Palliative Care versus Harmful Exposure

Secondhand Medical Marijuana Smoke in Multi-Unit Housing

April 2, 2013
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Presenters

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Prohibiting the Use of Medical Marijuana in Multi-Unit Residential Settings

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Topics

- The rights of multi-unit housing owners to restrict the use of medical marijuana on their properties
- How restrictions are being implemented
- Selected court decisions in medical marijuana cases
- Some practical considerations
Multi-Unit Housing Categories

- Market rate (non-federally-subsidized) multi-unit housing
- “Affordable” (federally-subsidized) multi-unit housing
The Problem

- Secondhand smoke spreads throughout multi-unit dwellings
  - Equally true for tobacco and marijuana smoke
- Comprehensive smoke-free policies eliminate this problem
- Making an exception for medical marijuana brings the problem back
- Significant issue: 18 states + DC permit medical marijuana (+ 2 states have legalized and 14 states have decriminalized marijuana)
Public Health Concern

- Combustion produces carcinogens and toxins, whether from tobacco or marijuana.
- Research finds marijuana smoke contains higher levels of several toxic compounds than tobacco smoke – including ammonia, hydrogen cyanide, nitric oxide and certain aromatic amines – and causes respiratory symptoms such as cough, phlegm and wheeze.
- California EPA, Office of Environmental Health Hazard Assessment, in June 2009 added marijuana smoke to “Prop 65” list as a proven carcinogen, containing 33 of the same harmful chemicals found in tobacco smoke.
The Law: Market-Rate Housing

- Smoke-free policies may include a prohibition on smoking of medical marijuana
- Marijuana is a prohibited controlled substance under federal law
- When in conflict, federal law preempts (supersedes) state law
Federal Controlled Substances Act (21 U.S.C. §801 et seq.)

- Classifies marijuana as a “Schedule 1” drug: very high potential for abuse and no accepted medical use under federal law
- Prohibits the manufacture, distribution, dispensation and possession of marijuana

U.S. Constitution: Supremacy Clause (Article VI, Paragraph 2)
- Federal law trumps state law where there is a direct conflict of laws
U.S. Supreme Court upheld Congress’s authority, under Commerce Clause, to enact Controlled Substances Act and prohibit intrastate use of marijuana, even when a state’s medical marijuana law permits its use – i.e., federal law preempts state law (Gonzales v. Raich, 545 U.S. 1, 50 (2005)).

Washington State appellate court upheld housing authority eviction of tenant who used marijuana for medicinal purposes – court determined that requiring housing authority to violate federal law was unreasonable (Assenberg v. Anacortes Housing Authority, Washington State Court of Appeals, 1st Div., 2007).
Michigan Attorney General

“Neither the [Michigan Marihuana Act] nor any other law precludes the owner of a hotel, motel, apartment building, or any other similar facility from prohibiting the smoking of marihuana or the growing of marihuana plants anywhere on the premises.”

The Law: “Affordable” Housing

- Public and other subsidized housing owners have the same rights as market-rate owners to adopt smoke-free policies.
- In addition, U.S. Department of Housing & Urban Development (HUD) policy (Memorandum, Feb. 10, 2011) explicitly prohibits new tenants in Public Housing and Housing Choice Voucher programs ("Section 8" housing) from using medical marijuana.
- Notes that Quality Housing & Work Responsibility Act (Public Housing Reform Act) of 1998, 42 U.S.C. §13661, prohibits admission into PH and HCV programs based on use of controlled substances and preempts conflicting state law.
The Law: “Affordable” Housing

- HUD memo continued:
  - For existing residents, Public Housing Reform Act allows, but does not compel, public housing authorities to terminate assistance for use of controlled substance.
  - PHAs have discretion to determine continued policy deemed most appropriate for their local communities.
    - Discretion extends to denying assistance or terminating individual medical marijuana users, rather than entire households, for both applicant and existing residents.
The Law: “Affordable” Housing

- HUD memo continued:
  - Food and Drug Administration-approved drugs
    - Notes that FDA has approved drugs for medicinal uses which are comprised of marijuana synthetics (e.g., Marinol and Cesamet)
    - These are not medical marijuana and are legal under federal laws, and therefore allowed in public housing and voucher programs
Actions Taken to Date

- A number of market-rate housing owners have amended their leases, or indicated that they plan to do so, to explicitly prohibit the smoking of marijuana in their buildings, including by individuals certified by the state to use marijuana for medicinal purposes.
- A number of tenants have been evicted from affordable housing for using medical marijuana.
The Question of “Reasonable Accommodation”

- Whether the owner of multi-unit residential housing must accommodate the user of medical marijuana under federal or state non-discrimination laws
  - HUD has addressed this, as well (Memorandum, Jan. 20, 2011)

>> Cheryl Sbarra <<
Other Practical Options?

- Alternative forms of administration that might provide required therapeutic benefit, where marijuana use is permitted (possibly through accommodation) but smoking is not
  - Capsules
  - Vaporization ("vaping")
  - Eating (brownies, flour, "cannabutter," etc.)
  - Drinking (tea, etc.)
  - Suppositories
Resources from SFELP

- MISmokeFreeApartment website:
  - www.mismokefreeapartment.org

- Smoke-Free Environments Law Project website:
  - www.tcsg.org/sfelp/home.htm

- SFELP apartments website:
  - www.tcsg.org/sfelp/apartment.htm

- Medical marijuana-specific information & analysis:
  - www.mismokefreeapartment.org/l3rights.html
Medical Marijuana Use in Multi-Unit Housing – Is Reasonable Accommodation Required?

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Acknowledgements

• Restricting the Use of Medical Marijuana in Multi-Unit Residential Setting: Legal and Practical Considerations, Clifford E. Douglas, J.D., June 1, 2010;


• Medical Marijuana Use In Public Housing and Housing Choice Voucher Programs, HUD, February 10, 2011.

• Research conducted by Chris Banthin, J.D., Public Health Advocacy Institute, Northeastern University School of Law.
Main Focus is Public Housing

• Federal public housing (HUD).
• Other federally assisted housing (Section 8).
  o Housing Choice Voucher Programs

• Discussion of market-rate properties addressed previously.
  o Probably similar results relative to reasonable accommodation.
  o Different statutory references.
Question Presented

• Whether Public Housing Agencies (PHAs) and owners of other federally assisted housing may grant current residents, or applicants for residency, a reasonable accommodation under federal or state nondiscrimination laws for the use of medical marijuana?
• **No** – **But** . . . .
Reasonable Accommodation Argument for Use of Medical Marijuana

• Must make reasonable accommodations in rules, policies, and practices when accommodation is needed to provide a disabled person with the opportunity to enjoy his/her dwelling.

• 3 applicable laws:
  o Fair Housing Act
  o Section 504 of the Rehabilitation Act (Section 504)
  o Title II of the American with Disabilities Act (ADA)
• Federal Drug Laws – Marijuana is a Schedule I substance under the Controlled Substances Act.
  o The manufacture, distribution or possession of which is a federal criminal offense.
  o May not be prescribed by a physician.
  o 21 U.S.C. § 801 et seq. and §§ 841(a)(1); 844(a); 812(b)(1)(A)- (C ).
State Medical Marijuana Laws

• Contain common characteristics:
  o Permit physicians to discuss benefits and risks of marijuana use;
  o Permit physicians to recommend or certify that patient qualifies for marijuana use;
  o Exemption from arrest and prosecution for:
    • Patients who grow, possess, and use marijuana;
    • Caregivers for growing, procuring and administering medical marijuana to patient;
Common Characteristics (cont.)

• Physicians who certify patient’s need for marijuana.
  o Documentation requirements;
  o Limits on amounts that can be possessed, cultivated and used.
Federal Housing Admission and Termination Standards

• Quality Housing and Work Responsibility Act of 1998 (QHWRA)
  o U.S. Housing Act

• Admissions standards:
  o Admission is prohibited for any household with a member
    • Who the PHA or owner determines is illegally using a controlled substance (federal law) or
    • The Provider has reasonable cause to believe that the illegal use may interfere with the health, safety or right to peaceful enjoyment of the premises by other residents.
Admission and Termination Standards (cont.)

• How to determine illegal drug use:
  - Use must be recent enough to reasonably conclude that use is ongoing.
  - Case by case basis examining “all relevant circumstances.”

• Termination Standards:
  - Very different.
  - Discretionary.
Termination Standards (cont.)

• PHA and owner have discretion to evict a CURRENT tenant who is illegally using a controlled substance.
  o May elect to terminate occupancy, but not required to terminate occupancy.
  o But required to deny admission.

• May not establish lease conditions that affirmatively permit occupancy by medical marijuana users.
Providers May NOT Permit Use of MM as a Reasonable Accommodation

• 3 previously mentioned laws prohibit discrimination against persons with disabilities in public housing/federally assisted housing.
  - Refusal to make reasonable accommodations in rules, policies and practices when such are necessary to provide disabled persons with opportunity to enjoy dwelling.
To Establish Discrimination Based on Failure to Accommodate:

• Person meets definition of “disabled” or “handicapped.”
• Accommodation is necessary to use and enjoy dwelling; or
• Is necessary to avoid discrimination.
• Person requests accommodation.
• Accommodation is reasonable.
• Defendant refuses to make the required accommodation.
MM user not “disabled.”

• ADA and Section 504 exempt current illegal drug users from their definition of “disabled” person.
  o When the provider acts (denies admission or evicts) on the basis of the illegal drug use.
  o Illegality of drug based solely by federal Controlled Substance Act (CSA).
    • Prohibits all forms of marijuana use.
  o Acting “on the basis of illegal drug use”:
    • Illegal drug use v. failure to install grab bars.
Relevant Cases

• **Barber v. Gonzales:**
  - “a federal claim under the ADA does not exist because the term ‘individual with a disability’ does not include an individual who is currently engaging in the illegal use of drugs when the covered entity acted on the basis of such use.”

• **Assenberg v. Anacortes Hous. Auth.**
  - Although tenant had a debilitating back injury, “because [he] was an illegal drug user, [the PHA] has no duty to accommodate him.”
  - 26 Fed.Appx. 643, 644 (9th Cir. 2008).
Fair Housing Act

• Different than 2 previous laws.
  o Handicap means:
    • A physical or mental impairment which substantially limits one or more of such person’s major life activities
    • Such term does not include current, illegal use of or addiction to a controlled substance.
  o Does not categorically exclude MM users.
    • MM user with underlying condition in addition to MM use may meet definition of handicapped person.
      o Not disqualified “per se” from definition of handicapped if they have another condition.
Fair Housing Act (cont.)

• However, same result even if “handicap” status is established:

• Accommodations allowing the use of medical marijuana in public housing or other federally assisted housing are not reasonable under Fair Housing Act.

• Standard for Unreasonableness:
  o Granting accommodation requires fundamental alteration in the nature of housing provider’s operations; or
  o Imposes an undue financial and administrative burden on provider.
Fundamental Alteration in Nature

• Accommodation of MM use would sanction violations of federal criminal law.

• This is a fundamental alteration of nature of public housing.
  o To provide safe living environment free from illegal drug use.
  o To provide safe and sanitary dwelling for families of low income.
  o Violates lease obligation to refrain from any drug-related criminal activity on or off premises.
Other marijuana-related conduct

• Manufacture, cultivation, possession, distribution illegal (CSA).
• All drug-related activity is illegal.
  - Marijuana use in other forms?
    • Ingestion, vaping, etc.
    • All drug-related activity. . .
Disparate Impact Claims

• When a rule or management practice of the property has a significant negative or disproportionate impact on a “protected class of people.”

• Protected Class:
  o Those with a physical or mental disability, race, sexual orientation or another such immutable characteristic.

• Intent to discriminate not necessary.

• Provider may take steps to prevent illegal drug use, even if occupants are members of a protected class.
Impact of Executive Branch’s Policy Relative to MM

• Discourages federal prosecution of individuals clearly in compliance with state laws on MM.

• Does not legalize MM.

• Resource allocation issue for federal prosecutors.

• Might bolster requests for reasonable accommodation.
Impact of State Nondiscrimination Laws

• Some state laws do not specifically exclude current illegal drug users from definition of “disability.”

• Some states may not consider behavior in compliance with state MM law to be illegal drug use.

• However, unlikely that would require providers to permit use of federally-prohibited drugs (MM).

• Another interpretation would be subject to preemption arguments and fail.
Controlled Substance Act Controls

- Requiring reasonable accommodation of MM use “positively conflicts” with CSA.
- It would mandate the very conduct the CSA prohibits.
- State law cannot stand as an obstacle to federal law (preemption).
Take-Away Points

1. Providers may not grant reasonable accommodation to all tenants to grow, use, possess or distribute MM even if state allows it.

2. Providers must deny admission to applicants currently using MM.

3. Providers have discretion to terminate tenancy of current residents using MM.

4. Provider is “exercising his/her discretion, not providing reasonable accommodation.”
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