

# Up in Smoke

NO, THERE ARE NOT  
FREE SAMPLES.

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## A little history

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**In Colonial United States hemp was a crop mandated by the Crown. Cannabis was widely used for medicinal purposes.**

**John Adams (yes, that John Adams) grew hemp and wrote of “hemp’s mind altering capabilities”**

**In 1910, following a revolution in Mexico, immigrants introduced the recreational use of cannabis.**

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## A little history

**'20s Louis Armstrong played "Muggles"**

**'30s Harry Anslinger named Commissioner of the Bureau of Narcotics: "No one knows, when he places a marijuana cigarette to his lips, whether he will become a philosopher, a joyous reveler in a musical heaven, a mad insensate, a calm philosopher, or a murderer."**

**'38 marihuana is named as 'dangerous' by the Federal Pure Food, Drug & Cosmetics Act.**

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1970 the Controlled Substances Act made marihuana a Schedule 1 Controlled Substance. Production, Possession, Distribution and Use is Illegal.



A)...has a high potential for abuse



B)...has no currently accepted medical use in treatment in the United States.



C)...there is a lack of accepted safety for use of the drug or other substance under medical supervision.

## Schedule 1 of the CSA

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## A little history

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**'71 Computer science students from MIT and Stanford use ARPANET to broker a deal for the sale of cannabis- making pot the first item to be sold on-line.**

**'70s & '80s Nixon, Ford, Carter & Reagan**

**'70s some states begin decriminalization process: OR, AK, ME, CO, CA, OH, MN, MS, NY, NC, NE (not all remain)**

**'90s Medicinal Use/Decriminalization/"legalization"**

**'00s Largest opponents to cannabis regulation are "exiting the electorate"**

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## A little history

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**First Obama term: Raids conducted on over 270 state authorized medical dispensaries. \$300m spent (\$100 million more GW Bush)**

**'13 the Obama administration issues the Cole Memorandum.**

**'14 Rohrabacher-Farr Amendment**

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## A little history

**'15: 1% of all electricity in the United States was consumed in the production of cannabis. (3% of all power in California)**

**'15: Los Angeles reaches saturation point: there were more square feet of rental/lease space dedicated to dispensaries than Starbucks.**

**'17 Study by Seedo found that more cannabis was consumed in NYC than any other city on the planet (more than twice as much as L.A.) 77.44 metric tons consumed yearly (same weight as the Endeavor space shuttle)**

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## Let's Define Stuff!: Botany for beginners

For something called 'weed' cannabis is deceptively complex and hard to grow.

*Cannabis* has 3 principal species

- *Sativa*
- *Indica*
- *Ruderalis*

Tetrahydrocannabinol (THC): Main psychoactive chemical

Cannabinoids: Can be psychoactive or nonpsychoactive

- Tetrahydrocannabinol (THC) Main psychoactive chemical
- Cannabidiol (CBD) non-psychoactive

Hemp: Dense fibers used for everything from clothing to biofuel

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What's the deal  
with CBD?  
Yes, more  
botany!

CBD Full Spectrum (whole plant) is Cannabidiol CBD that contains all other cannabinoids found in the cannabis plant including Cannabinol (CBN) Cannabigerol (CBG), and Tetrahydrocannabivarin (THCV) and trace amounts of THC.

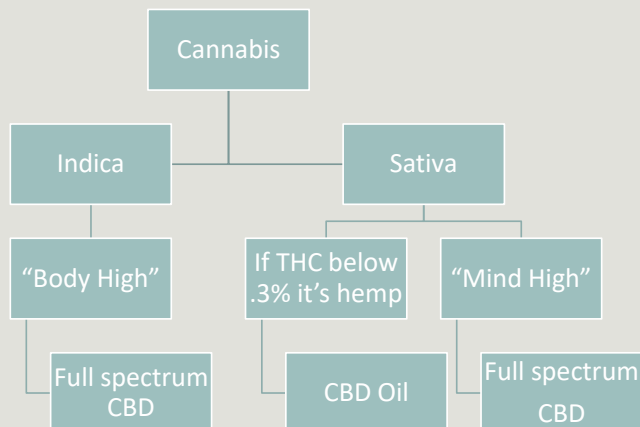
CBD Isolate is purified CBD that is isolated from the other cannabinoids.

Marijuana can contain up to 30% THC, Hemp has less than .3% THC. CBD can be derived from either.

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## botany

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## DEA Ruling on Epidiolex

In September of 2018 the DEA rescheduled a CBD drug that

1. Had been approved by the FDA, and
2. That contain no more than .1% THC.

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**2018 Farm Bill removes industrial hemp from Schedule 1 of the CSA.**



**10/31/19 USDA publishes Interim Final Rule**



**11/1/19-1/29/20 Public Comment period for IFR from USDA**

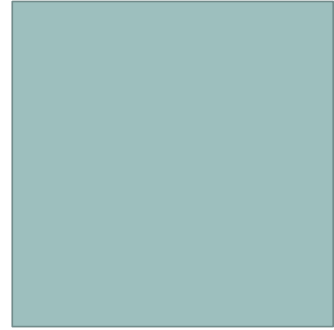
hemp

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# Los Angeles Times



## 10 million pot plants worth \$1 billion destroyed in Kern County



LATEST CALIFORNIA >

CALIFORNIA

California may pause student physical fitness tests due to bullying concerns

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## New York prosecutor to drop marijuana charges in Vermont hemp seizure

Published November 20, 2019



Prosecutors are planning to drop all charges against the man arrested on marijuana possession charges in connection with a case in which 106 pounds of hemp plants shipped from Vermont were mistaken as MJ and seized by the New York Police Department.

The Brooklyn district attorney's office said that Ronen Levy's felony marijuana possession charge will likely be dismissed Dec. 2.

Further, the police claimed that a field test came back positive for marijuana, but those tests often can't distinguish legal hemp from pot.

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BUSINESS NEWS NOVEMBER 3, 2019 / 12:24 PM / 3 MONTHS AGO

## For many U.S. farmers who planted hemp, CBD boom leaves bitter taste

Isabella Jibilian

5 MIN READ



(Reuters) - Dan Maclure planted eight acres of hemp on his Vermont farm for the first time this year, aiming to cash in on the exploding demand for CBD, a derivative of the plant reputed to ease anxiety and other ills without the high of its close cousin, marijuana.

About 65% of U.S. hemp farmers lack a buyer for their crop this season, leaving them few alternatives, according to a July survey by Whitney Economics. Hemp has less infrastructure than other crops, so farmers cannot rely on selling their crop to a local grain elevator.

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## Controlled Substances Act

***“It shall be unlawful for any person knowingly or intentionally...to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance.”***

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**“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”**

## Supremacy Clause

Article 6 of the United States Constitution

17

But Trista, if it's illegal,  
why is it okay in 38ish  
States?

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OR...HOW WE GOT HERE

18

## Cole Memorandum “The Dirty 8”

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- 1. Prevent distribution to minors.**
- 2. Prevent revenues from supporting criminal enterprises.**
- 3. Prevent diversion to state without decriminalization.**
- 4. Prevent cannabis activity from being used as a cover for trafficking or other illegal drugs or illegal activity.**

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## Cole Memorandum

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- 5. Prevent violence and the use of firearms in the production and distribution.**
- 6. Prevent drugged driving.**
- 7. Prevent growth of cannabis on public land.**
- 8. Prevent cannabis use/growth on federal property.**

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## Sessions Memorandum 1/4/18

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Directs that “[i]n deciding which marijuana activities to prosecute under these laws with the Department’s finite resources, prosecutors should follow well-established principles that govern all federal prosecutions.”

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## Rohrabacher-Farr Amendment

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Prohibits DOJ from using funds “to prevent states from implementing their own state laws that authorize the use, distribution, possession or cultivation of medical marijuana.”

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## US v. Macintosh (2016)

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**Interprets the Rohrabacher-Blumenauer Amendment to prevent DOJ from prosecuting “individuals who engaged in conduct permitted by the state medical marijuana laws and who fully complied with such laws”**

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## CSA Cases of interest

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### GONZALES V. RAICH

No affirmative defense under the CSA for complying with the marijuana laws of a particular state.

### U.S. V. ROSENTHAL

Jury prevented from hearing that the alleged criminal activity was decriminalized under state law.

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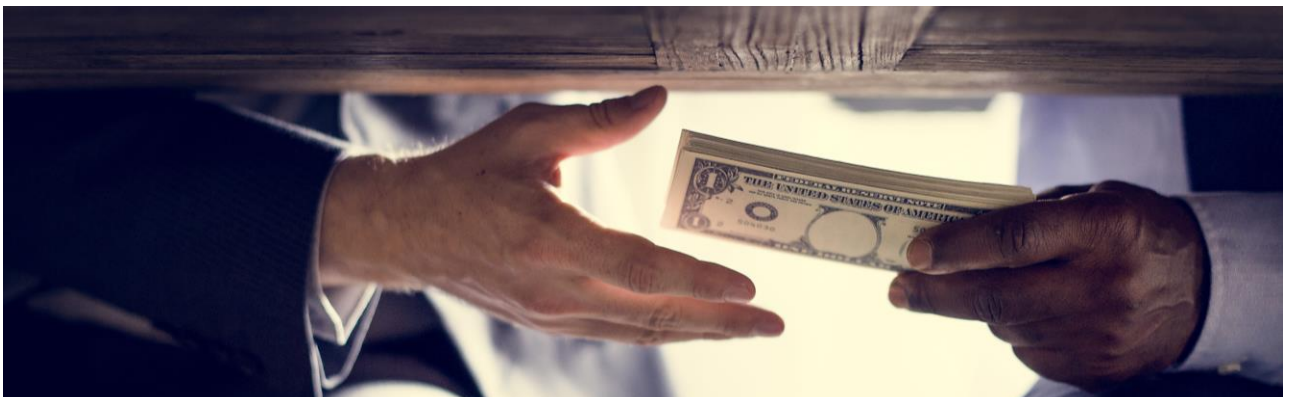
Touching the plant  
Not Touching the plant

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**Criminal conspiracy laws  
don't make a legal  
distinction- there is no  
requirement that you  
"touch the plant"**



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**IF IT'S ILLEGAL, THAN WHY  
BOTHER WITH IT?**

**Or, what's the economic impact?**

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## NAR Survey

**Impact on residential property value near dispensaries**

**More than 75% saw no change**

**10% have seen an increase**

**12%-14% have seen a decrease.**

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## University of Mississippi



Economists Cheng Cheng and Walter J. Mayer compared the increases in home prices in Colorado municipalities that regulated retail cannabis sales to home prices in municipalities that prohibited retail sales. They found a larger increase in municipalities with cannabis.



Economic Inquiry reports an increase in housing values of 6% that they credit to regulation of cannabis retail sale.

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## NAR Survey



Commercial property value near dispensaries



71% saw no change



19% saw an increase



10% saw a decrease

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## New York Times

Commercial Real Estate developers report a 50% increase in prices for warehouse properties in Denver.

California Real Estate developers have seen 100% increases in prices for greenhouse space.

No interstate distribution means local commercial/industrial boom.

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## NAR Survey

Do tenants want to locate near a dispensary?

42% say don't know

20% some tenants opposed

19% No change

2% Demand to be near a dispensary

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## NAR Survey



43% in medicinal states and 36% in recreational states had no issues leasing a property where cannabis had been grown or consumed.



Smell and moisture were the most common issue.

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# Cannabis real estate concerns

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**INSURANCE**



**CONTRACT  
ENFORCEABILITY**



**BANKING**

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## Insurance

## Residential Case Study

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# Cause of loss

Cannabis ember?



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Fire



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# commercial

## MOLD?



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## CANNABIS CULTIVATION?



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## Clarifying law around insurance of marijuana act (CLAIM Act)



Prohibit federal agencies from penalizing or discouraging insurers from underwriting or handling claims for a cannabis-related business.



Forbid terminating or canceling the licenses of an insurer solely because the insurer engaged in the business of insurance in connection with a cannabis-related business.



Officers, directors, and employees of an insurer may not be held liable pursuant to any federal law solely for engaging in the business of insurance for working with a cannabis client.

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## Cash is king

It's a green industry...

38

## Pre-Lease Considerations

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Is there an underlying mortgage?

- If yes, does the underlying mortgage forbid illegal activity or illegal use?
- What are the consequences?
  - Lease acceleration is the most common consequence for this particular breach of mortgage agreement.

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## When cash is king... Cannabis-izing a lease

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**When leasing to a cannabis business, must have a system in place to process cash payments.**

**Lease must address any particular requirements of cash process that are different from traditional lease.**

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## When cash is king...

A little insight into the federal government view on medicinal use..

Question 11e on Form 4473 – which asks if the buyer is “an unlawful user of, or addicted to, marijuana ... or any other controlled substance?” – now has a warning printed below it in bold type that states: “The use or possession of marijuana remains unlawful under Federal law regardless of whether it has been legalized or decriminalized for medicinal or recreational purposes in the state where you reside.”

Is there a requirement that you are a “registered patient” or employee to enter the dispensary?

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## US Treasury Financial Crimes Enforcement Network (FinCEN)

Goal was to “enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses”

- The **Marijuana Limited filing** means the financial institution’s due diligence indicates that the MRB does not raise any of the red flags as defined in the Cole Memorandum and is compliant with the appropriate state’s regulations regarding marijuana businesses. The financial institution is providing banking services to the MRB.
- The **Marijuana Priority** filing means the financial institution’s due diligence indicates that the MRB may raise one or more of the red flags as defined in Cole or may not be fully compliant with the appropriate state’s regulations regarding MRBs. The financial institution is providing banking services to the MRB while further investigation is being conducted.
- The **Marijuana Termination** filing means the financial institution decided to terminate its relationship with the MRB for one or more of the following reasons:
  - The financial institution’s due diligence indicates that the MRB raises one or more of the Cole red flags.
  - The MRB is not fully compliant with the appropriate state’s regulations.
  - The financial institution has decided not to have marijuana related customers for businesses reasons.

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## When cash is king...

**Prior to leasing, landlord bank should be consulted. Depending on structure, they may have to comply with the requirements of FinCEN memorandum.**

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### THE SECURE AND FAIR ENFORCEMENT BANKING ACT (SAFE)



**Protect financial institutions and insurance companies from federal prosecution if they provide services to cannabis clients.**



**If those cannabis clients are following state or tribal law.**



**Passed US House with significant bipartisan support.**



**Stalled in the US Senate.**

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## Pre-leasing & Trigger Clause: Zoning

How does this city/town/village/hamlet use zoning to impact location of cannabis related businesses?

- If zoning changes, *City of Riverside v. Inland Empire Patients* makes it clear the cannabis business will have to go. Make it a trigger clause.

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## Planned Unit Developments

- Do the PUD rules conflict with the state or local law?
- Trigger clause



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## Homeowners Associations

**2/3 of respondents to NAR Marijuana Survey reported HOAs often have rules and restrictions on smoking & growing in home or common areas.**

**6% report that HOAs allow growing or smoking in common/home areas.**

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### Acknowledgment



**Required by state law in most authorized states.**



**No “innocent owner defense” available in civil forfeiture statutes.**

Lease  
Considerations

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## Lease Considerations

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### Permitted Use

**Avoid “lawful cannabis business/use”**

**Be Specific!**

**Product form.**

**Cultivation? How many plants?**

**Medicinal or recreational sale.**

**Processing? How and into what form?**

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## Lease Considerations

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**Early termination rights: “trigger” events**

**Federal criminal prosecution for conspiracy to sell or produce a controlled substance.**

**Seizure of your property under federal asset forfeiture laws.**

**Potential nuisance claims at the local level.**

**Failure to receive state licensure.**

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## Lease Considerations

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**Smoking prohibitions, vaping prohibitions, dabbing prohibitions**

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## Lease Considerations

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### **Illegal Use Prohibitions**

**Compliance with all laws is impossible.**

***“tenant will comply with all applicable state and local laws, including but not limited to the state marijuana licensing and program rules”***

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## Lease Considerations

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### Tenant improvements:

Tenant bears all expenses for improvements or alterations.  
(Landlord/owner sets parameters)

Tenant is responsible and bears all expenses for removing improvements at the termination of the lease.

*“The Lease shall be contingent upon Lessee obtaining all permits, variances and governmental approvals needed for the lawful construction and operation of Lessee’s business. Lessee shall apply for each permit at its sole cost and expense and Lessee shall not commence construction until all permits and approvals are obtained”*

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## Lease Considerations

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### Indoor Cultivation

Water

Heat

Humidity

Energy consumption

Hydroponic water waste

Pesticide

Fertilizer



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## Lease Considerations

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**If owner of property wishes to base rent on % of income- this may make the property owner a partner in the cannabis business and then the state authorization/regulation law requirements come into play.**

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Owner's Right  
to Inspect

**Trade secrets associated with the cultivation and processing of marijuana related products.**

**Strains can't be patented b/c of the illegality at the federal level.**

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## What Can Go Wrong?

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**The Federal Government can and does seize property used for cultivating, manufacturing, or selling marijuana.**

**In the last several years, the Federal Government has netted at least one billion dollars from seizing personal and real property used to manufacture or distribute drugs illegal under federal laws.**

**The Federal Government has seized property associated with the production of marijuana products in states with decriminalization.**

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## Asset Forfeiture

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### CRIMINAL

Against a person *after* a conviction for an underlying criminal offense.

### CIVIL

The government sues the property itself and the property owner is treated as a third party claimant.

Does not require that the government prove the landowner is guilty of a crime.

Substantial connection between the property and the alleged crime.

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## What can go wrong?

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**Bankruptcy court is not available for a cannabis based business.**



**You can't have a security interest in cannabis.**

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## Contract Enforceability

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MANN V.  
GULLICKSON,  
2016 WL 6473215  
(N.D. CAL.  
NOVEMBER 2,  
2016)

- Plaintiff Mann sold marijuana business to Gullickson. Gullickson agreed to pay \$400,000 in three installments.
- Gullickson failed to make payment and Mann sued alleging breach of contract.
- Gullickson moved for summary judgment arguing that the contract was void “because it relates to medical marijuana, which is still a prohibited substance” under the Controlled Substance Act.
- The court concluded that “even where contracts concern illegal objects, where it is possible for a court to enforce a contract in a way that does not require illegal conduct, the court is not barred from according such relief.”
- Court looks at this and says touching the plant is illegal - possession, cultivation, distribution are in violation of the CSA. Paying what you owe doesn’t require touching the plant.
- In the opinion of the court however it cites “the federal government’s waivering policy on medical marijuana” in determining that its ruling doesn’t “condone or encourage” illegal conduct.

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HAMMER V.  
TODAY’S  
HEALTH CARE II,  
CV 2011-051310  
(ARIZ. SUPERIOR  
CT. APR. 17,  
2012)

Took the opposite approach of Mann v. Gullickson and refused to enforce a contract where funds were loaned to a marijuana business.

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Hammer is pre-Cole, Mann is post-Cole: in a post-Sessions memo analysis- the court may find that there is no distinction in “touching the plant” and find the contract void.

Parties to a contract may waive defenses to enforcement- agreements with cannabis industry clients should include this waiver.

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## Kanovsky Memorandum

**What to do when patients using medical marijuana live in federally subsidized housing.**

**On January 20, 2011 HUD issued the Kanovsky Memorandum, addressing the question of whether PHAs and owners of federally assisted housing could grant residents reasonable accommodation for the use of medical marijuana.**

**HUD emphasized the Quality Housing and Work and Responsibility Act of 1998 which “requires PHAs and owners to deny admission to those households with a member who the PHA or owner determines is, at the time of consideration for admission, illegally using a ‘controlled substance’ as the term is defined by the CSA.**

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## Kanovsky Memorandum

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**Makes it clear that HUD interprets federal nondiscrimination laws to not require PHAs or owners to make reasonable accommodations for medical marijuana use.**

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What am I seeing?

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***It's not easy being green...***

66

**Sally Seller contacts Rosie REALTOR® to list her 3,000 square foot home in Kalispell. The exterior of the home is in immaculate condition and Rosie knows the property will not be on the market long. Rosie has looked at comparable properties in the area and is prepared to deliver an amazing listing presentation. Sally gives Rosie a tour of the property and Rosie is somewhat surprised to discover that in the basement one room has two state-of-the-art hydroponic grow stations for cannabis, a sink and disposal system has also been installed for the hydroponic water waste. Sally explains to Rosie that she has a medical marijuana card and at any time has 4 mature plants and 4 seedlings pursuant to state law.**

**Rosie delivers her listing presentation and Sally signs a listing agreement that day. Rosie makes some recommendations for staging the property for showing including that the cannabis should be removed from the property during showings if possible and the room be aired out in advance. Sally expresses some concern due to the size of the grow stations and Rosie volunteers to loan Sally the moving van that her company owns and loans to clients when it's needed.**

67

**Rick REALTOR® has an active real estate practice that involves managing residential properties for several property owners. One of the properties, a single family home, has been rented for several years by Mary. Mary has never been late with her rent and on the occasions when Rick has been inside the property, he has noted that Mary takes excellent care of the property.**

**Rick is surprised when Mary drops by his office to let him know that she has changed jobs and is now employed by ABC Cannabis Dispensary. Mary explains to Rick that ABC pays its employees in cash and Mary would like to pay her rent in cash as well.**

**The lease is silent as to the form of payment and Rick has accepted cash payments from other tenants in the past, so he updates his file to reflect the new employer for Mary and tells her the cash payments will not cause a problem.**

**Class question: What should Rick have done in preparation of accepting cannabis cash?**

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Several months later, Mary stops by the office to discuss the following situation with Rick: Her mother has been diagnosed with cancer and Mary would like her mother to move in with her while she receives treatment. Mary asks Rick if he would be willing to ask the property owner to amend the lease to remove the no smoking clause so her mother can use medical marijuana while she is staying with her. Rick contacts the property owner who asks Rick if he knows of any reason why he shouldn't amend the lease and Rick says he doesn't know of any. The property owner agrees to the change.

**Class Question:** What should Rick have checked before making this change?

69

Ronald REALTOR has been working with MJ Budd for over a year trying to find the perfect location for his cannabis dispensary. Budd has outgrown his current space and while ideally he would like to purchase his new location, he is open to leasing. Ronald finds what he feels is an ideal location and Budd agrees that it is a workable location. When Ollie, the owner of the property becomes aware that it is Budd wishing to purchase the building he refuses to sell and instead proposes a lease where Budd would pay a low flat monthly rate and a percentage of the dispensary profits.

**Class Question:** Is there a downside to this type of agreement?

Budd refuses the proposed lease arrangement and eventually Ollie agrees to sell the property. Upon closing Ronald expects to receive the commission rate outlined in his agency agreement. Ollie was not represented by an agent. Budd responds to Ronald's request for payment by claiming the agreement was for an illegal purpose and is therefore unenforceable. The agreement clearly stated Roland was to find a location suitable for a cannabis dispensary, a use which is illegal under federal law.

**Class Question:** Will Ronald get paid?

70