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1st Circ. Says Dormant Commerce Clause Applies To Med. Pot

By **Sam Reisman**

Law360 (August 17, 2022, 6:54 PM EDT) -- A split First Circuit panel affirmed Wednesday that the Constitution's dormant commerce clause applies to the federally illegal medical cannabis industry and that a Maine law mandating local ownership of cannabis businesses cannot stand.

In the 2-1 decision, the appellate panel upheld a Maine federal judge's August 2021 ruling striking down the state's residency requirement for cannabis business owners, saying it was a clear violation of the constitutional doctrine that limits states' power over interstate commerce.

U.S. District Judge Nancy Torresen **wrote at the time**, "Plaintiffs allege that the Dispensary Residency Requirement violates the dormant Commerce Clause because it explicitly discriminates against residents of other states and Maine cannot show a legitimate local purpose for the requirement."

In upholding the lower court's decision, the circuit panel majority repudiated arguments that marijuana's federal illegality meant that the dormant commerce clause could not override a policy that even Maine officials conceded favored in-state actors.

The appeal hinged on the constitutionality of a provision of Maine's medical marijuana law that required medical cannabis business owners to be state residents. The dispute was the first of its kind to reach the federal circuit courts and could have widespread ramifications for the U.S. marijuana sector, which has developed as siloed state markets under federal prohibition.

"The prohibition that Maine's Medical Marijuana Act seeks to impose on out-of-state actors entering that very market reflects the reality that the market continues to operate," Circuit Judge David J. Barron wrote for the court. "That prohibition even indicates that the market is so robust that, absent [Maine's] Medical Marijuana Act's residency requirement, it would be likely to attract entrants far and wide."

The majority found that Congress had changed its position on medical marijuana since the passage of the Controlled Substances Act even if it hadn't decriminalized cannabis.

The court pointed specifically to the enactment of the Rohrabacher-Farr Amendment in congressional spending bills. These riders, which have been approved annually each year since 2014, forbid the U.S. Department of Justice from using its resources to target entities that are compliant with state-regulated medical marijuana regimes.

"Congress, through the Rohrabacher-Farr Amendment, has acknowledged the existence of a market in medical marijuana," Judge Barron wrote. "It has also acknowledged, through that same measure, that this market may continue to exist in some circumstances free from federal criminal enforcement and thus subject only to state regulation."

The opinion marks a victory for cannabis giant Acreage Holdings Inc. and its subsidiaries, Wellness Connection of Maine and High Street Capital Partners LLC, which challenged Maine's law in court after High Street expressed interest in purchasing all the equity in Wellness Connection but couldn't because of Maine's residency requirement.

In a dissent, Circuit Judge Gustavo Antonio Gelpí Jr. wrote that the dormant commerce clause jurisprudence cited by the majority throughout its opinion should not apply to medical marijuana because the product remains federally illegal.

"I believe that illegal markets are constitutionally different in kind, and thus disagree that the Commerce Clause protects the free-flowing operation of national markets that Congress has already made illegal through its Commerce Clause power," Judge Gelpí wrote.

Counsel for Acreage and a spokesperson for the Maine Attorney General's Office declined to comment.

A separate challenge to a similar Maine law that applied to the state's recreational cannabis licenses **ended** in May 2020 when state officials said they would not enforce the residency rule. The state attorney general's office said at the time that the residency rule "is subject to significant constitutional challenges and is not likely to withstand such challenges," and so it would not try to defend the rule.

That prompted a group of locals to file **a new lawsuit** against the state in October 2020, saying Maine officials could not simply ignore a state law. That case **was dismissed** without prejudice in April 2021 without touching the thorny issue of the dormant commerce clause.

U.S. Circuit Judges David J. Barron, Sandra L. Lynch and Gustavo Antonio Gelpí Jr. sat on the panel for the First Circuit.

The Maine parties are represented by Christopher C. Taub of the Office of the Maine Attorney General.

Wellness Connection is represented by Matthew Warner of Preti Flaherty Beliveau & Pachios Chartered LLP.

United Cannabis Patients and Caregivers of Maine, an intervenor in the case, is represented by James G. Monteleone of Bernstein Shur Sawyer & Nelson PA.

The cases are Northeast Patients Group et al. v. United Cannabis Patients and Caregivers of Maine, and Northeast Patients Group dba Wellness Connection of Maine et al. v. Kirsten Figueroa et al., case numbers 21-1719 and 21-1759, in the U.S. Court of Appeals for the First Circuit.

--Editing by Jill Coffey.