

16 U.C. Davis Bus. L.J. 31

U.C. Davis Business Law Journal

Fall, 2015

Article

ARE “LEGAL” MARIJUANA CONTRACTS “ILLEGAL”?

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ABSTRACT

America is currently in the midst of a “legal” marijuana business boom. In states that have legalized marijuana thousands of businesses have been created and are being openly operated despite the federal Controlled Substances Abuse Act (CSA). As a regular part of their business, these companies enter into contracts which violate the CSA, for example, every time they sell their main product. These businesses, and their stakeholders, rely upon the enforceability of these contracts in order to regulate their relationships. However, under the “illegality” or public policy defense to the enforcement of contracts these contracts are arguably all void and unenforceable. Under the traditional understanding of this defense not only will an illegal contract not be enforced but any consideration paid will not be returned. This defense is grounded in public policy discouraging illegal behavior and is a product of state law. Should courts apply it to the marijuana industry, which has been legalized also under state law when it clearly is not against the public policy of states which have legalized marijuana to allow for the sale of marijuana? This article explores the effects of the conflict between federal and state marijuana laws on businesses' ability to enter into legally enforceable contracts. This article argues that marijuana contracts do not in fact violate public policy and therefore should be enforced despite their “illegality”. Nevertheless, courts should exercise restraint in enforcing these agreements, particularly in applying equitable remedies such as specific performance, so as to avoid forcing individuals to violate federal law.

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*32 “The explicitly stated purpose of these loan agreements was to finance the sale and distribution of marijuana. This was in clear violation of the laws of the United States. As such, this contract is void and unenforceable.”¹

“It is the public policy of the state of Colorado that a contract is not void or voidable as against public policy if it pertains to lawful activities authorized by . . . the state constitution and . . . [Colorado's legal marijuana laws].”²

I. INTRODUCTION

It is a well understood concept in the field of contract law that if you enter into a contract to buy heroin, for example, and the drugs are not delivered as promised, a court will not enforce the contract.³ In fact, not only will a court not order the drug dealer to turn over your heroin, they will not even order the drug *33 dealer to return your money.⁴ This is because the contract that has been entered into violates public policy against the enforcement of illegal contracts.⁵ Specifically it violates the prohibition on heroin sales found in the federal Controlled Substances Abuse Act (the “CSA”).⁶

What happens if instead of heroin, the contract is for the purchase of marijuana, and the contract was signed in one of the 23 states plus the District of Columbia⁷ which has “legalized”⁸ marijuana on some level? Can this contract be enforced? On one hand, the very law which criminalizes the sale of heroin, the CSA, is the same law which criminalizes the sale of marijuana, which is illegal regardless of state law.⁹ For this reason, these contracts should be unenforceable. On the other hand, many states have legalized the sale of marijuana in spite of federal prohibition.¹⁰ Therefore, it is not against public policy of these states to allow the sale of marijuana. Since contract law is a product of state law, it can be argued that nothing is “illegal” for purposes of upholding public policy in states which have legalized marijuana.¹¹ In addition, the Federal Government no longer prioritizes enforcement of marijuana prohibition, at least in states that have *34 legalized it.¹² This article will argue that when the public policy behind marijuana's legalization is weighed against its federal prohibition, a court should find that enforcement is supported by the stronger policy.¹³ Therefore, contracts that involve marijuana businesses should be enforced even if these contracts violate the CSA.

However, it is not a simple matter to ask courts to uphold marijuana contracts despite their violation of the CSA. Should a court order a business to deliver marijuana in compliance with a contract when this would force the business to violate the CSA and potentially expose the business' stakeholders¹⁴ to criminal liability? Alternatively, a court could exercise its discretion and limit the remedies available for violation of a marijuana contract to damages and not make specific performance available.¹⁵ This article aims to explore the complex implications of upholding and enforcing contracts which violate federal law.

The answers to these questions have huge implications for the booming field of marijuana businesses.¹⁶ Thousands of marijuana businesses have opened in legal marijuana states. These businesses are challenging Starbucks for ubiquity.¹⁷ Businesses, stakeholders, and customers depend on contracts to regulate their relationships. If these contracts are unenforceable, these relationships will be more unstable. This will hurt the industry's ability to grow and flourish, which will decrease the likelihood that state policy goals, the driving *35 force behind legalization, will be achieved.¹⁸ This

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article seeks to add to the growing body of literature examining the conflict between federal and state marijuana law on the marijuana industry. This literature includes discussion of the problems marijuana businesses have with federal taxes,¹⁹ the ethical problems of being a lawyer advising a marijuana business,²⁰ and the struggles marijuana businesses have with business entity law protections.²¹ The issue of whether marijuana businesses can enforce contracts has been raised by others,²² but the issue of marijuana contract enforceability has not been developed in depth. Collectively, these articles seek to help marijuana business tread the murky path between illegal and legal conduct, while the larger debate between the Federal Government and the states plays out.

II. THE MARIJUANA INDUSTRY'S “LEGAL” STATUS

A. The Current State of Marijuana Laws in the United States

The history of marijuana regulation in the United States can be traced back centuries.²³ However, for the purposes of this article, the relevant time period begins in 1970, when the Federal Government passed the CSA and listed *36 marijuana as a schedule 1 drug.²⁴ This classification acted as a total prohibition of marijuana for medicinal and recreational use, and the act continues to be legally enforceable to this day.²⁵ States began to challenge this prohibition in the 1990s when California voters passed the nation's first medical marijuana law.²⁶ By 2015, 23 states and the District of Columbia had legalized marijuana to some extent.²⁷ This list includes four states, Colorado, Washington, Oregon and Alaska, which have legalized recreational marijuana.²⁸

With the increasing number of states that have legalized marijuana, as well as growing popular support for its legalization²⁹ the Federal Government has slowly backed off rigorous enforcement of its marijuana prohibition.³⁰ Without actually changing the CSA, the Executive Branch has articulated a policy of not going after marijuana businesses that are complying with state regulations.³¹ On *37 the campaign trail in 2008, President Obama said “I'm not going to be using Justice Department resources to try to circumvent state laws on this issue.”³² For the most part he has followed this stance, with the Federal Government backing off arresting individuals and closing businesses for growing marijuana in states where it is legal. In a series of letters addressed to United States Attorneys, the Justice Department issued guidance on marijuana enforcement priorities.³³ In the latest of these letters, Deputy Attorney General James Cole notes that “Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime. . . The Department of Justice is committed to enforcement of the CSA. . .”³⁴ Despite this strongly worded defense of the CSA the memo makes clear that wholesale enforcement of the CSA's marijuana prohibition is in fact no longer a priority. Instead it articulates the following enforcement priorities:

Preventing distribution of marijuana to minors; [p]reventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; [[p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states; [p]reventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; preventing violence and the use of firearms in the cultivation and distribution of marijuana; [p]reventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; [p]reventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana product on public lands; and [p]reventing marijuana possession or use on federal property.³⁵

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Notably absent from this list is a priority to stop the sale of marijuana generally or to shut down marijuana businesses. Instead it relies “on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws.”³⁶ For states that have legalized marijuana, this means that there will be no enforcement of the CSA. It should be noted, however, that marijuana arrests are up in states that have not legalized marijuana, especially states bordering Colorado, where police say marijuana is *38 flowing over the border into their states.³⁷ Although arrests have dramatically decreased in legalized states, arrests continue because the police and public are often confused regarding what is legal.³⁸ Aside from making enforcement a non-priority, the Obama administration has made some policy changes to try to help marijuana businesses. These changes include the Treasury Department making it easier for such businesses to open and maintain a bank account³⁹ and no longer requiring the U.S. Public Health Service to review research studies on the potential health benefits of marijuana.⁴⁰ This more tolerant view of marijuana has started to permeate throughout the legal system. Recently, a raid in California resulted in nearly 100,000 marijuana plants being destroyed.⁴¹ After the raid, which did not involve the DEA, police defended it by saying that it was about marijuana farmers illegally using 500,000 gallons of water per day, a major environmental problem in drought stricken California.⁴² In the past, a major marijuana raid would not have needed any secondary justification. Additionally, some district attorneys have begun funneling marijuana offenders into prison alternatives such as treatment programs.⁴³ However, Congress has been much slower to change its marijuana policy, in part because it has been controlled by *39 the Republican Party. In general, Republicans have been less favorable towards legalization.⁴⁴ However, some Republicans have begun to change their stance on marijuana, as evidenced by a recent Senate Appropriations panel vote to bar the Federal Government from blocking state medical marijuana laws.⁴⁵ Under the Consolidated and Further Continuing Appropriations Act (“Cromnibus Act”), the Federal Government is barred from using funds to prevent a state that has legalized marijuana “from implement[ing] [its] own [law] that authorize[s] the use, distribution, possession, or cultivation of medical marijuana.”⁴⁶ This measure must be re-passed each year and does not add long term comfort to marijuana businesses. Nevertheless, the measure signals a more favorable attitude towards marijuana by this branch of government.⁴⁷ Another vote by the Senate Appropriations Committee allowed marijuana businesses access to federal banking services.⁴⁸ The vote was mainly along party lines, but three Republican senators gave their support.⁴⁹

Despite making these marijuana policy changes, the sale of marijuana still remains a serious federal crime. There is nothing protecting marijuana business stakeholders from widespread prosecution other than current Executive Branch policy, which could change at any time. In particular, certain presidential candidates have expressed a much harder stance on marijuana than President Obama. For example, New Jersey Governor Chris Christie has vowed to “crack down” on legalized marijuana if he is elected president,⁵⁰ stating “[i]f you're *40 getting high in Colorado today, enjoy it. . . As of January 2017, I will enforce the federal laws.”⁵¹ Depending on who is elected as the next president, marijuana businesses could find themselves in a lot of trouble.⁵² A Republican controlled house can also slow down the legalization process. When Washington D.C. voted to legalize marijuana, the Republican controlled Congress passed a spending bill barring the District of Columbia from allotting any money to enact it.⁵³ Republicans have also recently voted against easing the federal restrictions on marijuana medical research.⁵⁴ Even if federal policy continues to slowly grow more tolerant of marijuana, until this conflict between federal and state marijuana laws is resolved, marijuana businesses will continue to operate in a legal grey zone.⁵⁵ In addition, businesses will continue to suffer from a multitude of other legal challenges including difficulty using the financial,⁵⁶ insurance,⁵⁷ tax,⁵⁸ business entity⁵⁹ and bankruptcy⁶⁰ systems.

**41 B. Growth of “Legal” Marijuana as an Industry*

Despite this host of formidable legal challenges, the marijuana industry has been growing rapidly.⁶¹ Commentators have noted that even with “a draconian tax regime” that makes marijuana businesses pay taxes on 100% of their gross income, the industry is able to survive because it is “insanely profitable.”⁶² In fact, it is currently the fastest growing industry in the United States.⁶³ In the first year that Colorado legalized recreational marijuana, sales *42 were approximately \$700 million.⁶⁴ In 2014, the national market for legal marijuana grew from \$1.5 billion to \$2.7 billion, a seventy-four percent increase.⁶⁵ It is also a booming area of job growth.⁶⁶ Most marijuana businesses are small,⁶⁷ in fact the industry has garnered some political support on this basis.⁶⁸ However, there are some businesses with assets in the tens or even hundreds of millions of dollars.⁶⁹ While the conflict between federal and state marijuana law is almost certainly a temporary issue, the question of how this industry is to deal with its effects until it is resolved will have a great impact on its development and its stakeholders. In particular, many potential stakeholders who have significant assets will avoid this industry so as to not put their outside assets at risk. This is why the insurance and banking industry has been reluctant to service marijuana businesses.⁷⁰ It is also likely why the tobacco industry has not gotten involved, despite being an obvious new market for them.⁷¹ While this *43 creates an opportunity for small businesses to grow,⁷² an opportunity lacking in many American industries,⁷³ many small business owners may not understand the consequences of contract illegality. As a result, their businesses could suffer a nasty shock if they find the courts will not enforce their agreements. A large tobacco company will have lawyers advising it at every step, but many small businesses skip regular legal consultation because of cost or effort.

Additionally, perhaps consequently, the marijuana industry now operates with something of a “wild west” mentality.⁷⁴ Marijuana is now grown to increase its strength, and is being combined with food products to make for a stronger high.⁷⁵ However, this is being done with no Food and Drug Administration oversight, as required by any other product marketed as a drug.⁷⁶ Furthermore, a recent report out of Oregon has shown that marijuana products in that state tested positive for illegally high levels of pesticide and other chemicals, some of which are not meant to be consumed.⁷⁷ Some of the pesticides and chemicals found in marijuana products are linked to cancer.⁷⁸ The presence of these chemicals was not disclosed to consumers who were, in some cases, using marijuana to treat illnesses such as cancer.⁷⁹ Disclosure of THC levels in edible marijuana products has also been shown to be inaccurate in many cases.⁸⁰ This unprofessionalism is *44 dangerous to consumers and can hurt the industry's reputation over time.⁸¹ The industry promotes itself, in part on the belief that marijuana is natural⁸² and less harmful than alcohol or tobacco.⁸³ Consumers may consequently not realize they are consuming a product that may in fact be laced with dangerous chemicals. Unprofessionalism can also hurt society on the retail level if marijuana businesses do not follow rules on who they can sell to. There has reportedly been a 66% increase in marijuana abuse by teenagers in Colorado since 2011. Teenagers who should not be getting the product are apparently getting it more easily now that businesses are openly selling.⁸⁴ Some who object to the growth of the marijuana industry have argued that dispensaries are “just not following what small amounts of rules there are on the books . . .”⁸⁵ One way of addressing these problems would be to bring more professionals into the industry who would have the training needed to grow product and sell it responsibly. Aside from the abstract legal argument that public policy defense should not apply to marijuana contracts, reforming contract analysis to make marijuana contracts enforceable could help promote the incorporation of these professionals into the industry.

III. THE MARIJUANA INDUSTRY AND CONTRACT LAW

For the thousands of marijuana businesses and stakeholders, the ability to rely on contract law to enforce their mutual obligations is just as important as for other industries. The ability to form contracts is integral to long term planning and relationship building for businesses and helps promote their stability. “[A] contract enables parties to project exchange into the future and to tailor their affairs according to their individual needs and interests . . .”⁸⁶ Contracts do not *45 simply enforce long term relationships; without contracts many relationships between marijuana business stakeholders will break down and many types of transactions simply will not happen. Marijuana companies form contracts with suppliers, employees, customers, service providers, and investors, among others. All these stakeholders depend on the enforceability of their agreements to make deals that depend on non-simultaneous exchange. For example, consider a situation where a business pays a farmer in advance for a product and the farmer fails to deliver without any legal consequences. Businesses would no longer form this sort of relationship, which would cut down on the success of these businesses and hurt the economy. If you cannot depend on contracts, then the only agreements you can rely on are ones where no executory action must take place, such as contracts in which each side completes their end of the bargain at the same time. When both parties are performing at the same time, there is no need to rely upon the other side's future ability or willingness to perform. But even these contracts will present problems if a court will not enforce them. Since marijuana is a sale of a good, it falls under the Uniform Commercial Code (“U.C.C.”).⁸⁷ However, many of the contracts marijuana businesses will enter into will be for services (such as employment agreements) and will fall under the common law. Both the U.C.C. and the common law offer remedies that will not be available if a court refuses to enforce contracts such as the ability to return or reject defective or non-conforming products.⁸⁸ This will potentially expose the public to harm as it delegitimizes the marijuana industry and gives protection to unscrupulous businesses which prey upon this legal grey zone.

A. The Public Policy/Illegal Contract Defense to Contract Enforcement

The defense that contracts are not enforceable if they pertain to an illegal subject is centuries old.⁸⁹ The grounds for this defense is not that the defendant in the contract deserves to escape liability,⁹⁰ but rather that the court does not want to assist the plaintiff in their wrongful conduct.⁹¹ As commentators have noted, this defense is not based on whether the contract has an illegal purpose, but that enforcement of the contract would violate the jurisdiction's public policy.⁹² As such, contract luminaries such as Farnsworth and Williston argue the defense should be termed “public policy” and the term “illegality” is incorrect and should *46 not be used.⁹³ The Restatement (Second) of Contracts (“Restatement”) also does not use the term illegal, but instead relies upon the fact that the contract violates some public policy.⁹⁴ The reason for this distinction is that the term “illegal” is “misleading insofar as it suggests that some penalty is necessarily imposed on one of the parties, apart from the court's refusal to enforce the agreement.”⁹⁵ This distinction is important because if contracts are unenforceable any time they would require or result in a violation of a law, then all marijuana contracts will be unenforceable. However, if contracts are unenforceable only when they violate public policy, then these contracts may be enforceable if a court finds that the policy behind legalization outweighs the policy behind respecting federal prohibition.⁹⁶ Despite efforts of contract experts, many courts continue to use the illegality term when voiding such contracts⁹⁷ and void “illegal” agreements without weighing any competing public policies.⁹⁸ Because contracts involving the sale of marijuana are clearly illegal even if a penalty is never enforced⁹⁹ it will be doubly tempting to use the term illegal instead of the more cumbersome public policy language. Weighing competing public policies will take

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more work from courts but will ultimately result in a better application of this defense even if a court decides to void a contract for violating the CSA.

Instead of simply voiding any “illegal” contract, the Restatement offers the following factors to consider in weighing the voiding of a contract because of its violation of public policy versus enforcement of the contract. In favor of enforcement are “(a) the parties' justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term.”¹⁰⁰ Courts must weigh the public policy against enforcement against this analysis. Factors considering this are: (a) The strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term.¹⁰¹

*47 By going through these factors, a court will be forced to consider the consequences of voiding marijuana contracts and may determine, as argued below, that the weight is greater on the side of enforcement than it is on voiding marijuana contracts in respect to the CSA when the CSA itself is no longer being seriously enforced.

1. Policy Behind Not Enforcing Illegal Contracts

To the extent we think of this defense as a “public policy” defense, it is not difficult to understand that enforcing agreements that violate laws would generally violate public policy. For instance, if a state has a public policy against murder, then enforcement of a contract for an assassination violates that public policy. A court need not spend much time discussing the public policy against promoting murder in making the decision to void the assassination contract. In addition, public policy can be violated even if a contract does not directly result in a violation of the law, but simply promotes or increases the chance of law breaking. In *Bovard v. American Horse Enterprises, Inc.*, a court found a contract for the sale of a drug paraphernalia manufacturing business (e.g. bong and roach clips) was unenforceable, even though the sale of paraphernalia was legal, because it was against public policy.¹⁰² The state had a public policy against the use and transfer of marijuana, and this implied a public policy against the manufacture of goods that promoted marijuana use.¹⁰³ Of course, this decision was made prior to state legalization of marijuana, but the sale of marijuana is in direct violation of the CSA. The sale of drug paraphernalia does not violate the CSA. Therefore, this holding would seemingly require the voiding of all marijuana contracts. While not a marijuana case, in *Yoo v. Jho*, a court found that a contract for the sale of a business that sold counterfeit goods was unenforceable, and reversed the lower court's decision that provided partial rescission to the buyer.¹⁰⁴ It found that the buyer knew the store sold counterfeit goods. The buyer was interested in the counterfeit goods and continued selling them after purchasing the business, thus making the object of the business purchase agreement illegal and against the public policy of the state.¹⁰⁵ The court stated that even if the consideration for the sale of the business did not include the inventory, the customer base that came to the store to unlawfully buy counterfeit goods rendered the contract unenforceable.¹⁰⁶ Applied to the sale of a marijuana business, this same analysis would void the sale even if the business was being sold without any of the marijuana inventory. In sum, the public policy defense is *48 based on the court's unwillingness to promote the illegal behavior at the heart of the contract.

If the public policy defense voids “illegal” contracts because the underlying illegality violates public policy, then what should a court do when the underlying illegality does not violate public policy? In other words, should “illegality” by itself void a contract if the contract technically violates a law, but there is no public policy support behind that law? Imagine a state passed a law in the 19th century that forbade an unmarried man and woman from cohabitating under the belief that this was immoral behavior, and this law applies to men and women sharing a living space even if not sexually

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involved. Further, imagine this law has not been enforced in a very long time, and despite many openly cohabitating men and women there is no public or police desire to currently see this law enforced. In fact, it could be imagined that other state laws arguably provide support for such cohabitation by providing rental or food subsidies to poor couples even if the couples are unmarried. Would a rental agreement in which a man and woman agreed to live together be illegal in this state? Technically, this would be a violation of the law. Should it be voided due to its violation of the state's public policy? Even putting aside the constitutionality of this law, the answer should be no. As Farnsworth states:

If the agreement involves the commission of a serious crime or tort, it may be clear that unenforceability is warranted; and if the agreement involves only a trivial contravention of policy, it may be clear that unenforceability is unwarranted. In doubtful cases, however, the court's decision must rest on a delicate balancing of factors for and against enforcement of the particular agreement. Enforcement should not be refused unless the potential benefit in deterring misconduct or avoiding an inappropriate use of the judicial process outweighs the factors favoring enforceability.¹⁰⁷

Here, a court would need to balance the value of enforcing an agreement versus the public policy of respecting this cohabitation law. Regarding the analysis from Section II.A., the parties are justified in expecting their agreement to be enforced. The antiquated cohabitation law is no longer enforced, and does not reflect currently accepted social values. Additionally, the parties would forfeit their property interest if their agreement was not enforced. On the other hand, there is no longer any strength to support a moral improvement law, and the misconduct is technical at worst. Despite the fact this agreement supports a violation of the law, it seems ridiculous to void it in the name of supporting a policy the legal system no longer supports. The public policy that drove the state to paternalistically pass this law in the 19th century simply does not reflect social values today. Our society has evolved over time, and a law that has stayed on the books, but is no longer respected or enforced, should not stand in the way of contract enforcement.

2. Application of the Public Policy Defense to Marijuana Agreements

Unfortunately, the cohabitation example given above differs from the marijuana context. The CSA is more strongly supported by the government, even if it is not as strongly supported as it once was. The CSA is neither an antiquated relic, nor a law with no public policy arguments to support it. In addition, the support for enforcement of a marijuana contract is not as strong as for a rental agreement; marijuana is still illegal in the majority of states. So how should courts weigh these competing interests under the Restatement test?

The first factor, “the parties' justified expectations. . .”¹⁰⁸ in the enforcement of their agreement seems to offer very weak support for the enforcement of marijuana contracts. In the vast majority of cases, parties know, or should know, that marijuana is still prohibited by the CSA, so there is little justified expectation in the enforceability of the contract. But this is a self-fulfilling factor. If courts start enforcing marijuana contracts, by not voiding them, then this expectation value will obviously start to increase. In other words, this is a vicious circle for marijuana businesses. They cannot expect their contracts to be enforced because courts will not enforce them. Courts will not enforce them partially because marijuana businesses cannot reasonably expect the contract to be enforced. At some point, this cycle must end if the marijuana contracts deserve to be enforced. As more states across the U.S. legalize marijuana,¹⁰⁹ the cultural expectation by non-marijuana stakeholders will lean increasingly toward a belief that enforcement is justified. After all if the average citizen can buy marijuana openly in front of a police officer without fearing arrest, they probably have an expectation that their contract is legitimate. So the strength of this factor should increase as marijuana gains more cultural acceptance.

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The second factor, “any forfeiture that would result if enforcement were denied. . .”¹¹⁰ is arguably the same as for all contracts. There can be significant forfeitures if marijuana contracts are not enforced just as with any contract. A loan made to a marijuana business that is voided results in no less of a forfeiture for the lender and windfall for the marijuana business than a loan which would be voided against any other business. How much, and the nature of any, forfeiture is *50 highly dependent on the individual contract. However, the forfeiture does not change in the marijuana context, and there are certainly marijuana contracts that will result in substantial forfeitures if not enforced.

The third factor, “any special public interest in the enforcement of the particular term”¹¹¹ strongly favors the enforcement of marijuana contracts, since states are actively pursuing and promoting its sale. This factor will be given a separate treatment in section II.A.3.

Against this discussion, we must weigh the factors in favor of the public policy for voiding marijuana contracts. In this case, the third and fourth factors are easiest to address. The third factor, “the seriousness of any misconduct involved and the extent to which it was deliberate”¹¹² seems to weigh strongly against enforcement. Marijuana contracts deliberately violate the CSA, a law which, if enforced, carries the possibility of serious criminal and civil penalties. While some parties may claim state legalization confused and prevented them from knowing they violated the CSA, most marijuana stakeholders should know when the CSA is being violated. Undercutting the strength of this factor is the argument that the misconduct is no longer serious, since legal marijuana sales are no longer being seriously pursued by police, even federal police such as the DEA.¹¹³

The fourth factor, “the directness of the connection between the misconduct and the term”¹¹⁴ strongly weighs against enforcement. In most cases, there is an obvious direct connection between the marijuana contract and the violation of the law, any time marijuana is sold. In some cases, it is less direct, as with a loan to a marijuana business, but even these agreements would violate the CSA.¹¹⁵ Despite the strength of these two factors, if there is no public policy supporting the violated law, then as with the cohabitation example, the contract should probably be enforced. However, the strength of the other restatement factors in favor of voiding marijuana contracts “the strength of that policy as manifested by legislation or judicial decisions. . .” and “the likelihood that a refusal to enforce the term will further that policy. . .” show that there is public policy support behind the CSA's prohibition of marijuana. Therefore these factors deserve their own separate discussion and will be discussed in section II.A.4.

*51 It seems the applicability of the public policy defense to marijuana contracts ultimately comes down to the strength of the specific public interest in favor of enforcement versus the strength of the public policy in support of the CSA. In the marijuana context, it is not so clear cut which of these competing policies is strongest, even in states where it has been legalized. Nevertheless, this article concludes that the policy behind marijuana's prohibition and legalization has developed over time and that society is at a stage where it can treat marijuana contracts as legal and binding in states that are actively supporting its sale. Even if not persuaded by these arguments, the current development of marijuana policy in the states is taking us quickly in the direction of greater legalization, which will most likely reach a tipping point when the value of enforcing marijuana agreements clearly outweighs the value of voiding them.

3. The Special Public Interest in the Enforcement of Marijuana Contracts

States have articulated many reasons for legalizing marijuana. These include combating crimes that come from ceding a profitable industry to cartels,¹¹⁶ creating a new source of tax revenue,¹¹⁷ failure of the war on drugs,¹¹⁸ *52 disproportionate impact of criminalization on minorities,¹¹⁹ unnecessarily high incarceration rates,¹²⁰ and, of course,

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compassionate care for sick people who would potentially benefit from the pain mitigating effects of the drug.¹²¹ Some of these policies are based on the perceived failure of the war on drugs and some are based on the hope that the regulated sale of marijuana will produce benefits for society. Whether these policies will be achieved or whether legalization will lead to more problems than the war on drugs will have to be judged over time. The important point for this article is that states are actively pursuing these policies for the benefit of their citizens, while the Federal Government has largely conceded the value of enforcing the CSA.¹²² Nevertheless, there is some evidence that some of the state policies are being achieved. Colorado and Washington have reported significant tax revenues as a result of their recreational marijuana programs.¹²³ Washington State collected \$70 million in taxes in the first year based on \$257 million of marijuana sales in the state.¹²⁴ Colorado in turn collected \$60 million in taxes during its first year.¹²⁵ Indications are that these tax revenues should continue to increase as the market continues to develop.¹²⁶ The *53 economic gains are not purely experienced by the marijuana industry. Tourism in these two states has also increased.¹²⁷ Presumably, this tax revenue is, for the most part, coming out of the pockets of illegal marijuana dealers including Mexican cartels. With marijuana arrests down, the high incarceration rates (including the disparate impact of arrests on minorities) should fall with time. Colorado most likely saved a good portion of the estimated \$145 million it had been spending each year fighting marijuana.¹²⁸

Enforceable marijuana contracts can help further many of these policy goals by promoting the industry. A more successful marijuana industry should produce more taxes and jobs, for instance. Further supporting the special interest behind enforcement is the fact that a well-regulated industry, with the ability to enforce agreements is more likely to produce and sell products in a responsible manner compared to an industry operating without the benefit of contracts. So long as states continue to experiment with legalization they have an incentive to see this industry develop in a manner aimed at achieving the underlying policy goals. This means that states, as well as their court systems, have an incentive to do everything they can to promote a professional, responsible marijuana industry. This also includes allowing stakeholders the certainty of enforceable contracts as enjoyed and relied upon by other industries. On the flip side, if the marijuana industry is legalized, but forced into a legal grey zone, it will be more likely to produce fewer public benefits and more public harms by skirting laws such as the ban on selling marijuana to minors.

In addition to the public policy goals of states that drove them to legalization, courts should also consider the negative effects of enforcing the public policy defense against marijuana businesses. If marijuana businesses cannot rely upon contracts, they will be forced even further into the world of illegal businesses. If they cannot get legitimate loans, they may borrow money from cartels or other criminal and dangerous parties. These lenders will not rely upon enforceability of their contracts in court, but will rely on threats of violence instead. These parties could also exercise power over the business. This will make these businesses less reputable and less attractive as an operation for the non-criminal elements that need to be joining it if it is to grow into a responsible and productive member of the business community.¹²⁹ It could also lead to more *54 dangerous marijuana being sold on the market¹³⁰ or consumers being overcharged when they are sold a product that is mislabeled.¹³¹ The next section of this article will examine how both the marijuana industry and the public can be harmed if marijuana contracts are not enforceable. Specifically loan agreements and commercials sales will be discussed.

i. Loans to Marijuana Businesses

Marijuana businesses are not cheap to start up. They require not only the purchase of marijuana seeds, but also a hydroponic-farm. Alternatively, businesses may purchase the marijuana from a farmer, set up retail operations, get the required licenses, pay employees, etc. In order to finance this operation, many businesses will need a loan. As has been

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noted, the marijuana industry has been largely shut out from the traditional lending market.¹³² This is in large part because traditional lenders such as banks fear violating the CSA and facing potential criminal and civil penalties.¹³³ But these lenders also need to be able to depend upon contract law to enforce the borrower's obligation to repay the loan. If lenders cannot depend on their loan agreements, they will stop lending. An Arizona state court in 2012 refused to enforce an agreement in which two individuals each loaned \$250,000 to a Colorado marijuana business.¹³⁴ The agreement explicitly provided that the loans would be used to finance a “medical marijuana sales and grow center.”¹³⁵ The court's holding was not influenced by both states having legalized medical marijuana.¹³⁶ The court did not attempt to balance the public policy interest of the CSA and state marijuana laws. Instead, the court found the CSA's prohibition of marijuana meant these contracts violated federal law, making these contracts void and unenforceable.¹³⁷ While recognizing “the harsh result of this ruling” the court also rejected the idea that an equitable *55 remedy such as unjust enrichment was available to the lenders.¹³⁸ For this court, if the contract was illegal, it was void.

What the court did not consider was that it was effectively shutting marijuana businesses out of the debt market entirely. Now, not only will traditional banks be afraid to lend money, but so will angel investors, family members, and others who often loan money to start-up businesses. Shutting this industry out of the debt market could adversely affect the public. Lenders bring discipline and impose caution on borrowers. Since lenders get paid a fixed rate of return they generally do not benefit from risky business decisions. These risky business decisions could produce massive returns for equity holders, but could also bankrupt a company. Lenders, in the loan agreements, typically require that borrowers take certain precautions to protect the value of the business. These precautions include maintaining adequate insurance, instituting a compliance system, or providing personal guarantees from the equity holders or third parties. By denying marijuana companies the ability to access this market, the discipline and restraint imposed by lenders will also be lost. This can cause the industry to take risks that could end up harming both the industry's long-term growth and reputation but also the public. Aside from the risks of marijuana businesses turning towards criminal elements for financing (such as cartels) briefly discussed above, marijuana companies may simply decide to forgo proper financing and instead cut corners to save money and by doing so avoid hiring better quality employees, consulting lawyers and accountants, skipping safety tests etc., all steps that should improve customer safety. One last consideration is that both Congress and the Treasury Department have been trying to make banking services more easily available for the marijuana industry.¹³⁹ By voiding these contracts, courts would be arguable running afoul of that federal policy.

ii. Commercial Sales

Most commercial sales of marijuana will be a cash-for-product transaction in which the consideration is simultaneously exchanged. In this case, little trust is required between the parties because you immediately receive something you pay for in cash. If you walk into a 7-11 and buy a bag of Cheetos with cash, you have what you wanted while the store has what they wanted. In such situations, the fact that contracts cannot be enforced will have few consequences. But of course, even these relatively straightforward forward contracts pose problems if the contracts cannot be enforced.

One issue will be whether the implied warranties included in all U.C.C. contracts (unless excluded by the seller) apply. Normally, when a seller knows *56 that a buyer is buying a good for a particular purpose, it is implied into the agreement that the good sold is fit for that purpose.¹⁴⁰ If consumers buy marijuana, it should be implied into the sale agreement that the marijuana will, in fact, get the user high, especially if the buyer is relying on the seller's skill or judgment.¹⁴¹ If a seller sold oregano under the guise of marijuana, the buyer would naturally want to return the product and get their money back.¹⁴² By making marijuana contracts unenforceable, courts will be hurting consumers by taking away legal protections given to them in other areas of the law.¹⁴³ It also opens the door to unscrupulous

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businesses to exploit the court's unwillingness to enforce their agreement. Essentially the lack of contract enforceability gives marijuana businesses an incentive to act in a shady underhanded manner because of the lack of consequences. While the marijuana business could suffer reputational harm, in a fast growing and rapidly developing industry like marijuana's, a business' reputation may not be easily ascertainable by the public and is certainly less dependable than a contract. While it is true that consumers who purchase marijuana illegally already lacked the right to enforce their agreement, with marijuana's legalization, marijuana is becoming more mainstream and states should seek to promote marijuana business professionalism so as to better protect the public than when it was sold illegally.

In addition, not all commercial sales can be completed simultaneously. In some cases, especially where large purchases are made, payment is often made prior to delivery or vice versa.¹⁴⁴ When a Colorado dispensary was sued for failing to pay for a \$40,000 marijuana delivery,¹⁴⁵ the contract was voided by a Colorado state court on the grounds of illegality.¹⁴⁶ The grower was out both his marijuana and his payment for it.¹⁴⁷ This particular case predates the passage of C.R.S. § 13-22-601, which attempts to do away with the illegality defense for marijuana contracts and the case may come out differently today. Nevertheless, it illustrates the problems that marijuana businesses will have with the normal application of commercial law if they cannot rely upon the enforceability of their agreements. In addition, no other state has passed a version of C.R.S. § 13-22-601^{*57} and so this issue will still be very relevant in all the other states which have legalized marijuana.

4. The Strength of the Policy Supporting the CSA as Manifested by Legislation or Judicial Decisions and the Likelihood that a Refusal to Enforce the Term will Further that Policy

In states that have legalized marijuana, we can say that it is not against public policy for individuals to enter into contracts involving marijuana. But, this is not enough to establish that courts should not apply the public policy defense and void these contracts. First off, federal courts still have a priority of enforcing federal law over state law, and state courts normally apply this defense when federal law is violated.¹⁴⁸ For example, state courts have found contracts unenforceable when they violated federal laws such as the Federal Consumer Credit Protection Act, even when there was no state law against the contract.¹⁴⁹ Courts, especially federal courts, dealing with marijuana businesses often take a black and white approach to the illegality of their business.

Debtor points out that federal authorities have never notified it that it is in violation of the law and that it has never been charged or convicted of any federal or state crime. But the fact that a violator is never charged, tried or convicted does not change the fact that the crime has been committed.¹⁵⁰

If this is as deep into the public policy defense as courts are willing to go, then all marijuana contracts will be voided. However, as argued above, a mere violation of the law should not automatically cause a contract to be voided absent a strong public policy supporting the violated law. Therefore a discussion of the policy behind respecting the CSA is needed. Any argument in favor of state marijuana policy is almost certainly doomed in a federal court. The federal court will naturally favor the policy of federal law, and so the question of why a state court should respect the CSA will be the primary issue.

What is the public policy behind the CSA that should justify courts, especially state courts, in voiding marijuana contracts? To begin, there is a ***58** general injury to the public if federal laws are not respected or upheld by state courts. This could promote law breaking by citizens or a more general contempt for the law as citizens realize that some laws can be ignored without legal consequences, and one can enlist the aid of a court in breaking that law. That being said, if this argument is allowed too much credence, than any violation of a law, including of cohabitation example given earlier,

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will result in a voided contract and short cut the proper weighing of public policy. Therefore we will now focus on the specific value of the CSA as opposed to the law generally.

As articulated by the Restatement, two public policies factor in favor of voiding marijuana contracts: 1) consideration of the strength of the policy supporting the CSA, and 2) the likelihood that voiding a contract will support that policy. The CSA prohibited marijuana under the belief that marijuana is a dangerous and addictive drug that harms Americans. Violation of the CSA is a serious crime, and the Federal Government has taken enforcement of the CSA and its marijuana prohibition to be an extremely important public policy for a long time.¹⁵¹ The government has reportedly spent one trillion dollars on the war on drugs over the last 40 years,¹⁵² and at one point was spending forty-two billion per year on marijuana enforcement.¹⁵³ This clearly reflects very strong support for the policies behind the CSA. Voiding marijuana contracts arguably supports that policy by making it harder to obtain marijuana and by making it a more expensive drug. One should also consider the reasons why the Federal Government made marijuana illegal in the first place, so as to judge the weight of those policies today. The policy behind marijuana's prohibition is complex. It was based on some honest concerns about the dangerousness of the drug, but also on a host of cultural issues that got wrapped around marijuana's use.¹⁵⁴ When marijuana was essentially banned with the Marijuana Tax Act of 1937, marijuana use was associated with violent crime and was believed to be addictive.¹⁵⁵ Marijuana is often cited as a gateway drug to more serious and dangerous drugs.¹⁵⁶ While there were honest concerns about the effect of marijuana, its *59 prohibition cannot be separated from cultural prejudices in the 1930s.¹⁵⁷ For example, some argue that marijuana's prohibition was a product of anti-Mexican immigrant sentiment.¹⁵⁸ In any case, when examining the historic roots of marijuana prohibition, the policies justifying its original ban are rarely if ever cited any longer to support its continued prohibition. Some defenders of prohibition still hold to the idea that marijuana is harmful.¹⁵⁹ But these arguments are often based less on what marijuana is, and more on what it could become if put in the hands of major corporations like the tobacco companies.¹⁶⁰ These defenders often accept that marijuana is less harmful or dangerous than alcohol or tobacco, but that that does not mean we should be adding more legal drugs to the marketplace.¹⁶¹

The problem here is that the Federal Government no longer seriously enforces the CSA in states that have legalized marijuana. As discussed in section I.A., the Federal Government is no longer actively pursuing marijuana users or business, and has been slowly taking steps to normalize this industry. It can also be argued the Federal Government has largely conceded to states the ability to regulate marijuana, and that the Federal Government has little interest in enforcing the CSA on this issue. After the Drug Enforcement Agency raided two marijuana dispensaries in Los Angeles, an agent stated that the raids were about the way the shops were being run and not about marijuana generally. He said “[i]f this was simply about somebody selling marijuana in West Hollywood, the DEA wouldn't be here.”¹⁶² While a new presidential administration may have a tougher policy on marijuana,¹⁶³ the current administration has clearly ceded control over marijuana to states.¹⁶⁴ There are many old laws in America that while officially still in force, have not been taken seriously for a long time.¹⁶⁵ For example, it is *60 still against the law in New York State for a person to engage “in sexual intercourse with another person at a time when he has a living spouse, or the other person has a living spouse.”¹⁶⁶ This law against adultery, while still on the books, is no longer enforced. The state clearly no longer considers it important public policy to prevent adultery through criminal enforcement of marital vows. Nor should courts consider it an important public policy to void contracts that violate this law. The Federal Government has signaled a similar statement that they do not consider the CSA's prohibition of marijuana to be an important public policy. Therefore, when states weigh the public policies behind respecting the CSA against the state's legalization of marijuana, the court may very well come out in favor of the later.

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While clearly the Federal Government has not fully embraced marijuana legalization, prohibition also no longer reflects a top priority. Again quoting Farnsworth, “policies vary over time. As the interests of society change, courts are called upon to recognize new policies, while established policies become obsolete. . .”¹⁶⁷ To quote the Supreme Court in a similar vein, “[t]he Standard of such policy is not absolutely invariable or fixed, since contracts which at one stage of our civilization may seem to conflict with public interests, at a more advanced stage are treated as legal and binding.”¹⁶⁸ The Federal Government's view of marijuana, in addition to society's view as a whole, has evolved over time and, however begrudgingly, led to an increased acceptance of marijuana. Considering this, how should courts weigh the strongly pursued policy behind legalization against the weakly pursued goals behind prohibition?

5. Weighing Competing Marijuana Policies

As previously mentioned, some courts have categorically found marijuana illegal and on that basis refused marijuana stakeholders many standard legal protections.¹⁶⁹ What these courts fail to do is weigh the value of enforcement against the public policy that is being violated. Simply stating that marijuana is illegal should not necessarily doom all marijuana contracts however,

Not every illegal contract must be voided in order to protect public policy. . . ‘the power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and. . . should be exercised only in cases free from doubt.’ . . . As a general rule, ‘a contract is not void as against public policy unless it is injurious to the interests *61 of the public or contravenes some established interest of society.’¹⁷⁰

So the question becomes, do contracts involving marijuana injure the interests of the public or contravene some established interest of society? Clearly federal court will be slow to recognize the value of state marijuana policy, since Congress has not adopted that policy, and state courts will probably have to lead on this issue.¹⁷¹ But there is no clear answer to this question for state courts, and it should come down to weighing the public policy of respecting the CSA against the state's public policy to legalize marijuana in order to figure out which offers more benefit to the public. Because states are actively supporting marijuana legalization, the Federal Government is also slowly moving in the same direction, and the public policy behind the CSA's prohibition no longer seems strong enough to justify voiding marijuana contracts in states which have legalized it.

IV. POTENTIAL REMEDIES FOR ADDRESSING CONTRACT NON-ENFORCEMENT

Despite this article's argument that the public policy defense should not be applied to void marijuana contracts, the reality is that it currently is often being applied to do just that. Consequently, the next section will address some alternatives to contract enforcement that have been proposed as a means of holding marijuana stakeholders accountable when they intentionally take advantage of a court's unwillingness to enforce their agreement.

A. Fraud and Bad Faith Claims

If marijuana businesses and consumers cannot rely upon the enforceability of contracts, what about other potential remedies such as fraud or bad faith claims? The definition of fraud is usually very broad, such as “[a]ctual fraud includes cases in which there is an intentional and successful employment of any cunning, deception, or artifice to circumvent, cheat, or deceive another.”¹⁷² If a marijuana business intentionally sold fake marijuana this would fit within this

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definition, and seem to give rise to a fraud claim even if the sale agreement or U.C.C. rights cannot be enforced. Likewise, if a marijuana business entered a *62 contract, for example for the purchase of a large amount of marijuana from a farmer, intending not to pay and to defend on the basis of the contract illegality defense, this would also seem to fit the definition of fraud. This could provide for recovery in some instances. Since fraud claims require intentional misrepresentations, this approach will not help in all cases where an agreement was honestly made but then breached innocently later on. If marijuana is purchased from a farmer, and the business simply runs out of the money to pay for it, fraud will again not provide a remedy.

There is another problem with relying on fraud claims to remedy the contract enforceability problem: there is a public policy exception to fraud claims,¹⁷³ and an ongoing problem of the unclean hands doctrine.¹⁷⁴ For it to apply, a court would have to find that public policy does not require a court to abstain from adjudicating the claims between two marijuana stakeholders. But if a court is going to find that, it might as well find that the marijuana contract itself is enforceable. This remedy would only seem to complement enforceable marijuana contracts not be a substitute.

Another possible remedy that has been suggested is that marijuana stakeholders could potentially pursue a bad faith claim for contracts later voided for being illegal.¹⁷⁵ If a marijuana business enters a contract with full disclosure of the nature of its business, and the other party defends on the basis of the federal illegality of marijuana, the marijuana business may be able to bring a bad faith claim against the other contract party. For example, if a marijuana business obtains insurance coverage but then the insurer denies coverage based upon an illegality defense, the marijuana business could attempt to recover by arguing that the insurance company committed an act of bad faith when it entered the agreement. Bad faith claims will likely prove unhelpful for the same reason that makes fraud claims unhelpful in courts which will not uphold the validity of marijuana contracts. If a court finds that marijuana contracts violate public policy, they are likely to also refuse to adjudicate a bad faith claim because of the unclean hands doctrine.

B. Forum and Venue Selection Clauses

While it is not certain that state courts located in jurisdictions that have legalized marijuana will uphold the validity of marijuana contracts, they are far more likely to overlook a CSA violation than are federal or state courts located in *63 jurisdictions which have not legalized marijuana. Consequently, one way parties can increase the likelihood that their marijuana contracts will be enforced is with a forum selection clause (selecting a jurisdiction likely to uphold the contract's enforceability) as well as a venue selection clause (selecting a state court and waiving the right to sue or appeal in federal court). This has been the advice of some working in the industry.¹⁷⁶ It will help to eliminate forum shopping insofar as the party seeking to avoid contract enforcement will not try to move the proceeding to a marijuana unfriendly court. Unfortunately, this tactic will not help in all situations. Any contract that is not in writing would obviously not include these provisions. Most customer contracts would fall into this category. While it is possible to have every customer sign a contract with these clauses, it would be cumbersome and probably unnecessary. After all, most retail sales will involve cash for product, at which point both parties have already fulfill their contracts and it is less important whether a court would uphold the contract's enforceability. Larger purchases of product, or purchases where the consideration is not simultaneously delivered should probably be accompanied by a written contract with these clauses. The larger problem is that a forum and venue selection clause will simply not resolve the underlying problem of how the contract will be treated even by a state court in a marijuana legal jurisdiction.¹⁷⁷ As *Hammer v. Today's Health Care II* demonstrated, even state courts located in jurisdictions that have legalized marijuana might find these contracts unenforceable.¹⁷⁸ So while these clauses can help keep marijuana parties out of the wrong court, the underlying question of enforceability, as discussed above, must still be addressed.

C. Legislative Action

A much more proactive approach to dealing with contract unenforceability is for state legislatures to try to preempt these court rulings. This has been Colorado's approach. Colorado's marijuana industry has begun to experience some unfavorable rulings in regards to contract enforceability.¹⁷⁹ Colorado state courts issued rulings that invalidated marijuana contracts.¹⁸⁰ Aware of the problems the Colorado marijuana industry is experiencing with regards to contracts, the Colorado legislature has addressed the illegality defense with [C.R.S. § 13-22-601](#). § 13-22-601 states “[i]t is the public policy of the state *64 of Colorado that a contract is not void or voidable as against public policy if it pertains to lawful activities authorized by section 16 of article XVIII of the state constitution and article 43.4 of title 12, C.R.S.” If this rule is applied by courts as intended, marijuana contracts should now be enforceable in Colorado as long as they comply with state marijuana laws. Unfortunately there are no cases that have yet addressed [C.R.S. § 13-22-601](#), and so the question of how it will be applied is unclear. Additionally, federal courts are far less likely to uphold the validity of this law than state courts, and forum shopping will still likely be a problem. Despite the clear policy of [C.R.S. § 13-22-601](#), the Colorado Supreme Court is still issuing rulings that marijuana is in fact illegal under federal law, and statutes that protect “lawful activities” do not protect marijuana use.¹⁸¹ The ultimate problem is that [C.R.S. § 13-22-601](#) no more trumps the CSA than do the state laws that legalize marijuana. Consequently, courts will be forced to question the enforceability of [C.R.S. § 13-22-601](#). Ultimately, for marijuana contracts to be enforced, courts must first conclude that because the Federal Government is no longer actively enforcing the CSA, they do not need to invalidate marijuana contracts. In addition, the unclean hands doctrine¹⁸² could be applied to prevent recovery between two parties, each of whom was violating the CSA. This doctrine acts much like the illegality defense. It prevents a court from adjudicating a dispute when two parties have engaged in wrongdoing.¹⁸³ While the Colorado legislature has addressed the illegality defense with [C.R.S. § 13-22-601](#), a court would still need to address the issue of adjudicating a dispute between two individuals attempting to violate federal law. It may seem obvious the unclean hands and the illegality defense would be resolved in the same manner since they are so similar. However, [C.R.S. § 13-22-601](#) only directly addresses the illegality defense and the Colorado Supreme Court has held in other areas that marijuana is still unlawful under federal law. Thus, state law protections are not available for those who violate the CSA. In *Coats v. Dish Network*, the court found that “employees who engage in an activity such as medical marijuana use that is permitted by state law, but unlawful under federal law are not protected by [state laws which protect employees from discharge for lawful activities the employees engage in while off duty].”¹⁸⁴ The court held “the term ‘lawful’ refers only to those activities that are lawful under both state and federal law.”¹⁸⁵ If the Colorado Supreme Court is not willing to find marijuana use “lawful” for purposes of a Colorado statute despite the many laws in Colorado attempting to make marijuana lawful, then it is possible that it will read *65 [C.R.S. § 13-22-601](#) narrowly and not interpret it to mean that other equitable doctrines such as the unclean hands doctrine are still available defenses.

Whether through a finding that the public policy defense does not apply or through the application of a law such as [C.R.S. § 13-22-601](#), if the enforceability of marijuana contracts are upheld, the problems for courts and marijuana stakeholders does not end. As the next section will discuss it will not be a simple matter for courts to treat marijuana contracts like any regular contract.

V. PROBLEMS WITH MARIJUANA CONTRACT ENFORCEMENT

For the reasons discussed in section II above, the best solution for the marijuana industry, and for the accomplishment of the state public policy goals that drove legalization, is for state courts to find that the public policy behind legalization outweighs the weakly held policy behind federal prohibition. Courts should find that marijuana contracts are not

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illegal and that other equitable remedies are available to those in the industry. This, accompanied by strong legislative support like Colorado's [C.R.S. § 13-22-601](#) and the careful use of forum and venue selection clauses could make marijuana contracts more dependable. This should in turn strengthen the marijuana industry and hopefully make it a more responsible member of society. Even if all these dominos fall into place, there are, and should be, limits to the enforceability of marijuana contracts.

A. Specific Performance of Marijuana Contracts

What are the limits on enforcing marijuana contracts even without a public policy defense and with strong legislative support like [C.R.S. § 13-22-601](#)? Does Colorado truly expect its courts to treat marijuana contracts like other contracts which do not run afoul of the law? The most obvious way that this law will cause courts to struggle is when the question of specific performance comes up. Specific performance is a remedy in which one contract party argues that monetary damages are insufficient and that the court should force the other contract party to perform their obligations under the contract.¹⁸⁶ This remedy is not available for most contracts in which monetary damages allow one to go out and find replacement goods or services.¹⁸⁷ Instead, it is reserved for situations in which the consideration in a contract is somehow unique or irreplaceable, such as when you are purchasing land or art.¹⁸⁸ Is there anything unique in the marijuana industry that would qualify it for specific performance? There are a couple of *66 possible candidates, which include land to be used for a marijuana farm,¹⁸⁹ the sale of a marijuana business itself, and even the sale of a specific type of marijuana which is not available except from one seller.¹⁹⁰

For the most part, marijuana is probably a fungible good and so monetary damages would be sufficient as a remedy if a seller could not provide you with the marijuana that you contracted for.¹⁹¹ However, the industry markets different strains of marijuana as being unique.¹⁹² Just like with wine, there are reviewers and awards to help consumers pick out the best marijuana on the market.¹⁹³ Reviews break down marijuana strains into taste, smell, genetics and effect. A review of a strain called “Cherry Pie” describes the taste as “dark cherry, black licorice” with a smell “like grapes” and an effect of an “[i]mmmediate body high this strain will put you on your ass.”¹⁹⁴ Other than the description of the effect (which signals a clearly different consumer culture), this could very well be a wine review. If certain vintages of wine could be unique, why not certain strains of marijuana? If a consumer, or business purchaser, could establish that they were trying to buy something unique, in theory specific performance would be available as a remedy. For example, suppose a new marijuana dispensary and grow operation called Pot Inc. is opening in Colorado. It contracts with an existing marijuana operation called High Times Inc. to buy a particular strain of marijuana called Chocolate Kush for the purpose of reselling. Chocolate Kush is a unique genetic strain, and is currently exclusively owned by High Times. Further, High Times has acknowledged that Chocolate Kush is unique and has a taste, smell and effect that is different from anything else available on the market. In theory, if there is no ability to cover in the market with equivalent goods, specific performance should be an available remedy to require High Times to turn over the product to Pot Inc. In reality, most marijuana, is probably not so unique to warrant a lawsuit of this nature. A more realistic example of when specific *67 performance would be applicable is in the context of a marijuana farm or business itself. Since these involve the sale of land, they would normally be good candidates for specific performance remedies. After all, you cannot simply go out and buy an identical farm or business location.

Should a court which has upheld a marijuana contract's enforceability grant specific performance as a remedy? The answer is likely no because ordering specific performance would go beyond allowing marijuana stakeholders the ability to regulate their relationships despite the CSA, and go into the territory of requiring them to violate the CSA. “The right to specific performance is not absolute. Whether the remedy should be granted depends upon the equities of the

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case . . . and rests within the sound discretion of the trial court¹⁹⁵ In addition, contracts which are illegal or violate public policy are usually denied specific performance.¹⁹⁶ However, if a court has already decided to ignore the CSA, and enforce a contract, they could use the same reasoning to overlook that violation when determining whether to grant specific performance. Nevertheless, there are clear and logical reasons why a court could find that a marijuana contract is legal while still determining that specific performance is not appropriate. Namely, that forcing someone to violate the CSA is a larger affront to federal law than simply finding it not applicable for application of a contract defense. If specific performance is not available, there will be consequences for stakeholders in this industry. For example, a landlord can simply evict a marijuana business tenant, in breach of contract, at any time and the tenant will only be able to seek damages, not the continued use of their premises.

What should marijuana parties do if specific performance is ordered? One possible response for specific performance would be that if its order would cause a party to violate federal law, so be it. The parties took their chances when they formed a contract in violation of federal law, and now they have to live with it. If a court orders specific performance in a marijuana contract, would there be any defenses that could help a party refuse to perform (and therefore violate the CSA)? A party subject to such an order could go to a federal court and seek an injunction against enforcement of the state court's order.¹⁹⁷ Federal courts, seeing a clear order to disobey federal law should be willing to grant an injunction preventing an order of specific performance for a marijuana contract.¹⁹⁸ So, even *68 if a court orders specific performance, marijuana stakeholders likely stand a good chance of preventing its enforcement.

VI. CONCLUSION

The marijuana industry is a field with many exciting opportunities for business owners. Over the coming years, many individuals and businesses will be able to establish themselves as central players in this new industry, and make themselves a fortune doing so. Nevertheless, with reward comes great risk. This industry is faced with a host of legal challenges that should give serious pause to anyone considering joining it. The inability of the marijuana industry to rely upon the enforceability of their contracts, a heavy tax burden, high insurance costs, lack of access to banking, and other problems, will destabilize the industry, prevent it from developing normally, and make it difficult to attract professional stakeholders. On an individual business level, the lack of legal protections can turn what would be a routine business issue for another industry into a death knell, costing stakeholders their investment, or more. Marijuana stakeholders can gain some limited protection from forum and venue selection clauses to ensure they do not end up litigating their contracts in a jurisdiction that will automatically void their agreements as illegal. But these clauses will not protect against state courts that make similar decisions despite being in marijuana legal jurisdictions. State legislatures that have an incentive to see this industry grow professionally should follow Colorado's lead and pass legislation aiming at helping marijuana contracts become enforceable obligations. Unfortunately, Colorado's current legislation does not address the true complexity of marijuana contract issues, and marijuana stakeholders are left with questions about the reliability of their contracts while courts figure out the details. While the ultimate resolution to marijuana contract enforceability may depend on the end of marijuana prohibition by the Federal Government, in the short term a finding that marijuana is legal based upon the strong support of its legalization by states would solve many of the problems discussed in this article.

Footnotes

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professional responsibility. The author would like to thank Max Cahuff, Stephen Friedman, Larry Hammermesh, Johanna Peuscher-Funk, Paul Regan, and Therese Scheuer, for their valuable assistance with this article.

1 Hammer v. Today's Health Care II, CV2011-051350, at *4 (Ariz. Sup. Ct. Apr. 17, 2012), <http://www.keytlaw.com/Cases/hammer.pdf>. (in which an Arizona court refused to uphold the validity of a contract in which money was loaned to a Colorado marijuana business).

2 [Colo. Rev. Stat. Ann. § 13-22-601 \(West 2013\)](#).

3 See Hammer, *supra* note 1.

4 See *id.* at 4 (“[T]his is not all, for one who enters into such a contract is not only denied enforcement of his bargain, he is also denied restitution for any benefits he has conferred under the contract.”); see *infra* note 90 § 5.9 (“Courts generally do not grant restitution under agreements that are unenforceable on grounds of public policy.”)

5 See [RICHARD A LORD, Williston on Contracts § 19:11 \(4th ed.\)](#).

6 21 U.S.C. § 812 Sched. I (b)(10) (2012). This article will focus its discussion of the CSA's prohibition of marijuana but there are other federal laws which criminalize aspects of marijuana businesses. See *e.g.*, Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (2012); Continuing Criminal Enterprise Statute, 21 U.S.C. § 848 (2012);

7 *State Marijuana Laws Maps*, (June 19, 2015), <http://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html>.

8 The term “legal” is in quotations to reflect the fact that marijuana is illegal in many jurisdictions including at the federal level. So as not to be cumbersome, this Article will hereinafter refer to the “legal” marijuana industry simply as the marijuana industry with the intent that it not include sellers of marijuana who are not attempting to comply with state marijuana laws. This article will not directly take a stance on whether the legalization of marijuana is a good or bad policy decision, instead it will focus on the best ways to promote and protect this industry given the current split between federal and state marijuana laws.

9 21 U.S.C. § 812 Sched. I (C)(10) (2012); Thomas C. Horne, State of Arizona Attorney General Opinion, (Aug. 6, 2012), <http://www.scribd.com/doc/102201478/Attorney-General-Opinion-I12-001-Re-Preemption-of-the-AMMA-Proposition-203-Pri> (concluding that Arizona's medical marijuana act is preempted by federal law to the extent it authorizes “any cultivating, selling, and dispensing of marijuana”); see [Gonzales v. Raich, 545 U.S. 1, 27, 34 \(2005\)](#) (holding that the federal government has the right to criminalize the sale of marijuana under the Commerce Clause); see also *infra* note 145 (quoting a Colorado state court invalidating a marijuana contract “[a]ny state authorization to engage in the manufacture, distribution or possession of marijuana creates an obstacle to full execution of federal law... Therefore, Colorado's marijuana laws are preempted by federal marijuana law.”).

10 See *infra* note 27.

11 See *infra* section IIA.

12 See *infra* section IA.

13 See [N. Ind. Pub. Serv. Co. v. Carbon Cty. Coal Co., 799 F.2d 265, 273 \(1986\)](#) (“the defense of illegality... is not automatic but requires... a comparison of the pros and cons of enforcement...”).

14 This article will use the generic term “stakeholders” to refer to anyone with an interest in marijuana businesses including equity holders, managers, employees etc.

15 See [Schreck v. T & C Sanderson Farms, Inc. 37 P.3d 510, 514 \(2001\)](#).

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- 16 Matt Ferner, *Here's How Fast The Marijuana Industry Is Growing, In 5 Charts*, HUFFINGTON POST (Jan. 1, 2015), http://www.huffingtonpost.com/2015/01/29/marijuana-industry-growth-charts_n_6565604.html (noting that “[l]egal marijuana is the fastest-growing industry in the United States.”); Christopher Ingraham, *The marijuana industry could be bigger than the NFL by 2020*, WASH. POST (Oct. 24, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/10/24/the-marijuana-industry-could-be-bigger-than-the-nfl-by-2020/>.
- 17 Thomas Hendrick, *Colorado has more MMJ dispensaries than Starbucks*, FOX 31 DENV. KDVR (May 6, 2013), <http://kdvr.com/2013/05/03/mmj-map/> (noting that marijuana dispensaries outnumber Starbucks in the Colorado); *How Many Marijuana Dispensaries are in California?*, ARTICLESBASE (Jan. 26, 2011), <http://www.articlesbase.com/medicine-articles/how-many-marijuana-dispensaries-are-in-california-4109979.html>, archived at <http://perma.cc/EC2Y-4WX6> (noting that there were over 2,500 dispensaries in California in early 2011); *Denv. Pot Dispensaries: 390; Colo. Starbucks: 208*, ABC 7NEWS DENV. (Jan. 5, 2010, 7:45 AM), <http://www.thedenverchannel.com/news/denver-pot-dispensaries-390-color-starbucks-208>, archived at <http://perma.cc/A3KB-YER4> (noting that in 2010 (prior to the boom of recreational marijuana) there were 390 dispensaries in Denver alone versus only 208 Starbucks); see *infra* note 116 (noting that while there are 112 Starbucks in Los Angeles, there had been as many as 1,000 marijuana dispensaries before a ballot measure restricted the number down to 135).
- 18 This article will not take a direct stance on the merits of legalizing marijuana. Instead it will proceed under the understanding that marijuana businesses are operating under certain states' laws and that those states have an interesting in seeing this industry succeed.
- 19 Phil Hackney, *A Response to Professor Leff on Tax Planning for Marijuana Dealers*, 99 IOWA L. REV. BULL. 25 (2014); Benjamin M. Leff, *Tax Planning for Marijuana Dealers*, 90 IOWA L. REV. 523 (2014); Edward Roche, *Federal Income Taxation of Medical Marijuana Businesses*, 66 TAX LAW. 429 (2013); Ben Rooney, *This Colorado pot shot made \$3.6 million last year*, CNN MONEY (Jan. 6 2015), <http://money.cnn.com/2015/01/06/smallbusiness/colorado-marijuana-best-year/> (noting that a marijuana shop was not able to deduct \$200,000 in rent on its tax returns).
- 20 Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders*, 91 OR. L. REV. 869, 880-86 (2013).
- 21 Luke Scheuer, *The “Legal” Marijuana Industry and its Challenge for Business Entity Law*, 6 Wm. & Mary Bus. L. Rev. 511 (2015); Luke Scheuer *The Worst of Both Worlds: The Wild West of the “Legal” Marijuana Industry*, 35 N. Ill. U. L. Rev. 557 (2015).
- 22 Erwin Chemerinsky, Jolene Forman, Allen Hopper and Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 96 (2015) (discussing the “profound legal uncertainty” over whether marijuana contracts will be enforced); Sam Kamin, *The Limits of Marijuana Legalization in the States*, 99 IOWA L. REV. BULL. 39, 46 (2014); Juliette Fairley, *Marijuana CEOs Face Invalidation of Contracts Until Congress Acts*, MAIN STREET. ((Dec 9, 2014), <https://www.mainstreet.com/article/marijuana-ceos-face-invalidation-of-contracts-until-congress-acts> (noting that federal courts are bound to invalidate marijuana related contracts); Robert Mikos, *Are Contracts with Marijuana Dealers Enforceable?*, (Jan 15, 2014), http://lawprofessors.typepad.com/marijuana_law/2014/01/are-contracts-with-marijuana-dealers-enforceable.html.
- 23 Tom Head, *Marijuana Laws in the United States*, ABOUT NEWS (June 12, 2015), <http://civilliberty.about.com/od/drugpolicy/tp/Marijuana-History-Laws-United-States.htm> (noting that in 1619 a Virginia statute required farmers to grow hemp (related to cannabis)).
- 24 21 U.S.C. § 812 Schedule I (C)(10) (2012).
- 25 *Id.*
- 26 Melissa Griffin-Caen, *Why California Wasn't the First State to Legalize Recreational Marijuana*, CBS SF BAY AREA (Nov. 17, 2014, 10:08 AM), <http://sanfrancisco.cbslocal.com/2014/11/17/pot-why-california-wasnt-the-first-to-legalize-recreational-use-marijuana-cannabiswashington-dc-colorado-alaska/>.

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- 27 Chris Boyette & Jacque Wilson, *It's 2015: Is Weed Legal in Your State?*, CNN (Jan. 7, 2015, 8:09 AM), <http://www.cnn.com/2015/01/07/us/recreational-marijuana-laws/>.
- 28 *State Marijuana Laws Map*, GOVERNING, (Feb 24, 2015), <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html>.
- 29 Lydia Saad, *Majority Continues to Support Pot Legalization in U.S.*, (Nov. 6, 2014) <http://www.gallup.com/poll/179195/majority-continues-support-pot-legalization.aspx> (indicating that in 2014 a majority of Americans support the legalization of marijuana, a substantial increase in support since 1969 when only 12% of Americans supported legalization); Justin McCarthy, *More Than Four in 10 Americans Say They Have Tried Marijuana* (July 22, 2015), http://www.gallup.com/poll/184298/four-americans-say-triedmarijuana.aspx?utm_source=tagrss&utm_medium=rss&utm_campaign=syndication (finding that 44% of American now admit to having used marijuana, up from 4% who admitted it in 1969).
- 30 Matt Ferner, *DEA Raids 2 Los Angeles Medical Marijuana Dispensaries*, HUFFINGTON POST (Oct. 24, 2014), http://www.huffingtonpost.com/2014/10/24/dea-raid-medical-marijuana-los-angeles_n_6038926.html (noting that two raids conducted on marijuana businesses in Los Angeles were about the specific practices of those marijuana businesses and not about the fact that simply sold marijuana); See Jack Healy, *Groundwork Laid, Growers Turn to Hemp in Colorado*, N.Y. TIMES (last modified Aug. 8, 2013), http://www.nytimes.com/2013/08/06/us/groundwork-laid-growers-turn-to-hemp-in-colorado.html?pagewanted=all&_r=0, archived at <http://perma.cc/B8J7-U558> (noting that the total number of marijuana plants seized by federal authorities has “dropped sharply in recent years. In 2012, federal officials reported that 3.9 million cannabis plants had been destroyed under D.E.A. eradication efforts. A year earlier, officials said they had eradicated 6.7 million plants.”);
- 31 C.J. Ciaramella, *Justice Department and Obama Reverse Stance on Medical Marijuana Raids*, DAILY CALLER (July 1, 2011, 2:47 PM), <http://dailycaller.com/2011/07/01/justice-department-and-obama-reverse-stance-on-medical-marijuana-raids/>, archived at <http://perma.cc/AS7G-CRW4> (quoting Attorney General Eric Holder as saying “[f]or those organizations that are doing so sanctioned by state law, and doing it in a way that is consistent with state law, and given the limited resources that we have, that will not be an emphasis for this administration.”)
- 32 *Id.*
- 33 James M. Cole, *Memorandum For All United States Attorneys*, (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.
- 34 *Id.*
- 35 *Id.*
- 36 *Id.*
- 37 Jon Gettman, *Arresting Developments: Marijuana Arrests on the Rise in 17 states*, HUFFINGTON POST (November 26, 2014), http://www.huffingtonpost.com/jon-gettman/arresting-developments-ma_b_5890824.html; John Ingold and Eric Gorski, *More Colorado Pot is Flowing to Neighboring States, Officials Say*, DENVER POST (Sep. 3, 2013), http://www.denverpost.com/breakingnews/ci_24008061/more-colorado-pot-is-flowing-neighboring-states, (noting that between 2009 and 2012 there had been a 300% increase in Colorado marijuana seized that was destined for other states).
- 38 Steven Nelson, *Colorado Marijuana Arrests Continue Despite Legalization: Hundreds Were Charged for Possession of Less than 2 Ounces of Weed in 2013*, U.S. NEWS & WORLD REPORT (Jan. 13, 2014), <http://www.usnews.com/news/articles/2014/01/13/colorado-marijuana-arrests-continue-despite-legalization>, (citing an overall dramatic decrease in marijuana arrests, but noting that they had not stopped entirely in Colorado).
- 39 Keri Geiger, Jesse Hamilton and Elizabeth Dexheimer, *Banks Keep Distance from Marijuana Business and Its Unbanked Billions*, INSURANCE JOURNAL (May 12, 2015), <http://www.insurancejournal.com/news/national/2015/05/12/367987.htm>.

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- 40 Steve Nelson, *Major Pot Research Barrier Goes Up in Smoke*, U.S. NEWS & WORLD REPORT. (June 22, 2015), <http://www.usnews.com/news/articles/2015/06/22/major-pot-research-barrier-goes-up-in-smoke>.
- 41 See Josh Harkinson, *Police Say the Biggest Pot Raid in Years Wasn't Really About Pot: Forget the Drug War--the Main Battle Now in the Emerald Triangle May Be Drought*, MOTHER JONES (June 30, 2015), <http://www.motherjones.com/environment/2015/06/emerald-triangle-marijuana-raid-water-drought>; Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 802 (2012) (referring to the district attorney in Philadelphia's changed policy to funnel “low-level marijuana offenders” into a “drug-abuse class” as opposed to prosecuting them as misdemeanors with a potential thirty-day jail sentence.).
- 42 Harkinson, *supra* note 41. (critics of the raid noted that the wine industry also illegally uses water but was not raided, nor its vines ripped out. Nevertheless, the fact that the police felt the need to justify their action was notable.)
- 43 Luna, *supra* note 41, at 802.
- 44 See Steve Gorman, *Delaware Governor Signs Bill Decriminalizing Pot: Report*, YAHOO NEWS (June 23, 2015), news.yahoo.com/delaware-governor-signs-bill-decriminalizing-pot-report-043806298.html (noting that the vote to decriminalize marijuana fell strictly on party lines with no support from Republicans in Delaware); Grant Schulte, *Nebraska, Oklahoma Sue Neighboring Colorado Over Marijuana Legalization*, SALT LAKE CITY TRIB. (Dec. 18, 2014), <http://www.sltrib.com/news/1966408-155/story.html> (noting that Nebraska and Oklahoma, both Republican controlled states, asked the Supreme Court to strike down Colorado's marijuana laws).
- 45 *Republican-Controlled Senate Appropriations Panel Backs State Medical Marijuana Laws*, U.S. NEWS & WORLD REPORT. (June 11, 2015), <http://www.usnews.com/news/politics/articles/2015/06/11/gop-controlled-hill-panel-backs-state-medical-marijuana-laws>.
- 46 Omnibus Act, Pub. L. No. 113-235, § 538, 128 Stat. 2217 (2014).
- 47 Sean Williams, *In Case You Missed It, Congress Just Passed an Important Marijuana Provision*, THE MOTLEY FOOL (June 20, 2015), <http://www.fool.com/investing/general/2015/06/20/in-case-you-missed-it-congress-just-passed-an-impo.aspx>.
- 48 James Higdon, *Congress' Summer Fling With Marijuana: How Congress turned on the DEA and embraced weed*, POLITICO (July 30, 2015), <http://www.politico.com/magazine/story/2015/07/dea-marijuana-120674.html#.VbuLL7fD-Hs>. (also noting that the Senate has this year voted to allow the Veterans Administration to recommend medical marijuana as a treatment for veterans.).
- 49 *Id.*
- 50 Dylan Stableford, *Chris Christie Would Crack Down on Legalized Marijuana as President*, YAHOO POL. (June 8 2015), <https://www.yahoo.com/politics/christie-would-crack-down-on-legalized-marijuana-121023583856.html>; Z. Byron Wolf, *Chris Christie Vows to ‘Crack Down’ on Marijuana as President*, (April 16, 2015), <http://www.cnn.com/2015/04/16/politics/chris-christie-marijuana/index.html>.
- 51 Terrence Dopp, *Smoke That Pot Now, Chris Christie Tells Users in States That Allow it*, BLOOMBERG POL. (July 28, 2015), <http://www.bloomberg.com/politics/articles/2015-07-28/smoke-that-pot-now-christie-tells-users-in-states-that-allow-it?cmpid=yhoo>.
- 52 Dylan Stableford, *Where the 2016 Presidential Candidates Stand on Marijuana*, YAHOO POL. (Apr. 20, 2015), <https://www.yahoo.com/politics/where-the-2016-presidential-candidates-stand-on-116920750826.html> (noting that presidential candidate Jeb Bush also opposed legal marijuana while other candidates such as Rand Paul support decriminalization).

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- 53 *Washington DC's hopes for legal marijuana crushed by Congress*, GUARDIAN (Dec. 10, 2014), <http://www.theguardian.com/travel/2014/dec/10/washington-dc-legal-marijuana-hope-crushed-by-congress>.
- 54 Aaron C. Davis, *House Republicans Say No to Allowing Federal Studies of Medical Marijuana*, WASH. POST (July 9, 2015), http://www.washingtonpost.com/politics/house-republicans-say-no-to-allowing-federal-studies-of-medical-marijuana/2015/07/09/01029cda-262d-11e5-b77f-eb13a215f593_story.html.
- 55 Aside from congress revising the CSA, some have speculated that the U.S. Supreme Court could strike down the prohibition on marijuana based on the number of states which have legalized it in addition to the federal government's failure to enforce it. *But see* Paul Ausick, *Will Marijuana Use Become Legal Nationwide?*, 24/7 WALL ST. (June 28, 2015) <http://247wallst.com/consumer-products/2015/06/28/now-that-same-sex-marriage-is-the-law-of-the-land-is-legal-marijuana-next/>.
- 56 Geiger, Hamilton and Dexheimer, *supra* note 39. (noting that despite changes to Treasury Department policy, marijuana businesses still do not have access to normal banking services); Paul Ausick, *Few Banks, Credit Cards Want Marijuana Industry Business*, 24/7 WALL ST. (May 18, 2015, <http://247wallst.com/consumer-products/2015/05/18/few-banks-credit-cards-want-marijuana-industry-business/>) (noting that “[t]he country's biggest banks, like JPMorgan and Wells Fargo, will not accept deposits from businesses involved in the marijuana business, saying that because marijuana sales remain in violation of federal law they will not take the chance. Smaller banks have tried to serve marijuana businesses, but they have run up against high reporting requirements and regulatory expenses.” In addition, credit cards companies have been refusing to allow for credit or debit transactions resulting in marijuana businesses building up huge piles of cash.)
- 57 *See* Amelia Templeton, *Lloyd's Ends Long Relationship With Oregon Cannabis Businesses*, JEFFERSON PUBL. RADIO (June 4, 2015), <http://ijpr.org/post/lloyds-ends-long-relationship-oregon-cannabis-businesses>.
- 58 *See, e.g., Olive v. Comm'r*, 792 F.3d 1146, 1147 (9th Cir. 2015) (finding that a marijuana business cannot deduct ordinary or necessary business expenses because its trade is prohibited by Federal law and must pay taxes on 100% of their gross income); *see also* Rooney, *supra* note 19 (noting a marijuana shop's inability to deduct \$200,000 in rent of its tax returns); *see also* Leff, *supra* note 19 (noting that marijuana business must currently pay taxes on gross rather than net profits, making it far more difficult for these businesses to be run profitably).
- 59 Scheuer, *supra* note 21.
- 60 Jim Christie, *Appeal in Marijuana Bankruptcy That Went Up in Smoke*, REUTERS LEGAL, (Jan. 8, 2015, 11:00:00) [https://a.next.westlaw.com/Document/Ifc0fde40972511e4af50e96fe042baa9/View/FullText.html?originationContext=docHeader&contextData=\(sc.Category\)&transitionType=Document&docSource=fe3c22ff286947c28aeda3d0707303](https://a.next.westlaw.com/Document/Ifc0fde40972511e4af50e96fe042baa9/View/FullText.html?originationContext=docHeader&contextData=(sc.Category)&transitionType=Document&docSource=fe3c22ff286947c28aeda3d0707303) (noting that a federal court dismissed a Chapter 13 case because the plan of reorganization was funded by proceeds from a marijuana business. The court stated: “A state citizen that chooses to defy one federal law puts himself in an awkward position when he seeks relief under another federal statute - especially when granting that relief directly involves a federal court in administering the fruits and instrumentalities of federal criminal activity....” *Id.*); Fairley, *supra* note 22 (noting that “[w]ithout bankruptcy protection, marijuana businesses are not allowed to dissolve or disappear without paying back debt obligations and instead face debt collection by judgment enforcement, which includes placing liens on real estate, garnishing wages, seizing property and freezing bank accounts.”); *In re Medpoint Mgmt.*, 528 B. R. 178 (Bankr. D. Ariz. 2015) (dismissing a marijuana business' involuntary bankruptcy case because the creditors who brought the case knew of the marijuana nature of the business and therefore had unclean hands.).
- 61 Matt Ferner, *Legal Marijuana is the Fastest-Growing Industry in the U.S.: Report*, HUFFINGTON POST (Jan. 28, 2015), http://www.huffingtonpost.com/2015/01/26/marijuana-industry-fastest-growing_n_6540166.html.
- 62 Paul Caron, 9th Circuit: Marijuana Dispensaries Cannot Deduct Business Expenses, Must Pay Taxes on 100% of Their Gross Income, (July 11, 2015), http://taxprof.typepad.com/taxprof_blog/2015/07/9th-circuit-marijuana-dispensaries-cannot-deduct-business-expenses-must-pay-taxes-on-100-of-their-gr.html.

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- 63 Bob Knudsen, *Colorado Marijuana Prices See Huge Drop, Drug Cartels Reeling*, E XAMINER (June 23, 2015), www.examiner.com/article/colorado-marijuana-prices-see-huge-drop-drug-cartels-reeling (noting that despite a significant drop in the price of marijuana due to competition, “businesses are still reporting massive growth in sales numbers as long time residents, new transplants, and pot tourists flock to the state by the thousands, fueling a huge economic boom, with all the good and bad that can bring with it. In fact, the biggest problem in Denver right now is that the city is growing so fast right now that nobody can keep up with it. Homes can't be built fast enough, rents are rising too quickly, and infrastructure is struggling to keep up with a city that could start bursting at the seams soon.”) George Budwell, *Is 1 Drug Really Outselling Legalized Marijuana?*, THE MOTLEY FOOL (Jan. 19, 2015), <http://www.fool.com/investing/general/2015/01/19/is-1-drug-really-outselling-legalized-marijuana.aspx> (“[The marijuana] industry is poised to become one of the fastest-growing industries of all time.”).
- 64 Rebecca Trager, *Chemists in Demand as Marijuana Industry Shows High Growth*, S CI. AM. (Mar. 25, 2015), <http://www.scientificamerican.com/article/chemists-in-demand-as-marijuana-industry-shows-high-growth/>.
- 65 Ferner, *supra* note 61.
- 66 See Jonah Bennet, *Job Growth in the Cannabis Industry Continues, 200,000 Positions Expected*, DAILY CALLER (Jan. 16, 2015), <http://dailycaller.com/2015/01/16/job-growth-in-the-cannabis-industry-continues-200000-positions-expected/>.
- 67 Colorado limits ownership of a marijuana dispensary in the state to residents of Colorado, this has the effect of keeping the businesses small and halting the development of national companies. See BUSINESSNAMEUSA.COM, *How to Start a Marijuana Dispensary in Colorado* (Apr. 10, 2013, 12:00 AM), <http://www.businessnameusa.com/view/How%20to%20Start%20A%20Marijuana%20Dispensary%20in%20Colorado.aspx> (listing requirements for opening a marijuana dispensary).
- 68 See Joey Bunch, *Colorado Pot Lobby Loud, Clear on Regulations, as Government Listens*, DENV. POST (Dec. 26, 2014), http://www.denverpost.com/potanniversary/ci_27174815/colorado-pot-lobby-loud-clear-regulations-government-listens (noting that the pot lobby had won over Republican support in Colorado because both the pot industry and Republicans want to promote small business ownership).
- 69 Jonathan Kaminsky, *Ex-Microsoft Manager Plans to Create First U.S. Marijuana Brand*, REUTERS (May 30, 2013, 3:14 PM), <http://www.reuters.com/article/2013/05/30/usa-marijuana-idUSL2N0EB0YA20130530>, archived at <http://perma.cc/3UH4-W5CR>; Eric Russell, *Medical Marijuana Group Submits Financing Plan to State*, BANGOR DAILY NEWS (Aug. 15, 2011, 6:48 PM), <http://bangordailynews.com/2011/08/15/business/medical-marijuana-group-submits-financing-plan-to-state/>, archived at <http://perma.cc/T9P5-SJ56>. See Dan Ritter, *Who Will Get High Off the Marijuana Gold Rush?*, WALL ST. CHEAT SHEET (Apr. 30 2013), <http://wallstcheatsheet.com/stocks/who-will-get-high-off-the-marijuana-gold-rush.html?a=viewwall>, archived at <http://perma.cc/S9RV-N376>; see, e.g., Alex Akesson, *Small Cap Hedge Funds Show Interest in Edible Marijuana Products from Latteno*, HEDGE.CO.NET (May 15, 2013), <http://www.hedgeco.net/news/05/2013/marijuana-hedge-fund-launches-edibles.html>, archived at <http://perma.cc/9LGF-64LG>;
- 70 See Geiger, Hamilton and Dexheimer, *supra* note 39; Templeton, *supra* note 57.
- 71 See *Will Big Tobacco Jump on the Marijuana Movement?*, CBS NEWS ((Dec. 19, 2012, 10:32 PM), http://www.cbsnews.com/8301-201_162-57560164/will-big-tobacco-jump-on-the-marijuana-movement/, archived at <http://perma.cc/7KGW-VD3J> (discussing hesitation of the tobacco industry to move into the marijuana market).
- 72 See Rooney, *supra* note 19 (giving example of one marijuana business that made \$3.6 million in revenue and grew from 5 employees to 40 in its first year of operations).
- 73 See Derek Thompson, *The Mysterious Death of Entrepreneurship in America*, ATLANTIC (May 12, 2014), <http://www.theatlantic.com/business/archive/2014/05/entrepreneurship-in-america-is-dying-wait-what-does-that-actually-mean/362097/>.

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- 74 David Rheins, *High Hopes for Cannabis Careers in the Wild West*, AOL JOBS (Jan. 2, 2014, 10:00 AM), <http://jobs.aol.com/articles/2014/01/02/high-hopes-for-cannabis-careers-in-the-wild-west/> (“In Colorado and Washington it is truly the Wild West. Unlike the end of alcohol prohibition 80 years ago, there are no established marijuana brands, or brand loyalties. Marketing teams in Denver and Seattle, and across the country, are busy creating the first MJ brand identities and consumer experiences from scratch. Exciting innovations are taking place in packaging, marketing and product creation.”); Scheuer, *supra* note 21, *The Worst of Both Worlds*.
- 75 See *infra* note 84; Adrienne LaFrance, *Was Marijuana Really Less Potent in the 1960s?*, ATLANTIC (Mar. 6, 2015), <http://www.theatlantic.com/technology/archive/2015/03/was-marijuana-really-less-potent-in-the-1960s/387010/>.
- 76 See Lars Noah, *The Coming Pharmacogenomics Revolution: Tailoring Drugs to Fit Patients' Genetic Profiles*, 43 JURIMETRICS J. 1, 4 (2002). “Sponsors of new drugs typically have to enroll thousands of subjects in randomized controlled trials (RCTs) in order to generate the necessary data” for FDA approval. *Id.*
- 77 Noelle Crombie, *A Tainted High: Lax State Rules, Inconsistent Lab Practices and Inaccurate Test Results Put Pesticide-Laced Pot on Dispensary Shelves*, OR. LIVE (June 11, 2015), www.oregonlive.com/marijuana-legalization/pesticides/.
- 78 *Id.*
- 79 *Id.* (“One lab owner recently stopped testing for a pesticide that kept showing up in cannabis products, saying bad results aren't good for business.”)
- 80 *Id.*
- 81 This is especially true considering marijuana edibles can include much higher levels of THC than would be consumed through smoking. See *infra* note 84; See REUTERS, *Surge in Marijuana Ills Causes Cries for Stricter Control*, YAHOO! HEALTH (Jan. 6, 2015), <https://www.yahoo.com/health/surge-in-marijuana-ills-causes-cries-for-stricter-107307309887.html> (noting that Colorado and Washington “have been flooded with dangerous products, from infused candies and concentrates, many far stronger than what might have been smoked in the 1960s.”)
- 82 *Id.* (claiming that “Casual use [of marijuana] by adults poses little or no risk for healthy people.”)
- 83 Maren Sahpiro, *No High Risk: Marijuana May Be Less Harmful Than Alcohol, Tobacco*, (Feb. 26, 2015) <http://www.nbcnews.com/storyline/legal-pot/no-high-risk-marijuana-may-be-less-harmful-alcohol-tobacco-n312876>.
- 84 Boffey, Philip M. *What Science Says About Marijuana*. N. Y. TIMES (July 30, 2014), http://www.nytimes.com/2014/07/31/opinion/what-science-says-about-marijuana.html?_r=0. This increase in marijuana use by teenagers is troubling when combined with evidence that marijuana causes teenagers brains to go through abnormal development. In addition marijuana use in teens has been linked to increased risk of suicide and are more likely to use other illegal drugs. Chris Boyette and Jacque Wilson, *It's 2015: Is weed legal in your state?* (Jan. 7, 2015) <http://www.cnn.com/2015/01/07/us/recreational-marijuana-laws/>.
- 85 See *infra* note 116.
- 86 LORD, *supra* note 5 § 1:1 (4th ed.).
- 87 U.C.C. § 2-102 (AM. LAW INST. & UNIF. LAW COMM'N 2014).
- 88 See e.g., U.C.C. § 2-601-616 (AM. LAW INST. & UNIF. LAW COMM'N 2014).
- 89 Holman v. Johnson, 98 Eng. Rep. 1120, 1121 (K.B. 1775) (“No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.”)
- 90 Allan Farnsworth, *Contracts*, 3rd ed. § 5.1 (citing *Coppel v. Hall*, 74 U.S. (7 Wall.) 542 (1868) (“The defense is allowed, not for the sake of the defendant, but of the law itself.”)).

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- 91 *Id.*
- 92 *Id.* [RESTATEMENT \(SECOND\) OF CONTRACTS § 178 \(1981\)](#).
- 93 Farnsworth, *supra* note 90; LORD , *supra* note 5 § 12:1 (4th ed.).
- 94 Restatement *supra* note 92.
- 95 Farnsworth, *supra* note 90.
- 96 Restatement *supra* note 92 (“A promise or other term of an agreement is unenforceable on grounds of public policy if... the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”).
- 97 *E.g.* [Isles Wellness, Inc. v. Progressive N, Ins. Co., 725 N.W.2d 90, 92-3 \(2006\)](#); [Geffen v. Moss, 53 Cal.App.3d 215, 222 \(1975\)](#); LORD, *supra* note 5 § 12:1
- 98 *See e.g.*, [Total Med. Mgmt., Inc. v. U.S., 105 F.3d 1314, 1321 \(1997\)](#) for a typical example of the treatment of this defense. The court analyzes the contract's illegality so far as to establish that it does in fact break a law, but does not consider the strength of the policy supporting that law.
- 99 [21 U.S.C. § 812 Sched. I \(C\)\(10\) \(2012\)](#).
- 100 Restatement *supra* note 92.
- 101 *Id.*
- 102 [201 Cal.App.3d 832, 841 \(1988\)](#).
- 103 *Id.*
- 104 [147 Cal.App.4th 1249, 1257 \(2007\)](#).
- 105 *Id.* at FN 1.
- 106 *Id.* at 1256.
- 107 Farnsworth, *supra* note 90 § 5.1.
- 108 Restatement *supra* note 92.
- 109 *See.* Sam Becker, *7 States on the Verge of Marijuana Legalization*, CHEAT SHEET (June 19, 2015), <http://www.cheatsheet.com/business/5-states-and-one-city-ready-to-legalize-marijuana.html?a=viewall> (discussing states which are close to legalizing recreational marijuana.).
- 110 Restatement *supra* note 92.
- 111 *Id.*
- 112 *Id.*
- 113 *Ferner, DEA Raids supra* note 30; Higdon, *supra* note 48 (quoting the new acting DEA administrator as playing down the importance of marijuana enforcement and emphasizing enforcement against drugs such as heroin, meth and cocaine instead. Playing into this may be the fact that Congress cut funding for the DEA's anti-marijuana unit by half.).
- 114 Restatement *supra* note 92.

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- 115 21 U.S.C. §§ 841, 844, 846, 848 (2012) (banning a host of activities surrounding the sale of controlled substances).
- 116 See Rafa Fernandez De Castro, *How Mexican Drug Cartels Are Reacting to Marijuana Legalization in the U.S.*, FUSION (Mar. 23, 2015, 7:43 PM), <http://fusion.net/story/108575/how-mexican-drug-cartels-are-reacting-to-marijuana-legalization-in-the-u-s/> (noting that about 30% of Mexican Cartel export revenue comes from the sale of marijuana); Nancy Benac & Alicia Caldwell, *Marijuana Legalization Gains Support, Confounding Policymakers*, HUFFINGTON POST (June 29, 2013, 9:49 AM), http://www.huffingtonpost.com/2013/06/29/marijuana-legalization_n_3521547.html; Olga Khazan, *How Marijuana Legalization Will Affect Mexico's Cartels*, WASH. POST (Nov. 9, 2012), <http://www.washingtonpost.com/blogs/worldviews/wp/2012/11/09/how-marijuana-legalization-will-affect-mexicos-cartels-in-charts/>. Khazan notes that according to a Mexican study regarding the as yet still unpassed Colorado and Washington ballot initiatives to legalize marijuana for recreational use, “Mexico's cartels would lose \$1.425 billion if the initiative passed in Colorado and \$1.372 billion if Washington voted to legalize. The organization also predicted that drug trafficking revenues would fall 20 to 30 percent....” though an American study found that cartels would suffer less of a loss. *Id.*
- 117 See Benac & Caldwell, *supra* note 116. (asserting legalization would result in new tax revenue while negatively impacting the profits of cartels as well as affecting the racial inequity in the way marijuana laws are enforced.); see also Michelle Patton, *The Legalization of Marijuana: A Dead-End or the High Road to Fiscal Solvency?*, 15 BERKLEY J. CRIM. L. 163, 191-203 (2010); Caroline Fairchild, *Legalizing Marijuana Would Generate Billions In Additional Tax Revenue Annually*, HUFFINGTON POST (Apr. 20, 2012, 9:13 AM), http://www.huffingtonpost.com/2013/04/20/legalizing-marijuana-tax-revenue_n_3102003.html; LEGIS. COUNCIL OF THE COLO. GEN. ASSEMBLY, 2012 STATE BALLOT INFO. BOOKLET AND RECOMMENDATIONS ON RETENTION OF JUDGES, Research Publication No. 614, at 7-14 (2012) [hereinafter Colorado Voter Guide], <http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application/pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251822971738&ssbinary=true> (setting aside the first \$40 million of marijuana excise tax each year for constructing public schools).
- 118 Jesse Wegman, *The Injustice of Marijuana Arrests*, N.Y. TIMES (July 28, 2014), http://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html?_r=0.
- 119 *Id.* (noting that despite comparable marijuana use by blacks and whites, blacks are far more likely to be arrested for marijuana offenses than whites. In Iowa, blacks are 8.3 times as likely to be arrested.).
- 120 E.g., Vince Beiser, *Meet the Grandpa Doing Life Without Parole--for Pot*, YAHOO! NEWS (Jan. 12, 2015, 5:55 AM), <http://news.yahoo.com/meet-grandpa-doing-life-without-parole-pot-105555273.html>. In the U.S., “[a]n estimated 40,000 people are doing anywhere from one year to life... on marijuana charges.” *Id.*
- 121 Jay M. Zitter, *Construction and Application of Medical Marijuana Laws and Medical Necessity Defense to Marijuana Laws*, 50 A.L.R. 6th 353, 353 (2009) (noting that marijuana has a long tradition of being used as a medicine); California's Compassionate Use Act of 1996, listed numerous illnesses which could benefit from marijuana as a treatment. CAL. HEALTH & SAFETY CODE § 11362.5(b)(1)(A) (West 2007); WASH. STATE OFFICE OF THE SEC'Y OF STATE & THE STEVENS CNTY. AUDITOR, STATE OF WASHINGTON & STEVENS COUNTY VOTER PAMPHLET, at 23-31 (2012) [hereinafter Washington Voter Guide], https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/2012/General-Election/Documents/22-%20Stevens.pdf (directing marijuana tax revenue to health care, drug education programs etc.); UNITED STATES CONFERENCE OF MAYORS, *In Support of States Setting Their Own Marijuana Policies Without Federal Interference*, USMAYORS.ORG (June 2013), http://www.usmayors.org/resolutions/81st_Conference/csj13.asp; Colorado Voter Guide *supra* note 117.
- 122 See *supra* Section IA.
- 123 Jareen Imam, *Pot Money Changing Hearts in Washington*, CNN (July 10, 2015), <http://www.cnn.com/2015/07/10/us/washington-marijuana-70-million-tax-dollars/index.html>; Katie Mulvaney, *Advocate Says Colorado Received \$60 Million in Taxes and Fees from Marijuana in 2014*, POLITIFACTS (Jan. 11, 2014), <http://www.politifact.com/rhode-island/statements/2015/jan/11/james-aubin/advocate-says-colorado-received-60-million-taxes-a/>.

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- 124 Imam, *supra* note 123.
- 125 Mulvaney, *supra* note 123.
- 126 Mulvaney, *supra* note 123.(noting that in January tax revenues collected from marijuana sales in Colorado were \$3.5 million but by October they had climbed to \$7.6 million).
- 127 See Mia Taylor, *Luxury Cannabis Tourism: Here's Your Guide*, STREET ((July 29, 2015), <http://www.thestreet.com/story/13233391/3/luxury-cannabis-tourism-here-s-your-guide.html> (noting that people were travelling from “as far away as Japan, Brazil, Colombia and Australia” to partake in marijuana tourism.).
- 129 Bruce Barcott, *How to Invest in Dope*, N.Y. TIMES (June 25, 2013), http://www.nytimes.com/2013/06/30/magazine/how-to-succeed-in-the-legal-pot-business.html?ref=magazine&_r=0. (quoting a private equity fund's managers on the need to install new management in marijuana businesses they invest in because “[e]ntrusting great sums of cash to the equivalent of Harold and Kumar seemed foolhardy.”
- 130 Crombie, *supra* note 77 (“Hoggan, owner of Chemhistory, suspects growers take tainted samples to other labs in an effort to obtain clean results. ‘What is a guy going to do if he has a pound of BHO that is worth wholesale, \$8,000?’ Hoggan said. ‘He just paid \$100 for a test and he got a fail. Well, he's going to try this other lab and pass.’”).
- 131 Noelle Crombie, *How Potent Are Marijuana Edibles? Lab Tests Yield Surprising Results*, (Mar. 6, 2015), <http://www.oregonlive.com/marijuana-legalization/potency/index.html> (noting that of many marijuana edibles tested, the amount of THC listed on the label was widely inaccurate with some edibles containing only about 20% of what they stated while other had about 50% more than was stated).
- 132 Geiger, Hamilton and Dexheimer, *supra* note 39.
- 133 *Id.*
- 134 Hammer, *supra* note 1 at 4.
- 135 *Id.* at 2.
- 136 *Id.*
- 137 *Id.* at 3.
- 138 *Id.* at 4.
- 139 Geiger, Hamilton and Dexheimer, *supra* note 39; Higdon, *supra* note 48.
- 140 U.C.C. § 2-315 (2014).
- 141 *Id.*
- 142 *Id.* See also U.C.C. § 2-314 (2014) (implying that all goods sold by merchants must be at least “of fair average quality... and are fit for the ordinary purposes for which such goods are used...”).
- 143 See Scheuer, *supra* note 21.
- 144 There are numerous marijuana delivery companies advertised on the internet. See e.g., www.speedwee.com/; <http://www.eazeup.com/>; www.flashbuds.com/.
- 145 John Ingold, *Colorado Court Ruling Says Medicinal Marijuana Trumped by Federal Law*, DENV. POST (June 18, 2012), http://www.denverpost.com/news/marijuana/ci_21340833/colorado-court-ruling-says-medical-marijuana-trumped-by.

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- 146 *Id.*
- 147 *Id.*
- 148 [American Buyers Club of Mt. Vernon, Inc. v. Grayling](#), 368 N.E.2d 1057, 1059 (1997); Fairley, *supra* note 22 (quoting “[t]here are limited options to guarantee enforceability of contracts across state lines since multi-state contracts involving controversies in excess of \$75,000.00 are usually litigated through the federal courts,” said Leo Shalit, marijuana attorney in New York. Yet almost any contract relating to the marijuana business is at risk for being challenged due to current conflict with Federal law regardless of a state's position on legalization. ‘A state judge could still find that a contract is void due to federal preemption and public policy violations because federal law trumps any direct conflict with state law,’ said Shalit. ‘This concept is known as Federal Preemption.’).
- 149 [American Buyers Club](#), 368 N.E.2d at 1059 (“The Law of Illinois Provides a defense to the enforcement of a contract if that contract is illegal either as a matter of Illinois or of federal Law.”).
- 150 [In re Rent-Rite Super Kegs West Ltd.](#), 484 B.R. 799, 805 (Bankr. D. Colo. 2012).
- 151 *See AP Impact: After 40 years, \$1 trillion, U.S. War on Drugs has failed to meet any of its goals*, A SSOCIATED P RESS (May 13, 2010), <http://www.foxnews.com/world/2010/05/13/ap-impact-years-trillion-war-drugs-failed-meet-goals/>.
- 152 *Id.*
- 153 Rob Kambia, *The War on Pot: America's \$42 Billion Annual Boondoggle*, AlterNet (Oct. 8, 2007), [http://www.alternet.org/story/64465/the_war_on_pot%3A_america's_\\$42_billion_annual_boondoggle](http://www.alternet.org/story/64465/the_war_on_pot%3A_america's_$42_billion_annual_boondoggle)
- 154 Malik Burnett & Amanda Reiman, *How Did Marijuana Become Illegal in the First Place*, DRUG POLICY ALLIANCE BLOG (Oct. 9, 2014), <http://www.drugpolicy.org/blog/how-did-marijuana-become-illegal-first-place>.
- 155 RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES*, 51 (Lindesmith Center, 1974).
- 156 *See, e.g., Is Marijuana a Gateway Drug?*, National Institution on Drug Abuse, <http://www.drugabuse.gov/publications/marijuana/marijuana-gateway-drug> (last updated June 2015) (noting that some scientific studies have shown that marijuana use can potentially make users more vulnerable to drug abuse and addiction to other substances but also noting that “most people who use marijuana do not go on to use other, ‘harder’ substances.” In addition the article notes that alcohol and tobacco act in a similar way to marijuana for purposes of being a gateway to harder drugs.) *See also* JANET JOY ET AL., *MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE* (National Academy Press, 1999).
- 157 Burnett & Reiman, *supra* note 154.
- 158 *Id.*
- 159 German Lopez, *Meet the man trying to halt marijuana legalization*, VOX (July 27, 2015), <http://www.vox.com/2015/3/20/8257631/kevin-sabet-marijuana-legalization>.
- 160 *Id.* (Quoting Kevin Sabet, co-founder of Smart Approaches to Marijuana, a pro-prohibition group, “[M]y biggest concern is creating Big Marijuana--sort of like Big Tobacco, which were still dealing with the consequences of.”).
- 161 *Id.*
- 162 Ferner, *DEA Raids supra* note 30.
- 163 *See* Stableford, *supra* note 52.
- 164 *See* Ciaramella, *supra* note 32.

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- 165 See the website dumblaws.com for a list of strange laws that are still officially on the books.
- 166 N.Y. Penal Law § 255.17.
- 167 Farnsworth, *supra* note 90 § 5.2.
- 168 Pope Mfg. Co. v. Gormully, 144 U.S. 224, 233-234 (1892).
- 169 See *In re Rent-Ride*, *supra* note 150.
- 170 Isles Wellness, *supra* note 97, at 92-3 respectively quoting *Cole v. Brown Hurley Hardware Co.*, 117 N.W. 746, 747 (Iowa 1908) and *In re Estate of Pertson*, 42 N.W.2d 59, 63 (1950) (other citations omitted).
- 171 Fairley, *supra* note 22.
- 172 Plaintiff's Proof Prima Facie Case § 14:28 (the actual elements of fraud “(1) the defendant made a promise to the plaintiff to perform a particular action in the future; (2) at the time the promise was made the defendant did not intend to perform; (3) the plaintiff relied on that promise; (4) the plaintiff acted upon the promise to its detriment; and (5) the plaintiff suffered damage thereby.”)
- 173 *Id.*
- 174 See Scheuer, *supra* note 21 (discussing the application of the unclean hands doctrine to marijuana businesses much more extensively).
- 175 Rebecca Millican, *How to Draft an Effective Marijuana Contract*, CANNA LAW BLOG (Feb. 10, 2014), <http://www.cannalawblog.com/how-to-draft-an-effective-marijuana-contract/>; Fairley, *supra* note 22 (advocating a choice of law provision in all marijuana related contracts).
- 176 See *id.*
- 177 See *Hammer v. Today's Health Care II*, CV2011-051350 (Ariz. Super. Ct. Apr. 17, 2012).
- 178 *Id.*
- 179 Ingold, *supra* note 145 (citing a case in which A Colorado state court found a marijuana contract illegal under federal law and thus void); *Coats v. Dish Network*, 303 P.3d 147 (Colo. Ct. App. 2013).
- 180 *Id.*
- 181 *Brandon Coats v. Dish Network*, 350 P.3d 849, 850 (Colo. Sup. Ct. 2015).
- 182 The applicability of *in pari delicto* would similarly need to be addressed
- 183 Scheuer, *supra* note 21.
- 184 *Dish Network*, 350 P.3d at 850.
- 185 *Id.*
- 186 LORD, *supra* note 5 § 67:1.
- 187 *Id.* § 67:8.
- 188 *Id.* § 67:61 (any piece of land is presumed to be unique, and that monetary damages will typically be an inadequate remedy...”); § 67:79.

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- 189 *Id.*
- 190 The UCC provides for specific performance in § 2-716 if the goods are unique; LORD, *supra* note 5 § 67:79 (4th ed.) (noting that specific performance may be available when the goods are “not purchasable in the market.”)
- 191 LORD, *supra* note 5 § 67:1 (noting that specific performance is appropriate only when “damages are an inadequate remedy”).
- 192 10 Best Marijuana Strains, BRAINZ (June 12, 2015), http://www.brainz.org/best_marijuana_cannabis_strains/; Best Weed Strains 2015, STRAIN REVIEWER (June 12, 2015), <http://www.strainreviewer.com/>.
- 193 *Id.*; see generally Sophie-Claire Hoeller, *I Went to a Marijuana Dispensary in Colorado and it Felt Just Like Visiting a Wine Store*, YAHOO FIN. (July 14, 2015), <http://finance.yahoo.com/news/went-marijuana-dispensary-colorado-felt-200016939.html> (describing the experience of shopping for marijuana at a dispensary as similar to a “fancy wine shop, where customers defer to a connoisseur who knows the products well and can recommend something to each person's liking.”).
- 194 Cherry Pie Strain, STRAIN REVIEWER (May 12, 2015), <http://www.strainreviewer.com/2013/06/cherry-pie.html>.
- 195 *Schreck*, 37 P.3d at 514 (citations omitted).
- 196 LORD, *supra* note 5 § 67:3.
- 197 See *Operating Engineers' Local No. 428 Pension Trust Fund v. Zamborsky*, 650 F.2d 196, 198 (1981).
- 198 See *id.* (in which a pension fund sought injunctive relief in a federal court for the enforcement of a state court order by arguing that the state court order conflicted with federal law. The court went through a preemption analysis and found that the federal law did not directly pre-empt the state court order and that it was not impossible for the fund to comply with the state order as well as federal law.)