

WE DON'T SERVE YOUR KIND HERE: FEDERAL COURTS AND BANKS DON'T DANCE WITH MARY JANE

BY CANDACE CARLYON, ESQ.

Even though Nevada is now one of the 29 states in which some form of marijuana sales are legal, marijuana is still a Schedule 1 narcotic, illegal under federal law. Unsurprisingly, federal courts generally close their doors to those in the marijuana industry, while Nevada banks “just say no” to accounts related to marijuana activities.

Bankruptcy cases generally deny relief to those in the marijuana business, regardless of marijuana’s legality pursuant to state law¹. There are many reasons to deny protection to such businesses. For example, bankruptcy courts are federal courts, which must respect and uphold federal law. Taking possession of assets in the course of bankruptcy proceedings would place the trustee in an untenable position, because “There is no way the Trustee could administer the plan without committing one or more federal crimes.”² A plan could not be confirmed, because it is a requirement that a plan not proposed by any means that are forbidden by law.³ Even bankruptcy cases filed by landlords, deriving income from a marijuana-industry tenant, are subject to dismissal.⁴

Bankruptcy courts recognize that it would be impossible to administer marijuana assets. “[N]either a Chapter 7 nor 13 trustee can administer the most valuable assets in this estate. Without those assets or the marijuana based income stream, the debtors cannot fund

a plan without breaking the law, and are therefore ineligible for relief...”⁵

Similarly, the banking industry is heavily regulated by federal law. While some efforts have been made to provide state-legal marijuana businesses with access to bank accounts, currently banks in Nevada will not do business with those in the marijuana industry; nor will they generally knowingly accept deposits that represent proceeds of such businesses.

There have been efforts at the federal level to provide for the possibility of banking marijuana proceeds. The October 2009 “Ogden Memo”⁶ recognized that “[i]t is likely not an efficient use of federal resources to focus enforcement efforts on individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law...” In August 2013, Deputy Attorney General James M. Cole issued a memorandum (the Cole Memo)⁷ that set forth several “enforcement priorities,” including distribution of marijuana to minors; benefiting criminal enterprises, gangs and cartels; preventing activities which front for other illegal drugs/activity; preventing violence and the use of firearms; and preventing drugged driving. Outside of stated priorities, the Cole Memo suggests that enforcement of marijuana laws will generally be left to the state and local police in states that have enacted a comprehensive and regulatory system. (Ed. note: See page 50 for recent news regarding the Cole Memo.)

In February 2014, the Financial Crimes Enforcement Network (FinCEN) issued a guidance⁸ purportedly clarifying how financial institutions can provide services to marijuana-related businesses.

FinCEN’s guidance suggested that financial institutions have the ability to make their own decisions as to whether to do business with state-licensed marijuana businesses. If a bank decides to accept such customers, a number of due diligence requirements were suggested. In addition, banks are required to file marijuana-specific suspicious activity reports (SAR’s) in three types of case:

1. A Marijuana Limited SAR, in cases when a customer’s marijuana-related business does not (based on the bank’s due diligence) implicate any of the Cole Memo enforcement priorities;
2. A Marijuana Priority SAR when a customer’s activity implicates any of the Cole Memo enforcement priorities; and
3. A Marijuana Termination SAR when a financial institution terminates a relationship with a marijuana-related business.

In response to the FinCEN guidance, Senators Chuck Grassley and Dianne Feinstein sent FinCen a letter,⁹ in which they complained that its guidance “is dangerously misleading. Indeed, following the guidance may expose financial institutions to civil or criminal liability. Congress and the President may reconsider marijuana’s legality, but until federal law is changed, selling marijuana, laundering marijuana proceeds, and aiding and abetting those activities all remain illegal.” The senators posed several questions relative to FinCEN’s guidance, and the response¹⁰ clarified that:

- FinCEN has no authority to purport to “enhance the availability of financial services” for what are, under federal law, illegal drug traffickers;



- The FinCEN guidance does not alter criminal laws prohibiting the distribution and sale of marijuana, the laundering of marijuana proceeds and any services that aid and abet these activities;
- The FinCEN guidance does not alter the federal criminal laws that subject any proceeds obtained, directly or indirectly, from illegal activity, including the distribution of marijuana, to forfeiture;
- The FinCEN guidance does not alter the Bank Secrecy Act's criminal penalties for failing to establish an anti-money laundering program, designed to guard against money laundering through financial institutions;
- FinCEN has no authority to exercise enforcement discretion relating to the federal criminal laws regarding marijuana, or to decline to enforce those laws; and
- FinCEN does not anticipate taking any steps to protect financial institutions from criminal prosecution by the DOJ where the institution follows the FinCEN guidance.

In response, Grassly issued the following statement:¹¹

Unless federal law is changed, selling marijuana, laundering marijuana proceeds, and aiding and abetting those activities all remain illegal. FinCEN's guidance to financial institutions is absolutely contrary to the mission of the agency – it purports to 'enhance the availability of financial services for ... marijuana-related businesses' – so it's only logical that FinCEN would now deny the stated purpose of that guidance. The agency also concedes the obvious – that its guidance does not change federal criminal law, affect its enforcement in any way, and that there are risks in doing business with the marijuana industry which should give the financial services industry little confidence that it will be protected should an institution be federally prosecuted for getting involved in illegal activities.

It is not surprising that, against this backdrop, Nevada banks have uniformly declined to enter into relationships with marijuana businesses, and will generally close accounts if they discover that such accounts are receiving the deposit of proceeds from such businesses. When one Colorado credit union announced it would handle such accounts, the Federal Reserve refused to issue it a routing number. A suit challenging the denial met with short shrift from the federal court. Judge Richard Brooke Jackson examined the contents of the Cole Memo and the FinCEN guidance, but concluded: "In short, these guidance documents simply suggest that prosecutors and bank regulators might "look the other way" if financial institutions don't mind violating the law. A federal court cannot look the other way."¹²

The result of the conflict between state and federal law creates a dangerous situation in which businesses are booming but unable to deposit receipts without disguising the source of their funds. The cash nature of the business, without any ability to deposit receipts, places the businesses, their employees and their customers in a dangerous situation. The ripple effect created by these successful businesses is huge. The receipts from marijuana-related businesses are paid over to vendors, landlords, employees and governmental agencies; all of these need to deposit those payments. Thus, the author must concur with Jackson's opinion when he wrote: "I regard the situation as untenable and hope that it will soon be addressed and resolved by Congress." **NL**

1. See, e.g., *In re Arenas*, 535 B.R. 845 (10th Cir. BAP 2015); *In re Rent-Rite Super Kegs West Ltd.* 484 B.R. 799 (Bkrcty. D. Colo. 2012); *In re Medpoint Mgmt., LLC*, 528 B.R. 178, 188 (Bankr. D. Ariz. 2015), vacated in part, No. BAPAZ151130KUJAJU, 2016 WL 3251581 (9th Cir. BAP 2016); *In re McGinnis*, 453 B.R. 770, 772 (Bankr. D. Or. 2011)(denying confirmation). In *In re Johnson*, 532 B.R. 53, 59 (Bankr. W.D. Mich. 2015), the court enjoined the debtor from engaging in the medical

marijuana business during the pendency of the bankruptcy. n *Northbay Wellness Group, Inc. v. Beyries (In re Beyries)*, 2015 WL 3529634 (9th Cir. 2015), the Ninth Circuit reversed the dismissal of a complaint against an attorney seeking to deny him a discharge for his embezzlement of client trust funds, where the client was in the marijuana business. The court found that the public interest in upholding the lawyer's obligations to his client outweighed the equitable defense of unclean hands.

2. *Id.*
3. See *Rent-Rite*. 484 B.R. 799.
4. In *Rent-Rite*, approximately 25 percent of the rental income was derived from a tenant in the marijuana business. In a Las Vegas case, *Red Rock Enterprises, LLC*, BK-S-15-13493-abl, Judge August B. Landis dismissed the case where the debtor leased the entire real property to a tenant who was building a licensed medical marijuana grow facility.
5. *Arenas*, 535 B.R. at 852.
6. Available at <https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>.
7. Available at <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.
8. Available at <https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses>.
9. Available at <https://www.grassley.senate.gov/news/news-releases/grassley-feinstein-press-administration-answers-guidance-provided-banks-illegal>.
10. Available at <https://www.aba.com/Advocacy/Grassroots/WINNDocs/FinCENResponseToSenGrassleyBanks-MarijuanaLegalization050814.pdf>.
11. Available at <https://www.grassley.senate.gov/news/news-releases/fincen-responds-grassleyfeinstein-guidance-financial-institutions-marijuana>.
12. *Fourth Corner Credit Union v. Fed. Reserve Bank of Kansas City*, 154 F. Supp. 3d 1185, 1189 (D. Colo. 2016), vacated, 861 F.3d 1052 (10th Cir. 2017). On appeal, the Tenth Circuit, in a 2-1 decision, held that the dismissal of the complaint should have been without prejudice.



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