SB 423 Monitoring: Montana Marijuana Act
Developments Through December 2011

Prepared by Sue O'Connell
for the Children, Families, Health, and Human Services Interim Committee
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Background

Senate Bill 423 repealed Montana's Medical Marijuana Act on July 1, 2011, and replaced it with new requirements for the cultivation, manufacture, and possession of marijuana for use by people with debilitating medical conditions.

SB 423 specifically requires the Children, Families, Health, and Human Services Interim Committee to:

- monitor how the Department of Public Health and Human Services (DPHHS) puts the new law into effect; and

- draft legislation for 2013 if members decide changes to the law are needed.

This briefing paper summarizes developments related to SB 423's implementation since the committee last met in November.

Legal Challenge: Montana Cannabis Industry Association v. State of Montana

In the ongoing legal challenge to Senate Bill 423, the Attorney General's Office has filed a brief that details its appeal of a District Court ruling issued in June.

On June 30, Judge Jim Reynolds of Helena prevented five provisions of SB 423 from going into effect while a lawsuit challenging the bill is pending. The Attorney General's Office has asked the Montana Supreme Court to invalidate two aspects of Judge Reynolds' ruling.

In a brief filed in mid-November, the state appealed the decision to put on hold the limit on the number of cardholders for whom a provider may grow marijuana and the ban on compensation. It did not appeal the lower court injunction against three other provisions: the ban on cardholder advertising of marijuana or related products; the ability of DPHHS and local law enforcement to conduct unannounced inspections of locations where providers are growing marijuana; and the requirement that DPHHS provide the Board of Medical Examiners with the names of physicians who provide written certification for more than 25 patients in a 12-month period.

The state's brief notes that the District Court decision applied the highest level of judicial scrutiny to the provisions related to compensation and to the limit of three patients per provider. As a result, the District Court determined that these provisions violated the right to pursue health and employment.

The Attorney General's Office argues that previous Montana Supreme Court rulings have determined that the right to pursue employment is limited to lawful activities. The brief notes that commercial sales of marijuana are illegal under Montana and federal law.

The brief also maintains that the Montana Constitution doesn't provide a right to pursue health free of government regulations. And it argues that while Montana's right to privacy covers the right to make medical decisions, that right must be balanced against the state's interest in regulating certain activities — especially where no fundamental right is at issue.

The Attorney General's Office argues that the lower court's decision should be reversed because a "strict scrutiny" analysis was applied in reviewing the law. The brief contends that the decision to subject SB 423 to that level of scrutiny was "an erroneous conclusion of law," and as a result, was an abuse of the lower court's discretion.

The brief asks the Supreme Court to correct the lower court's conclusions and to specify the type of constitutional analysis that the District Court should apply to its future consideration of the case when it proceeds to the trial stage.

The Montana Cannabis Industry Association has until Jan. 17 to file its response to the state's brief. The state then has 14 days to file a reply brief, but is not required to do so.

The Association has indicated it also will file a cross-appeal at the time it files its response. If it does so, the state will then have 30 days to respond to that brief.

New Legal Challenge: Christ v. State of Montana

In December, another lawsuit was filed challenging SB 423 as unconstitutional and asking that enforcement of the entire law be halted while the lawsuit is pending. The suit was filed in Missoula County by Jason Christ, doing business as the Montana Caregivers Network (MCN). That business sponsored many of the traveling clinics that drew attention in 2010. They provided hundreds of Montanans at a time with the opportunity to see a doctor to obtain the certification needed to apply for a medical marijuana card.

Many of the claims in the suit stem from the provisions in SB 423 that prevent people on probation and parole from obtaining cards to use marijuana for their medical conditions or to grow marijuana for people with debilitating medical conditions. The suit contends that this prohibition violates probationers' and parolees' right to privacy and dignity in making medical decisions, their right to pursue health, and their right to earn a living by supplying marijuana for people with debilitating medical conditions. The suit notes that hundreds of patients served by MCN are unable to obtain or renew a card to use marijuana for their medical conditions. The suit also says that SB 423 violates the right of free speech for physicians who are consulting with patients.

The Attorney General's Office must file a response to the suit by Feb. 1.

Registry Statistics

DPHHS statistics for the marijuana registry program show that the number of patients declined nearly 43% between May 2011 and December 2011. The number of patients peaked at 31,522 in May and stood at 18,012 in December.

SB 423's new provisions on the issuance of cards went into effect June 1, 2011. Those provisions require cardholders to be Montana residents. Individuals also may not receive a card if they are on probation or parole, and they must meet stricter requirements to obtain a card for chronic pain. In addition, physicians may no longer use telemedicine or other electronic means as a way to provide the written certification needed to obtain a card.

The latest statistics also show that:

- the number of registered cardholders who are under the age of 18 has declined by more than 60%, from 54 in May to 20 in December;

- the number of doctors providing written certification has declined from 362 in May to 288 in December;

- people obtaining cards for chronic pain represented 65% of the cardholders in December, compared with 73% in May;

- 17 doctors provided written certification for more than 100 patients in December, with the number of patients per doctor ranging from 101 to 110 patients to 2,791 to 2,800 patients; and

- 12 providers were growing or manufacturing marijuana for more than 100 patients, with the number of patients per provider ranging from 101 to 110 patients to 611 to 620 patients.

Cardholder/Provider Issues

A person registered to use marijuana for her debilitating condition has contacted the committee's staff to raise an issue for committee consideration.

The cardholder shares her home with a developmentally disabled person who also is a cardholder. In the past, she has served as the individual's caregiver.

She notes that SB 423 allows a marijuana provider to grow marijuana either at a property that the provider owns or rents or at a property owned or leased by the cardholder. However, no portion of the property used for growing marijuana for use by the cardholder may be shared with or rented or leased to a provider or another registered cardholder unless the cardholders are related to each other by the second degree of kinship by blood or marriage.

Because the stakeholder raising this issue is not related to the cardholder for whom she would like to provide marijuana, she is unable to grow the marijuana at the home they share.

She has suggested that the law should allow for a waiver of the provision on shared property, under certain circumstances.

Caregiver-to-Caregiver Sales

District Court judges in Flathead and Missoula counties ruled in 2011 that the former Medical Marijuana Act did not allow caregivers to transfer or sell marijuana to other caregivers. Both rulings are now on appeal to the Montana Supreme Court.

The appellants argue in their briefs that the former law allowed for such transactions because it allowed caregivers to acquire marijuana for their patients. They contend that caregivers must have the ability to obtain enough marijuana to meet their patients' needs if the caregivers are unable to grow an adequate supply on their own. The appellants also maintain that the former law implicitly allows for caregiver-to-caregiver sales because it neither prohibits a caregiver from delivering marijuana to a second caregiver or prohibits the second caregiver from acquiring it from the first caregiver.

The Attorney General's Office has filed a response in the Missoula County case. It has until Jan. 30 to file a response in the Flathead County case.

In the Missoula County case, the state has asked the Supreme Court to find that the appeal is moot because SB 423 repealed the Medical Marijuana Act and replaced it with provisions that make it clear that providers may not sell or transfer marijuana to each other.

If the Supreme Court does not declare the appeal moot, the state maintains that the high court should uphold the District Court ruling. The brief says that the former law specifically limited a caregiver to providing marijuana only to patients who had named the person as their caregiver.

If Initiative Referendum 124 succeeds in November, SB 423 will be repealed. The provisions of the former Medical Marijuana Act will then be in effect. A Supreme Court ruling on caregiver-to-caregiver sales would clarify an area of that law that many people have interpreted in different ways.

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