



## Children, Families, Health, and Human Services Interim Committee

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### 62nd Montana Legislature

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June 13, 2011

**TO:** Committee Members

**FROM:** Julianne Burkhardt, Staff Attorney

**RE:** Overview of Litigation regarding SB 423, the Montana Marijuana Act

### **Background**

On May 13, 2011, the Montana Cannabis Industry Association (MCIA) and several individual cardholders, providers, and one doctor filed a Complaint for Declaratory and Injunctive Relief and a Motion for a Preliminary Injunction. Also filed on May 13, 2011, was a request for a Temporary Restraining Order regarding the advertising ban for marijuana providers under Senate Bill No. 423 (SB 423). The timing of the litigation was important because several key parts of SB 423, including the advertising ban in section 20, came into effect on May 14, 2011. The MCIA is an industry group formed in late April of 2011. Bozeman attorney, James Goetz, is representing the MCIA and the individual plaintiffs. The defendant is the State of Montana. The litigation team of James Molloy, Mark Mattioli, and J. Stuart Segrest from the Attorney General's Office is defending the case. The Legislative Services Division is monitoring the litigation.

The declaratory judgment aspect of the case is asking the Court to declare, pursuant to the Montana Declaratory Judgment Act 27-19-101 *et seq.*, that SB 423 violates certain sections of the Montana Constitution and the Constitution of the United States. The request for injunctive relief seeks a preliminary injunction preventing the State from "codifying or enforcing Senate Bill 423's amendments to the MMA".

### **Complaint for Declaratory and Injunctive Relief**

The Complaint contains six counts of alleged violations of the Montana Constitution and one alleged violation of the U.S. Constitution. Count I alleges a denial of the right to privacy, dignity, pursuit of life's basic necessities, and freedom of speech pursuant to Article II, Sections 3, 4, 7, and 10, of the Montana Constitution based in part on the allegation that SB 423 "intrude[s] into the sanctity of the patient-physician relationship" harming the ability of patients to seek medical care consisting of access to medical marijuana. Count I also deals with the argument that SB 423 violates the right to free speech on the part of physicians by imposing

limitations and risks on physicians who may otherwise have recommended that patients utilize marijuana for their conditions. Count II alleges a denial of equal protection pursuant to Article II, Section 4, of the Montana Constitution primarily regarding patients who are under the supervision of the Department of Corrections. Count III alleges a violation of due process under Article II, Section 17, of the Montana Constitution arguing that the ability for providers of marijuana to supply marijuana is unconstitutionally restricted under SB 423. Count IV alleges a violation of the right to be free from unreasonable searches and seizures under Article II, Section 11, of the Montana Constitution based upon the provisions of section 14 of SB 423, which permits unannounced inspections of the premises of registered providers. Count V alleges a violation of the right to engage in political and commercial speech pursuant to Article II, Section 7, of the Montana Constitution and primarily deals with section 20 of SB 423, dealing with the advertising ban on marijuana. Count VI alleges a violation of the right of association and to petition government in violation of Article II, Sections 6 and 7, of the Montana Constitution and the First Amendment of the Constitution of the United States, and deals with the argument that §27-19-104, MCA, unconstitutionally infringes on the rights of MCIA members by requiring a list of members to be filed with the court when an association is a plaintiff in an action for injunctive relief and there is an allegation that there is an injury to the property or civil rights of the members.

### **Brief in Support of Motion for Preliminary Injunction**

On May 13, 2011, the MCIA also filed a brief in support of its motion for preliminary injunction. A preliminary injunction is an injunction preventing a party from taking a particular action. In this case, allowing SB 423 to take effect before the court has an opportunity to have a full trial on the merits. The MCIA's brief contains the MCIA's arguments in support of its request for injunctive relief. In order to prevail in its request for injunctive relief, the MCIA must first make a *prima facie* case on the merits. In general terms, this means that it must provide sufficient facts and corresponding legal arguments to show that it will most likely prevail at trial. In this situation, this means that the MCIA will need to make a firm case on its constitutional arguments.

The second prong of the test for the grant of a preliminary injunction requires the MCIA to show that it and its members will suffer irreparable harm before a trial on the merits can be held if the preliminary injunction is not granted. Finally, the MCIA will need to prevail on the balance of hardships should the injunction be granted.

### **State's Memorandum Opposing Plaintiffs' Motion for Preliminary Injunction**

On June 3, 2011, the State filed its brief in opposition to the request for preliminary injunction. The State's brief begins with the following quote from the 2004 Voter Information pamphlet regarding Initiative 148:

If passed by a majority of Montana voters, I-148 would protect [patients suffering from cancer, multiple sclerosis, AIDS, and other serious illnesses] from

arrest and prison if they have their physicians' approval to use marijuana for medical purposes. Perhaps most importantly, I-148 would allow patients to grow their own personal supply of marijuana so that they will no longer have to buy marijuana from the criminal market . . . Montana voters should pass I-148, so that Montana patients who need to use medical marijuana will no longer have to live in fear of being arrested and sent to prison.

The State's brief also points out that I -148 was a statutory initiative as opposed to a constitutional initiative. In other words, I-148 did not create a constitutional right to use medical marijuana, it simply created the original medical marijuana act which is no different in kind from any other statute passed by initiative or by the legislature.

### **Plaintiffs' Reply in Support of Motion for Preliminary Injunction**

On June 9, 2011, the Plaintiffs (MCIA and individual plaintiffs who are caregivers, patients, and doctor) filed their reply brief in support of their motion for a preliminary injunction. With respect to irreparable injury, Plaintiffs argued in general, that as of July 1, 2011, the current growers of medical marijuana (caregivers under the original law; providers under SB 423) will no longer be able to possess or cultivate marijuana, thus, drying up the supply for the current cardholders who are suffering from debilitating illnesses and who need medical marijuana on a regular basis. The Plaintiffs also focused on the ability of registered cardholders/patients to actually be able to grow their own marijuana and/or to locate a registered provider. The Plaintiffs also filed an affidavit of Lester Grinspoon, M.D., in support of their motion for preliminary injunction. Dr. Grinspoon is an Associate Professor of Psychology (emeritus) at the Harvard Medical School. His area of research is psychoactive drugs with a particular interest in the medical applications of marijuana.

### **Case Schedule**

The Court's schedule for the case includes a hearing on the preliminary injunction was on June 20 and 21, 2011. The Court also set a briefing schedule and set June 15, 2011, as the date to file and exchange witness exhibits, affidavits, and proposed findings of fact, and conclusions of law. The proposed findings and conclusions of law indicate how each party wants the Court to rule on specific issues in the case.

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