a separate treatment in section II.A.3. below.

Against this discussion we must weigh the factors in favor of the public policy of voiding marijuana contracts. In this case the third and fourth factors are easiest to address. The third factor, “the seriousness of any misconduct involved and the extent to which it was deliberate”<sup>112</sup> seems to weigh strongly against enforcement. Marijuana contracts deliberately violate the CSA, a law which, if enforced, carries the possibility of serious criminal and civil penalties. While some parties may claim that they did not know they were violating the CSA because of state legalization, most marijuana stakeholders should know that the CSA is being violated. Undercutting the strength of this factor is the argument that since legal marijuana sales are no longer being seriously pursued by police, even federal police such as the DEA,<sup>113</sup> in marijuana legal jurisdictions, that it is in fact no longer serious misconduct. The fourth factor, “the directness of the connection between the misconduct and the term”<sup>114</sup> strongly weighs against enforcement. In most cases there is an obvious direct connection between the marijuana contract and the violation of the CSA for example, any time marijuana is sold. In some cases it is less direct, as with a loan to a marijuana business, but even these agreements would violate the

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<sup>109</sup> See. Sam Becker, *7 States on the Verge of Marijuana Legalization*, (June 19, 2015)

<http://www.cheatsheet.com/business/5-states-and-one-city-ready-to-legalize-marijuana.html/?a=viewall> (discussing states which are closing to legalizing recreational marijuana.)

<sup>110</sup> Restatement *supra* note \_\_\_\_.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Ferner, DEA Raids supra* note \_\_\_\_; *Higdon, supra* note \_\_\_\_ (quoting the new acting DEA administrator as playing down the importance of marijuana enforcement and emphasizing enforcement against drugs such as heroin, meth and cocaine instead. Playing into this may be the fact that Congress cut funding for the DEA’s anti-marijuana unit by half.)

<sup>114</sup> Restatement *supra* note \_\_\_\_

CSA.<sup>115</sup> Despite the strength of these two factors, if there is no public policy supporting the violated law, then as with the cohabitation example, the contract should probably be enforced. However, the strength of the remaining restatement factors in favor of voiding marijuana contracts “the strength of that policy as manifested by legislation or judicial decisions...” and “the likelihood that a refusal to enforce the term will further that policy...” show that there is public policy support behind the CSA’s prohibition of marijuana. Therefore these factors deserve their own separate discussion and will be discussed in section II.A.4. below.

What it seems is that the applicability of the public policy defense to marijuana contract ultimately comes down to the strength of the specific public interest in favor of enforcement versus the public policy in support of the CSA. In the marijuana context it is not so clear cut which of these competing policies is strongest, even in states where it has been legalized. Nevertheless, this article concludes that the policy behind marijuana’s prohibition and legalization has developed over time and that society is at a stage where it can treat marijuana contracts as legal and binding in states which are actively supporting its sale. Even if not persuaded by these arguments, the current development of marijuana policy in the states is taking us quickly in the direction of greater legalization which will most likely reach a tipping point where the value of enforcing marijuana agreements clearly outweighs the value of voiding them.

### 3. THE SPECIAL PUBLIC INTEREST IN THE ENFORCEMENT OF MARIJUANA CONTRACTS

States have articulated many reasons for legalizing marijuana. These include combating crime that comes from ceding a profitable industry to cartels,<sup>116</sup> creating a new source of tax revenue,<sup>117</sup> failure of the war on drugs,<sup>118</sup> disproportionate impact of criminalization on

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<sup>115</sup> 21 U.S.C. §§ 841, 844, 846, 848 (2012) (banning a host of activities surrounding the sale of controlled substances).

<sup>116</sup> Rafa Fernandex De Castro, *How Mexican Drug Cartels Are Reacting to Marijuana Legalization in the U.S.*, (March 23, 2015) <http://fusion.net/story/108575/how-mexican-drug-cartels-are-reacting-to-marijuana-legalization-in-the-u-s/> (noting that about 30% of Mexican Cartel export revenue comes from the sale of marijuana); Nancy Benac & Alicia Caldwell, *Marijuana Legalization Gains Support, Confounding Policymakers*, HUFFINGTON POST (June 29, 2013, 9:49 AM), [http://www.huffingtonpost.com/2013/06/29/marijuana-legalization\\_n\\_3521547.html](http://www.huffingtonpost.com/2013/06/29/marijuana-legalization_n_3521547.html); Olga Khazan, *How Marijuana Legalization Will Affect Mexico’s Cartels*, WASH. POST (Nov. 9, 2012), <http://www.washingtonpost.com/blogs/worldviews/wp/2012/11/09/how-marijuana-legalization-will-affect-mexicos-cartels-in-charts/>. Khazan notes that according to a Mexican study regarding the as yet still unpassed Colorado and Washington ballot initiatives to legalize marijuana for recreational use, “Mexico’s cartels would lose \$1.425 billion if the initiative passed in Colorado and \$1.372 billion if Washington voted to legalize. The organization also predicted that drug trafficking revenues would fall 20 to 30 percent . . .” though an American study found that cartels would suffer less of a loss. *Id.*

<sup>117</sup> Benac & Caldwell, *supra* note \_\_\_. The authors note that legalization would result in new tax revenue while negatively impacting the profits of cartels as well as the “racial inequity in the way marijuana laws are enforced.” *Id.*; see also Michelle Patton, *The Legalization of Marijuana: A Dead-End or the High Road to Fiscal Solvency?*, 15 BERKLEY J. CRIM. L. 163, 191-203 (2010); Caroline Fairchild, *Legalizing Marijuana Would Generate Billions In Additional Tax Revenue Annually*, HUFFINGTON POST (Apr. 20, 2012, 9:13 AM), [http://www.huffingtonpost.com/2013/04/20/legalizing-marijuana-tax-revenue\\_n\\_3102003.html](http://www.huffingtonpost.com/2013/04/20/legalizing-marijuana-tax-revenue_n_3102003.html).

<sup>118</sup> Jesse Wegman, *The Injustice of Marijuana Arrests*, (July 28, 2014) [http://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html?\\_r=0](http://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html?_r=0).

minorities,<sup>119</sup> unnecessarily high incarceration rates,<sup>120</sup> and, of course, compassionate care for sick people who would potentially benefit from the pain mitigating effects of the drug.<sup>121</sup> Some of these policies are based on the perceived failure of the war on drugs and some are based on the hope that the regulated sale of marijuana will produce benefits for society. Whether these policies will be achieved or whether legalization will lead to more problems than the war on drugs will have to be judged over time. The important point for this article is that these policies are being actively pursued by states for the benefit of their citizens, while the federal government has largely conceded the value of enforcing the CSA.<sup>122</sup> Nevertheless, there is some evidence that some of the state policies are being achieved. Colorado and Washington have reported significant tax revenues as a result of their recreational marijuana programs.<sup>123</sup> Washington State collected \$70 million in taxes in the first year based on the sale of \$257 million of marijuana in the state.<sup>124</sup> Colorado in turn collected \$60 million in taxes during its first year.<sup>125</sup> Indications are that these tax revenues should continue to increase as the market continues to develop.<sup>126</sup> This could be affected by the decision of more states to legalize recreational marijuana which could bite into the market but even so, early tax revenue has been impressive. The economic gains are not purely experience by the marijuana industry either, tourism in these two states has also

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<sup>119</sup> *Id.* (noting that despite comparable marijuana use by blacks and whites, blacks are far more likely to be arrested for marijuana offenses than whites. In Iowa, blacks are 8.3 times as likely to be arrested.)

<sup>120</sup> Vince Beiser, *Meet the Grandpa Doing Life Without Parole—for Pot*, YAHOO! NEWS (Jan. 12, 2015, 5:55 AM), <http://news.yahoo.com/meet-grandpa-doing-life-without-parole-pot-105555273.html>. In the U.S., “[a]n estimated 40,000 people are doing anywhere from one year to life . . . on marijuana charges.” *Id.*

<sup>121</sup> Jay M. Zitter, *Construction and Application of Medical Marijuana Laws and Medical Necessity Defense to Marijuana Laws*, 50 A.L.R. 6<sup>th</sup> 353, 2009 (noting that marijuana has a long tradition of being used as a medicine); California’s Compassionate Use Act of 1996, listed numerous illnesses which could benefit from marijuana as a treatment. CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 2007); LEGISLATIVE COUNCIL OF THE COLO. GENERAL ASSEMBLY, 2012 STATE BALLOT INFO. BOOKLET AND RECOMMENDATIONS ON RETENTION OF JUDGES, Research Publication No. 614, at 7-14 (2012) [hereinafter Colorado Voter Guide], <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application/pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251822971738&ssbinary=true>; WASH. STATE OFFICE OF THE SEC’Y OF STATE & THE STEVENS CNTY. AUDITOR, STATE OF WASHINGTON & STEVENS COUNTY VOTER PAMPHLET, at 23-31 (2012) [hereinafter Washington Voter Guide], [https://wei.sos.wa.gov/agency/osos/en/press\\_and\\_research/PreviousElections/2012/General-Election/Documents/22-%20Stevens.pdf](https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/2012/General-Election/Documents/22-%20Stevens.pdf); UNITED STATES CONFERENCE OF MAYORS, *In Support of States Setting Their Own Marijuana Policies Without Federal Interference*, USMAYORS.ORG (June 2013), [http://www.usmayors.org/resolutions/81st\\_Conference/cs13.asp](http://www.usmayors.org/resolutions/81st_Conference/cs13.asp).

<sup>122</sup> See *supra* section IA above.

<sup>123</sup> Jareen Imam, *Pot Money Changing Hearts in Washington*, (July 10, 2015) <http://www.cnn.com/2015/07/10/us/washington-marijuana-70-million-tax-dollars/index.html>; Katie Mulvaney, *Advocate Says Colorado Received \$60 million in Taxes and Fees from Marijuana in 2014*, (January 11, 2014) <http://www.politifact.com/rhode-island/statements/2015/jan/11/james-aubin/advocate-says-colorado-received-60-million-taxes-a/>.

<sup>124</sup> Imam *supra* note \_\_\_\_.

<sup>125</sup> Mulvaney *supra* note \_\_\_\_.

<sup>126</sup> *Id.* (noting that in January tax revenues collected from marijuana sales in Colorado were \$3.5 million but by October they had climbed to \$7.6 million).

experienced a boom.<sup>127</sup> Colorado also most likely saved a good portion of the estimated \$145 million it had been spending each year fighting marijuana.<sup>128</sup> Presumably the money made by selling marijuana legally is, for the most part, coming out of the pockets of illegal marijuana dealers including Mexican cartels. Finally, as fewer are arrested for marijuana, the high incarceration rates (including the disparate impact of arrests on minorities) should fall with time.

Enforceable marijuana contracts can help further many of the policy goals by promoting the industry. A more successful marijuana industry should produce more taxes and jobs for example. Further supporting the special interest behind enforcement is the fact that a well regulated, professional industry, with the ability to enforce agreements just like any other industry, is more likely to produce and sell product in a responsible manner than an industry operating without the benefit of contracts. As long as states continue to experiment with legalization they have an incentive to see this industry develop in a manner aimed at achieving the underlying policy goals. This means that states, including their court systems, have an incentive to do everything they can to promote a professional, responsible marijuana industry including allowing stakeholders in the industry the certainty of enforceable contracts as enjoyed and relied upon by other industries. On the flip side, if the marijuana industry is legalized, but forced into a legal grey zone, which is more likely to attract a less professional body of stakeholders, it will be more likely to produce fewer public benefits and more public harms by skirting laws such as the ban on selling marijuana to minors

In addition to the public policy goals of states which drove them to legalization, courts should also consider the negative effects of enforcing the public policy defense against marijuana businesses. If marijuana businesses cannot rely upon contracts, they will be forced even further into the world of illegal businesses. If they cannot get legitimate loans, they may borrow money from cartels or other criminal and dangerous parties. These lenders will not rely upon enforceability of their contracts in court, they never have, but instead on threats of violence. These parties could also exercise power over the business. This will make these businesses less reputable and less attractive as an operation for the non-criminal elements that need to be joining it if it is to grow into a responsible and productive member of the business community.<sup>129</sup> It could also lead to more dangerous marijuana being sold on the market<sup>130</sup> or consumers being

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<sup>127</sup> See Mia Taylor, *Luxury Cannabis Tourism: Here's Your Guide*, (July 29, 2015)

<http://www.thestreet.com/story/13233391/3/luxury-cannabis-tourism-here-s-your-guide.html> (noting that people were travelling from “as far away as Japan, Brazil, Colombia and Australia” to partake in marijuana tourism.)

<sup>128</sup> Mulvaney *supra* note \_\_\_\_.

<sup>129</sup> Bruce Barcott, *How to Invest in Dope*, N.Y. TIMES, June 25, 2013,

[http://www.nytimes.com/2013/06/30/magazine/how-to-succeed-in-the-legal-pot-business.html?ref=magazine&\\_r=0](http://www.nytimes.com/2013/06/30/magazine/how-to-succeed-in-the-legal-pot-business.html?ref=magazine&_r=0). (quoting a private equity fund's managers on the need to install new management in marijuana businesses they invest in because “[e]ntrusting great sums of cash to the equivalent of Harold and Kumar seemed foolhardy.”)

<sup>130</sup> Crombie *supra* note \_\_\_\_ (“Hoggan, owner of Chemhistory, suspects growers take tainted samples to other labs in an effort to obtain clean results. ‘What is a guy going to do if he has a pound of BHO that is worth wholesale, \$8,000?’ Hoggan said. ‘He just paid \$100 for a test and he got a fail. Well, he’s going to try this other lab and pass.’”).

overcharged when they are sold a product that is mislabeled.<sup>131</sup> The next section of this article will examine how both the marijuana industry and the public can be harmed if marijuana contracts are not enforceable. Specifically loan agreements and commercial sales will be discussed.

#### i. LOANS TO MARIJUANA BUSINESSES

Marijuana businesses are not cheap to start up. You need to buy marijuana seed and grow it in a hydroponic-farm, or otherwise purchase the marijuana from a farmer, set up a retail operation, get a license, pay employees etc. In order to finance this operation many businesses will need a loan. As has been noted, the marijuana industry has been largely shut out from the traditional lending market.<sup>132</sup> This is in large part because traditional lenders such as banks fear violating the CSA and thus facing potential criminal and civil penalties.<sup>133</sup> But these lenders also need to be able to depend upon contract law to enforce the borrower's obligation to repay the loan. If lenders cannot depend on their loan agreements they will stop lending. An Arizona state court in 2012 refused to enforce an agreement in which two individuals each loaned \$250,000 to a Colorado marijuana business.<sup>134</sup> The agreement explicitly provided that the loans would be used to finance a "medical marijuana sales and grow center."<sup>135</sup> The court's holding was in spite of the fact that in both Colorado and Arizona medical marijuana was legal.<sup>136</sup> The court did not attempt to balance the public policy interest of the CSA versus state marijuana laws, instead the court found that the CSA's prohibition of marijuana meant these contracts violated federal law and as such were void and unenforceable.<sup>137</sup> While recognizing "the harsh result of this ruling" the court also rejected the idea that an equitable remedy such as unjust enrichment was available to the lenders.<sup>138</sup> Illegal = void in this case.

What the court did not consider was that it was effectively shutting marijuana businesses out of the debt market entirely. Now not only will traditional banks be afraid to lend money, but so will angel investors, family members and others who often loan money to start-up businesses. Shutting this industry out of the debt market could adversely affect the public. Lenders bring discipline and impose caution on borrowers. Since lenders get paid a fixed rate of return they generally do not benefit from risky business decisions which could produce massive returns for equity holders but could also bankrupt a company. Lenders, in the loan agreements, therefore

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<sup>131</sup> Noelle Crombie, *How Potent Are Marijuana Edibles? Lab Tests Yield Surprising Results*, (March 6, 2015) <http://www.oregonlive.com/marijuana-legalization/potency/index.html> (noting that of many marijuana edibles tested, the amount of THC listed on the label was widely inaccurate with some edibles containing only about 20% of what they stated while others had about 50% more than was stated).

<sup>132</sup> Geiger, Hamilton and Dexheimer *supra* note \_\_\_\_.

<sup>133</sup> *Id.*

<sup>134</sup> Hammer *supra* note \_\_\_\_ at 3.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 4.

<sup>138</sup> *Id.*

typically require that borrowers take certain precautions to protect the value of the business such as maintaining adequate insurance, instituting a compliance system or providing personal guarantees from the equity holders or third parties. By denying marijuana companies the ability to access this market, the discipline and restraint imposed by lenders will also be lost. This can cause the industry to take risks which could end up harming both the industry's long term growth and reputation but also the public. Aside from the risks of marijuana businesses turning towards criminal elements for financing (such as cartels) briefly discussed above, marijuana companies may simply decide to forgo proper financing and instead cut corners to save money and by doing so avoid hiring better quality employees, consulting lawyers and accountants, skipping safety tests etc., all steps that should improve customer safety. One last consideration is that both Congress and the Treasury Department have been trying to make banking services more easily available for the marijuana industry.<sup>139</sup> By voiding these contracts, courts would be arguable running afoul of that federal policy.

## ii. COMMERCIAL SALES

Most commercial sales of marijuana will be a cash for product transaction in which the consideration is simultaneously exchanged. When an individual walks into a store or restaurant and pays cash for something they immediately receive, relatively little trust is required between the parties, especially if the business has a no-returns policy. If you walk into a 7-11 and buy a bag of Cheetos with cash, you have what you wanted while the store has what they wanted. In such situations, the fact that contracts cannot be enforced will have few consequences. But of course, even these relatively straightforward forward contracts pose problems if the contracts cannot be enforced.

One issue will be whether the implied warranties included in all U.C.C. contracts (unless excluded by the seller) apply. Normally when a seller knows that a buyer is buying a good for a particular purpose, it is implied into the agreement that the good sold is fit for that purpose.<sup>140</sup> If consumers are buying marijuana for medicinal purposes or even just to get high, it would be implied into the sale agreement that the marijuana can accomplish what marijuana is supposed to do, especially if the buyer is relying on the seller's skill or judgment.<sup>141</sup> If a seller sold oregano under the guise of marijuana, the buyer would naturally want to return the product and get their money back and be disappointed when they cannot.<sup>142</sup> By making marijuana contracts unenforceable, courts will be hurting consumers by taking away legal protections given to them in other areas of the law.<sup>143</sup> It also opens the door to unscrupulous businesses to exploit the court's unwillingness to enforce their agreement. Essentially the lack of contract enforceability gives marijuana businesses an incentive to act in a shady underhanded manner because of the

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<sup>139</sup> Geiger, Hamilton and Dexheimer *supra* note \_\_; Higdon *supra* note \_\_.

<sup>140</sup> U.C.C. § 2-315. Implied Warranty: Fitness for Particular Purpose.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* See also U.C.C. § 2-314. Implied Warranty: Merchantability; Usage of Trade (implying that all goods sold by merchants must be at least "of fair average quality... and are fit for the ordinary purposes for which such goods are used...")

<sup>143</sup> See Scheuer *supra* note \_\_.



lack of consequences. While the marijuana business could suffer reputational harm, in a fast growing and rapidly developing industry like marijuana's, a business' reputation may not be easily ascertainable by the public and is certainly less dependable than a contract. While it is true that consumers who purchase marijuana illegally already lacked the right to enforce their agreement, with marijuana's legalization, marijuana is becoming more mainstream and states should seek to promote marijuana business professionalism so as to better protect the public than when it was sold illegally.

In addition, not all commercial sales can be completed simultaneously. In some cases, especially where large purchases are made, payment is often made prior to delivery or vice versa.<sup>144</sup> This is what happened to a marijuana grower when he delivered \$40,000 of marijuana to a dispensary.<sup>145</sup> The dispensary never paid and when sued the contract was voided by a Colorado state court on the grounds of illegality.<sup>146</sup> The grower was out both his marijuana and his payment for it.<sup>147</sup> This particular case predates the passage of C.R.S. § 13-22-601, which attempts to do away with the illegality defense for marijuana contracts and so may come out differently today. Nevertheless, it illustrates the problems that marijuana businesses will have with the normal application of commercial law if they cannot rely upon the enforceability of their agreements. In addition, no other state has passed a version of C.R.S. § 13-22-601 and so this issue will still be very relevant in all the other states which have legalized marijuana.

#### 4. THE STRENGTH OF THE POLICY SUPPORTING THE CSA AS MANIFESTED BY LEGISLATION OR JUDICIAL DECISIONS AND THE LIKELIHOOD THAT A REFUSAL TO ENFORCE THE TERM WILL FURTHER THAT POLICY

While we can say that it is not against the public policy of states which have legalized marijuana for individuals to enter into contracts involving marijuana, this is not enough to establish that courts should not apply the public policy defense and void these contracts. First off, federal courts still have a priority of enforcing federal law over state law and even state courts normally apply this defense even when the law being violated is a federal law.<sup>148</sup> For example, state courts have found contracts unenforceable when they violated federal laws such as the Federal Consumer Credit Protection Act even if there is no state law against the

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<sup>144</sup> There are numerous marijuana delivery companies advertised on the internet. See e.g., [www.speedwee.com/](http://www.speedwee.com/); <http://www.eazeup.com/>; [www.flashbuds.com/](http://www.flashbuds.com/).

<sup>145</sup> John Ingold, *Colorado Court Ruling Says Medicinal Marijuana Trumped by Federal Law*, (June 18, 2012) [http://www.denverpost.com/news/marijuana/ci\\_21340833/colorado-court-ruling-says-medical-marijuana-trumped-by](http://www.denverpost.com/news/marijuana/ci_21340833/colorado-court-ruling-says-medical-marijuana-trumped-by).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *American Buyers Club of Mt. Vernon, Illinois, Inc. v. Grayling*, 368 N.E.2d 1057, 1059 (1997); Fairley *supra* note \_\_ (quoting “[t]here are limited options to guarantee enforceability of contracts across state lines since multi-state contracts involving controversies in excess of \$75,000.00 are usually litigated through the federal courts,” said Leo Shalit, marijuana attorney in New York. Yet almost any contract relating to the marijuana business is at risk for being challenged due to current conflict with Federal law regardless of a state’s position on legalization. ‘A state judge could still find that a contract is void due to federal preemption and public policy violations because federal law trumps any direct conflict with state law,’ said Shalit. ‘This concept is known as Federal Preemption.’)

contract.<sup>149</sup> Courts, especially federal courts, dealing with marijuana businesses often take a black and white approach to the illegality of their business.

Debtor points out that federal authorities have never notified it that it is in violation of the law and that it has never been charged or convicted of any federal or state crime. But the fact that a violator is never charged, tried or convicted does not change the fact that the crime has been committed.<sup>150</sup>

If this is as deep into the public policy defense as courts are willing to go then all marijuana contracts will be voided. However, as argued above, a mere violation of the law should not automatically cause a contract to be voided absent a strong public policy supporting the violated law. Therefore a discussion of the policy behind respecting the CSA is now needed. Any argument in favor of state marijuana policy is almost certainly doomed in a federal court, which will naturally favor the policy of federal law over policy of state law, and so the question of why a state court, which should have a stronger view of state law policy, should respect the CSA will be the primary focus.

What is the public policy behind the CSA that should justify courts, especially state courts, in voiding marijuana contracts? To start there is a general injury to the public if federal laws or indeed any law such as the CSA are not respected by state courts. This could promote law breaking by citizens or a more general contempt for the law as citizens realize that some laws, clearly prohibiting an activity, can be safely ignored without legal consequences and that further, one can enlist the aid of a court in breaking that law. That being said, if this argument is allowed too much credence, than any violation of a law, including of the cohabitation example given earlier, will result in a voided contract and short cut the proper weighing of public policy. Therefore we will now focus on the specific value of the CSA as opposed to the law generally.

The two public policy factors in favor of voiding marijuana contracts, as articulated by the Restatement, are consideration of the strength of the policy supporting the CSA and the likelihood that voiding a contract will support that policy. The CSA prohibited marijuana under the belief that marijuana is a dangerous and addictive drug that harms Americans. Violations of the CSA are serious crimes and the federal government has taken enforcement of the CSA and its marijuana prohibition to be an extremely important public policy for a long time.<sup>151</sup> It has reportedly spent one trillion dollars on the war on drugs over the last 40 years<sup>152</sup> and at one point was spending forty-two billion per year on marijuana enforcement.<sup>153</sup> This clearly reflect very

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<sup>149</sup> *Id.* (“The Law of Illinois Provides a defense to the enforcement of a contract if that contract is illegal either as a matter of Illinois or of federal Law.”)

<sup>150</sup> *In re Rent-Rite Super Kegs West Ltd.*, 484 B.R. 799, 805 (Bankr. D. Colo. 2012).

<sup>151</sup> See *After 40 years, \$1 trillion, U.S. War on Drugs has failed to meet any of its goals*, (May 13, 2010) <http://www.foxnews.com/world/2010/05/13/ap-impact-years-trillion-war-drugs-failed-meet-goals/>.

<sup>152</sup> *Id.*

<sup>153</sup> Rob Kampa,

strong support for the policies behind the CSA. Voiding marijuana contracts arguably support that policy by making it harder to obtain marijuana and by making it a more expensive drug. One should also consider the reasons why the federal government made marijuana illegal in the first place so as to judge the weight of those policies today. The policy behind marijuana's prohibition is complex in that it was based on some honest concerns about the dangerousness of the drug but also on a host of cultural issues that got wrapped around marijuana's use.<sup>154</sup> When marijuana was essentially banned with the Marijuana Tax Act of 1937, marijuana use was associated with violent crime and was believed to be addictive.<sup>155</sup> Marijuana is often cited as a gateway drug to more serious and dangerous drugs.<sup>156</sup> While there were honest concerns about the effect of marijuana, its prohibition cannot be separated from cultural prejudices in the 1930s.<sup>157</sup> For example, some argue that marijuana's prohibition was a product of anti-Mexican immigrant sentiment.<sup>158</sup> In any case when examining the historic roots of marijuana prohibition, the policies justifying its original ban are rarely if ever cited any longer to support its continued prohibition. Some defenders of prohibition still hold to the idea that marijuana is harmful.<sup>159</sup> But these arguments are often based less on what marijuana is and more on what it could become if legalized and put in the hands of major corporations like the tobacco companies.<sup>160</sup> These defenders often accept that marijuana is less harmful or dangerous than alcohol or tobacco but that that does not mean we should be adding more legal drugs to the marketplace.<sup>161</sup>

The problem here is that the federal government no longer seriously enforces the CSA in states which have legalized marijuana. As discussed in section I.A. above, the federal government is no longer actively pursuing marijuana users or business and in fact has been slowly taking steps to normalize this industry. It can also be argued that the federal government has largely conceded to states the ability to regulate marijuana, and that the federal government has little interest in enforcing the CSA on this issue any longer. After the Drug Enforcement Agency raided two marijuana dispensaries in Los Angeles, an agent stated that the raids were

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<sup>154</sup> Malik Burnett and Amanda Reiman, *How Did Marijuana Become Illegal in the First Place*, (October 9, 2014) <http://www.drugpolicy.org/blog/how-did-marijuana-become-illegal-first-place>.

<sup>155</sup> Richard J. Bonnie & Charles H. Whitebread II, *The Marijuana Conviction: A History of Marijuana Prohibition in the United States*, 51 (1974).

<sup>156</sup> See e.g., National Institute on Drug Abuse, *Is Marijuana a Gateway Drug?*, <http://www.drugabuse.gov/publications/marijuana/marijuana-gateway-drug> (noting that some scientific studies have shown that marijuana use can potentially make users more vulnerable to drug abuse and addiction to other substances but also noting that "most people who use marijuana do not go on to use other, 'harder' substances." In addition the article notes that alcohol and tobacco act in a similar way to marijuana for purposes of being a gateway to harder drugs.) See also Joy et al., *Marijuana and Medicine: Assessing the Science Base* (National Academy Press, 1999).

<sup>157</sup> See *id.*

<sup>158</sup> Burnett and Reiman, *supra* note \_\_\_\_

<sup>159</sup> German Lopez, *Meet the man trying to halt marijuana legalization*, (July 27, 2015) <http://www.vox.com/2015/3/20/8257631/kevin-sabet-marijuana-legalization>.

<sup>160</sup> *Id.* (Quoting Kevin Sabet, co-founder of Smart Approaches to Marijuana, a pro-prohibition group, "[m]y biggest concern is creating **Big Marijuana**—sort of like Big Tobacco, which were still dealing with the consequences of.")

<sup>161</sup> *Id.*

about the way the shops were being run and not about marijuana generally. He said “[i]f this was simply about somebody selling marijuana in West Hollywood, the DEA wouldn’t be here.”<sup>162</sup> While a new presidential administration may have a tougher policy on marijuana,<sup>163</sup> the current administration has clearly ceded control over marijuana to states.<sup>164</sup> There are many old laws in America that while officially still in force, have not been taken seriously for a long time.<sup>165</sup> For example, it is still against the law in New York State for a person to engage “in sexual intercourse with another person at a time when he has a living spouse, or the other person has a living spouse.”<sup>166</sup> This law against adultery, while still on the books, is no longer enforced. The state clearly no longer considers it important public policy to prevent adultery through criminal enforcement of marital vows. Nor should courts consider it an important public policy to void contracts which violate this law. The federal government has signaled a similar statement that they do not consider the CSA’s prohibition of marijuana to be an important public policy either. Therefore, when states weigh the public policy behind respecting the CSA versus the public policy articulated by the state when it legalized marijuana the court may very well come out in favor of the later.

While clearly the federal government has not fully embraced marijuana legalization, prohibition also clearly no longer reflects a top priority the way it once did. Again quoting Farnsworth, “policies vary over time. As the interests of society change, courts are called upon to recognized new policies, while established policies become obsolete...”<sup>167</sup> To quote the Supreme Court in a similar vein, “[t]he Standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interests, at a more advanced stage are treated as legal and binding.”<sup>168</sup> The federal government’s view of marijuana, not to mention society’s view as a whole, has evolved over time and, however begrudgingly, marijuana is gaining some acceptance. Considering this, how should courts weigh the strongly pursued policy behind legalization behind the increasingly weakly pursued goals behind prohibition?

## 5. WEIGHING COMPETING MARIJUANA POLICIES

As noted earlier, some courts have categorically found marijuana illegal and on that basis refused marijuana stakeholders many standard legal protections.<sup>169</sup> What these courts fail to do is weigh the value of enforcement versus the public policy that is being violated. Simply stating that marijuana is illegal should not by itself necessarily doom all marijuana contracts however,

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<sup>162</sup> Ferner, *DEA Raids supra* note \_\_\_\_.

<sup>163</sup> See Stableford *supra* note \_\_\_\_.

<sup>164</sup> See Ciaramella *supra* note \_\_\_\_.

<sup>165</sup> See the website [dumblaws.com](http://dumblaws.com) for a list of strange laws that are still officially on the books.

<sup>166</sup> NY Penal Law Title O Article 255.17.

<sup>167</sup> Farnsworth *supra* note \_\_\_\_ § 5.2.

<sup>168</sup> *Pope Mfg. Co v. Gormully*, 144 U.S. 224, 233-234 (1892).

<sup>169</sup> See *In re Rent-Ride supra* note \_\_\_\_.

“[n]ot every illegal contract must be voided in order to protect public policy... ‘the power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and... should be exercised only in cases free from doubt.’ ... As a general rule, ‘a contract is not void as against public policy unless it is injurious to the interests of the public or contravenes some established interest of society.’”<sup>170</sup>

So the question becomes, do contracts involving marijuana injure the interests of the public or contravene some established interest of society? Clearly federal court will be slow to recognize the value of state marijuana policy, since that policy has not been adopted by Congress, and state courts will probably have to lead on this issue.<sup>171</sup> But there is no clear answer to this question for state courts and it should come down to weighing the public policy of respecting the CSA versus the public policy that drove states to legalize marijuana in order to figure out which offers more benefit to the public. Because states are actively supporting marijuana legalization, while the federal government is also slowly moving in the same direction, the public policy behind the CSA’s prohibition no longer seems strong enough to justify voiding marijuana contracts in states which have legalized it.

### III. POTENTIAL REMEDIES FOR ADDRESSING CONTRACT NON-ENFORCEMENT

Despite this article’s argument that the public policy defense should not be applied to void marijuana contracts, the reality is that it currently is often being applied to do just that. Consequently the next section will address some alternatives to contract enforcement that have been proposed as a means of holding marijuana stakeholders accountable when they intentionally take advantage of a court’s unwillingness to enforce their agreement.

#### A. FRAUD AND BAD FAITH CLAIMS

If marijuana businesses and consumers cannot rely upon the enforceability of contracts, what about other potential remedies such as fraud or bad faith claims? The definition of fraud is usually very broad such as “[a]ctual fraud includes cases in which there is an intentional and successful employment of any cunning, deception, or artifice to circumvent, cheat, or deceive another.”<sup>172</sup> If a marijuana business intentionally sold fake marijuana this would fit within this definition and seem to give rise to a fraud claim even if the sale agreement or U.C.C. rights cannot be enforced. Likewise, if a marijuana business entered a contract, for example for the purchase of a large amount of marijuana from a farmer, intending to not pay and to defend on the

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<sup>170</sup> *Isles Wellness*, *supra* note \_\_ at 92-3 respectively quoting *Cole v. Brown Hurley Hardware Co.*, 117 N.W. 746, 747 (Iowa 1908) and *In re Estate of Pertson*, 42 N.W.2d 59, 63 (1950) (other citations omitted).

<sup>171</sup> *Fairley* *supra* note \_\_

<sup>172</sup> Plaintiff’s Proof Prima Facie Case § 14:28 (the actual elements of fraud “(1) the defendant made a promise to the plaintiff to perform a particular action in the future; (2) at the time the promise was made the defendant did not intend to perform; (3) the plaintiff relied on that promise; (4) the plaintiff acted upon the promise to its detriment; and (5) the plaintiff suffered damage thereby.”)

basis of the contract illegality defense, this would also seem to fit the definition of fraud. This could provide for recovery in some instances. Since fraud claims require intentional misrepresentations this approach will not help in all cases where an agreement was honestly made but then breached innocently later on. So if marijuana is innocently sold, and instead of being intentionally fake it is simply bad quality and unusable, a fraud claim cannot be brought. If marijuana is purchased from a farmer, and the business simply runs out of the money to pay for it, fraud will again not provide a remedy.

There is another problem with relying on fraud claims to remedy the contract enforceability problem in that there is a public policy exception to fraud claims<sup>173</sup> in addition to ongoing problem of the unclean hands doctrine.<sup>174</sup> So this potential remedy seems inherently flawed in that for it to apply a court would have to find that public policy does not require a court to abstain from adjudicating the claims between two marijuana stakeholders. But if a court is going to find that, it might as well find that the marijuana contract itself is enforceable. This remedy would only seem to complement enforceable marijuana contract not be a substitute.

Another possible remedy that has been suggested that marijuana stakeholders could potentially pursue for contracts which are voided as illegal is a bad faith claim.<sup>175</sup> If a marijuana business enters a contract with full disclosure of the nature of its business, and the other party defends on the basis of the federal illegality of marijuana, the marijuana business may be able to bring a bad faith claim against the other contract party. For example, if a marijuana business obtains insurance coverage but then the insurer denies coverage based upon an illegality defense, the marijuana business could attempt to recover by arguing that the insurance company committed an act of bad faith when it entered the agreement. Bad faith claims will likely prove unhelpful for the same reason that makes fraud claims unhelpful in courts which will not uphold the validity of marijuana contracts. If a court finds that marijuana contracts violate public policy, they are likely to also refuse to adjudicate a bad faith claim because of the unclean hands doctrine.

## B. FORUM AND VENUE SELECTION CLAUSES

While it is not certain that state courts located in jurisdictions which have legalized marijuana will necessarily uphold the validity of marijuana contracts, they are far more likely to overlook a violation of the CSA than are federal courts or state courts located in jurisdictions which have not legalized marijuana. Consequently, one way parties can increase the likelihood that their marijuana contracts will be enforced is with a forum selection clause (selecting a

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<sup>173</sup> *Id.*

<sup>174</sup> See Scheuer *supra* note \_\_ in which this author discusses the application of the unclean hands doctrine to marijuana businesses much more extensively.

<sup>175</sup> Rebecca Millican, *How to Draft an Effective Marijuana Contract*, (Feb. 10, 2014)

<http://www.cannalawblog.com/how-to-draft-an-effective-marijuana-contract/>; Fairley *supra* note \_\_ (advocating a choice of law provision in all marijuana related contracts).

jurisdiction likely to uphold the contract's enforceability) as well as a venue selection clause (selecting a state court and waiving the right to sue or appeal in federal court). This has been the advice of some working in the industry.<sup>176</sup> It will help to eliminate forum shopping insofar as the party seeking to avoid contract enforcement will not try to move the proceeding to a marijuana unfriendly court. Unfortunately this tactic will not help in all situations. Any contract that is not in writing would obviously not include these provisions. Most customer contracts would fall into this category. While it is possible to have every customer sign a contract with these clauses, it would be cumbersome and probably unnecessary. After all, most retail sales will involve cash for product, at which point both parties have already fulfill their contracts and it is less important whether a court would uphold the contract's enforceability. Larger purchases of product, or purchases where the consideration is not simultaneously delivered should probably be accompanied by a written contract with these clauses. The larger problem is that a forum and venue selection clause will simply not resolve the underlying problem of how the contract will be treated even by a state court in a marijuana legal jurisdiction.<sup>177</sup> As the *Hammer v. Today's Health Care II* case demonstrated, even state courts located in jurisdictions that have legalized marijuana might find these contracts unenforceable.<sup>178</sup> So while these clauses can help keep marijuana parties out of the wrong court, the underlying question of enforceability, as discussed above, must still be addressed.

### C. LEGISLATIVE ACTION

A much more proactive approach to dealing with contract unenforceability is for state legislatures to try to preempt these court rulings. This has been Colorado's approach. Colorado's marijuana industry began to experience some worst case scenario rulings in terms of contract enforceability.<sup>179</sup> Colorado state courts issued rulings that invalidated marijuana contracts.<sup>180</sup> Not unaware of the problems the marijuana industry is experiencing with contracts, the proactive Colorado legislature has addressed the illegality defense with C.R.S. § 13-22-601. It attempts to get rid of this defense. It states "[i]t is the public policy of the state of Colorado that a contract is not void or voidable as against public policy if it pertains to lawful activities authorized by section 16 of article XVIII of the state constitution and article 43.4 of title 12 , C.R.S." If this rule is applied by courts as intended, marijuana contracts should now be enforceable in Colorado as long as they comply with state marijuana laws. Unfortunately there are no cases that have yet addressed C.R.S. § 13-22-601 and so the question of how it will be applied is unclear. In addition, federal courts are far less likely to uphold the validity of this law than state courts and so forum shopping will still likely be a problem. Despite the clear policy of C.R.S. § 13-22-601, the Colorado Supreme Court is still issuing rulings, in non-contract enforcement cases, that marijuana is in fact illegal under federal law and therefore statutes which protect "lawful

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<sup>176</sup> *Id.*

<sup>177</sup> *See Hammer v. Today's Health Care II*, CV2011-051350 (Apr. 17, 2012).

<sup>178</sup> *Id.*

<sup>179</sup> *Ingold supra note \_\_*, (citing a case in which A Colorado state court found a marijuana contract illegal under federal law and thus void); *Coats v. Dish Network L.L.C.*, 303 P.3d 147, Colo. App. 2013).

<sup>180</sup> *Id.*

activities” do not protect marijuana use.<sup>181</sup> The ultimate problem is that C.R.S. § 13-22-601 no more trumps the CSA than do the state laws which legalize marijuana and so courts will be forced to question the enforceability of C.R.S. § 13-22-601. Ultimately, for marijuana contracts to be enforced, courts must first conclude that because the federal government is no longer actively enforcing the CSA that they do not need to invalidate marijuana contracts at all.

In addition, the unclean hands doctrine<sup>182</sup> could be applied to prevent recovery between two parties, each of whom was violating the CSA. In my previous article on marijuana businesses the unclean hands doctrine as applied to these businesses was discussed in detail.<sup>183</sup> Without repeating that entire discussion, suffice it to say that this doctrine acts much like the illegality defense in that it prevents a court from adjudicating a dispute when two parties have engaged in wrongdoing. While the Colorado legislature has addressed the illegality defense with C.R.S. § 13-22-601, a court would still need to address the issue of adjudicating a dispute between two individuals attempting to violate federal law. It may seem obvious that these two doctrines, unclean hands and the illegality defense, since they are so similar would be resolved in the same manner. However, C.R.S. § 13-22-601 only directly addresses the illegality defense and the Colorado Supreme Court has held in other areas that marijuana is still unlawful under federal law and so state law protections are not available for those who violate the CSA. In *Coats v. Dish Network*, it found that “employees who engage in an activity such as medical marijuana use that is permitted by state law but unlawful under federal law are not protected by [state laws which protect employees from discharge for lawful activities the employees engage in while off duty].”<sup>184</sup> The court found “the term ‘lawful’ refers only to those activities that are lawful under both state and federal law.”<sup>185</sup> If the Colorado Supreme Court is not willing to find marijuana use “lawful” for purposes of a Colorado statute despite the many laws in Colorado attempting to make marijuana lawful, then it is possible that it will read C.R.S. § 13-22-601 narrowly and not interpret it to mean that other equitable doctrines such as the unclean hands doctrine are still available defenses.

Whether through a finding that the public policy defense does not apply or through the application of a law such as C.R.S. § 13-22-601 if the enforceability of marijuana contracts are upheld, the problems for courts and marijuana stakeholders does not end. As the next section will discuss it will not be a simple matter for courts to treat marijuana contracts like any regular contract.

#### IV. PROBLEMS WITH MARIJUANA CONTRACT ENFORCEMENT

For the reasons discussed in section II above, the best solution for the marijuana industry, and for the accomplishment of the state public policy goals that drove legalization, is for state courts to find that the public policy behind legalization outweighs the weakly held policy behind federal prohibition and that therefore marijuana contracts are not illegal and that other equitable

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<sup>181</sup> No. 12SC394, *Coats v. Dish Network*, June 15, 2015.

<sup>182</sup> The applicability of *in pari delicto* would similarly need to be addressed

<sup>183</sup> Scheuer *supra* note \_\_\_\_.

<sup>184</sup> No. 12SC394, *Coats v. Dish Network*, June 15, 2015.

<sup>185</sup> *Id.*



remedies are available to those in this industry. This accompanied by strong legislative support like Colorado's C.R.S. § 13-22-601 and the careful use of forum and venue selection clauses could make marijuana contracts more dependable. This should in turn strengthen the marijuana industry and hopefully make it a more responsible member of society. Even if all these dominos fall into place, there are, and should be, limits to the enforceability of marijuana contracts.

#### A. SPECIFIC PERFORMANCE OF MARIJUANA CONTRACTS

What are the limits on enforcing marijuana contracts even without a public policy defense and with strong legislative support like C.R.S. § 13-22-601? Does Colorado truly expect that its courts should treat marijuana contracts like other contracts which do not run afoul of the law? The most obvious way in which this law will cause courts to struggle is when the question of specific performance comes up. Specific performance is a remedy in which one contract party argues that monetary damages are insufficient and that the court should force the other contract party to performance their obligations under the contract.<sup>186</sup> This remedy is not available for most contracts in which monetary damages allow one to go out and find replacement goods or services.<sup>187</sup> Instead it is reserved for situations in which the consideration in a contract is somehow unique or irreplaceable, such as when you are purchasing land or art.<sup>188</sup> Is there anything unique in the marijuana industry that would qualify for specific performance? There are a couple of possible candidate. These include land to be used for a marijuana farm,<sup>189</sup> the sale of a marijuana business itself and even potentially the sale of a specific type of marijuana which is not available except from one seller.<sup>190</sup>

For the most part marijuana is probably a fungible good and so monetary damages would be sufficient as a remedy if a seller could not provide you with the marijuana that you contracted for.<sup>191</sup> However the industry does market different strains of marijuana as being unique.<sup>192</sup> Just like with wine, there are reviewers and awards to help consumers pick out the best marijuana on the market.<sup>193</sup> Reviews break down marijuana strains into taste, smell, genetics and effect. A review of a strain called "Cherry Pie" describes the taste as "dark cherry, black licorice" with a

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<sup>186</sup> Williston *supra* note \_\_ § 67:1.

<sup>187</sup> *Id.* § 67:8.

<sup>188</sup> *Id.* § 67:61 (any piece of land is presumed to be unique, and that monetary damages will typically be an inadequate remedy..."); § 67:79.

<sup>189</sup> *Id.*

<sup>190</sup> The UCC provides for specific performance in § 2-716 if the goods are unique; Williston *supra* note \_\_ § 67:79 (4<sup>th</sup> ed.) (noting that specific performance may be available when the goods are "not purchasable in the market.")

<sup>191</sup> Williston *supra* note \_\_ § 67:1 (noting that specific performance is appropriate only when "damages are an inadequate remedy").

<sup>192</sup> 10 Best Marijuana Strains, (June 12, 2015) [http://www.brainz.org/best\\_marijuana\\_cannabis\\_strains/](http://www.brainz.org/best_marijuana_cannabis_strains/); Best Weed Strains 2015, (June 12, 2015) <http://www.strainreviewer.com/>.

<sup>193</sup> *Id.*; see Sophie-Claire Hoeller, *I Went to a Marijuana Dispensary in Colorado and it Felt Just Like Visiting a Wine Store*, (July 14, 2015) <http://finance.yahoo.com/news/went-marijuana-dispensary-colorado-felt-200016939.html> (describing the experience of shopping for marijuana at a dispensary as similar to a "fancy wine shop, where customers defer to a connoisseur who knows the products well and can recommend something to each person's liking.")

smell “like grapes” and an effect of an “[i]mmediate body high this strain will put you on your ass.”<sup>194</sup> Other than the description of the effect (which signals a clearly different consumer culture), this could very well be a wine review. If certain vintages of wine could be unique, why not certain strains of marijuana. If a consumer, or business purchaser, could establish that they were trying to buy something unique, in theory specific performance would be available as a remedy. For example, imagine a new marijuana dispensary and grow operation called Pot Inc. is opening in Colorado. It contracts with an existing marijuana operation called High Times Inc. to buy a particular strain of marijuana called Chocolate Kush for the purpose of reselling. Chocolate Kush is a unique genetic strain and is currently only owned by High Times. Further, High Times has acknowledged that Chocolate Kush is unique and has a taste, smell and effect that is different from anything else available on the market. If there is no ability to cover in the market with equivalent goods, in theory specific performance should be an available remedy to require High Times to turn over the product to Pot Inc. In reality, most marijuana, while having unique qualities, is probably not so unique to warrant a lawsuit of this nature, but it is conceivably possible. A more realistic example of when specific performance would be applicable is in the context of a marijuana farm or business itself. Since these involve the sale of land, they would normally be good candidates for specific performance remedies. After all, you cannot simply go out and buy an identical farm or business location.

Should a court which has upheld a marijuana contract’s enforceability grant specific performance as a remedy? The answer is probably still no. This is because ordering specific performance would go beyond allowing marijuana stakeholders the ability to regulate their relationships despite the CSA, and go into the territory of requiring them to violate the CSA. “The right to specific performance is not absolute. Whether the remedy should be granted depends upon the equities of the case ... and rests within the sound discretion of the trial court....”<sup>195</sup> In addition, contracts which are illegal or violate public policy are usually denied specific performance.<sup>196</sup> However, if a court has already decided to ignore the CSA and enforce a contract, they could use the same reasoning to overlook that violation when determining whether to grant specific performance. Nevertheless, there are clear and logical reasons why a court could find that a marijuana contract is not illegal while still determining that specific performance is not appropriate. Namely that forcing someone to violate the CSA is a larger affront to federal law than simply finding it not applicable for application of a contract defense. If specific performance is not available, there will be consequences for stakeholders in this industry. For example, a landlord can simply evict a marijuana business tenant, in breach of contract, at any time and the tenant will only be able to seek damages, not the continued use of their premises.

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<sup>194</sup> Cherry Pie Strain, (May 12, 2015) <http://www.strainreviewer.com/2013/06/cherry-pie.html>.

<sup>195</sup> Schreck 37 P.3d at 514 (citations omitted).

<sup>196</sup> Williston *supra* note § 67:3.

What should marijuana parties do if specific performance is ordered? One possible response by a court asked for specific performance would be that if its order would cause a party to violate federal law, so be it. The parties took their chances when they formed a contract to violate federal law and now they have to live with it. If a court does order specific performance in a marijuana contract, are there defenses that could help a party refuse to perform (and therefore violate the CSA)? A party subject to such an order could go to a federal court and seek an injunction against enforcement of the state court's order.<sup>197</sup> Federal courts, seeing a clear order to disobey federal law should be willing to grant an injunction preventing an order of specific performance for a marijuana contract.<sup>198</sup> So even if a court orders specific performance, marijuana stakeholders probably stand a good chance of preventing its enforcement.

## CONCLUSION

The marijuana industry is a field with many exciting opportunities for business owners. Over the coming years many individuals and businesses will be able to establish themselves as central players in this new industry, and probably make themselves a fortune doing so. Nevertheless, with reward comes great risk. This industry is faced with a host of legal challenges that should give serious pause to anyone considering joining it. The inability of the marijuana industry to rely upon the enforceability of their contracts, coupled with their heightened tax, insurance, banking and other problems, will act to destabilize this industry and stop it from developing normally and attracting professional stakeholders. On an individual business level, the lack of these legal protections can come in to quickly bite them and cause what would be a normal business issue for another industry to become a death knell for a marijuana business, and cost its stakeholders their investment, or more. Marijuana stakeholders can gain some limited protection from forum and venue selection clauses to ensure they do not end up litigating their contracts in a jurisdiction that will automatically void their agreements as illegal. But these clauses will not protect against state courts who make similar decisions despite being in marijuana legal jurisdictions. State legislatures which have an incentive to see this industry grow professionally should follow Colorado's lead and pass legislation that will help marijuana contracts become enforceable obligations. Unfortunately Colorado's current legislation does not address the true complexity of marijuana contract issues and so marijuana stakeholders will still be left with questions about the reliability of their contracts while courts figure out the details. While the ultimate resolution to marijuana contract enforceability may depend on the end of marijuana prohibition by the federal government, in the short term a finding that marijuana is not illegal based upon the strong support of its legalization by states, while only a nominal

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<sup>197</sup> See *Operating Engineers' Local No. 428 Pension Trust Fund v. Zamborsky*, 650 F.2d 196, 198 (1981).

<sup>198</sup> See *id.* (in which a pension fund sought injunctive relief in a federal court for the enforcement of a state court order by arguing that the state court order conflicted with federal law. The court went through a preemption analysis and found that the federal law did not directly pre-empt the state court order and that it was not impossible for the fund to comply with the state order as well as federal law.)

enforcement of its prohibition by the federal government, would solve many of the problems discussed in this article.