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Limitations in Federal Court on Damages for Claims Involving Cannabis

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Since the legalization of marijuana use by various states, courts from around the country have been tasked with addressing claims that involve cannabis-related activities. Due to the conflict between federal and state law in these jurisdictions, disputes often arise about the enforcement of underlying contracts, the viability of the claims, or the recovery of certain damages. Recently faced with some of these issues, the U.S. District Court for Oregon dismissed a cannabis grower's claim for $5.4 million in lost profits on several grounds, including that awarding these damages would violate federal law under the Controlled Substances Act of 1970 (CSA).[1] This decision could signal a growing trend by the federal courts to limit the ability to seek lost profits related to cannabis.

In *J. Lilly, LLC v. Clearspan Structures Int'l*, the grower purchased a commercial greenhouse from a manufacturer to start a cannabis grow operation.[2] After the greenhouse was constructed, the grower alleged defects that rendered the building incapable of supporting the type of grow operation intended.[3] The grower brought several contract-based claims against the manufacturer and a negligence claim against the contractor who installed the greenhouse.[4] The grower alleged that it lost $5.4 million in profits because it was unable to get the business started due to the allegedly defective greenhouse.[5]

In dismissing the claim for lost profits, the court enforced a consequential damages waiver clause, finding that it was conspicuous in the contract.[6] The court rejected the grower's argument that enforcement of the damages waiver was unconscionable, noting that the parties were of equal bargaining power and that the clause was reciprocal.[7]

The court also agreed with the manufacturer that lost profits were too speculative to let a jury decide.[8] The grower failed to offer any evidence of gross sales and associated expenses to produce the cannabis, or even expert testimony to support these damages.[9] The grower relied on deposition testimony that she knew she could make a profit if given the chance.[10]

The court further ruled that it would be improper to award lost profits allegedly suffered due to the inability to sell a product that is illegal to sell under federal law.[11] Oregon, like several other states, has decriminalized the commercial manufacture, delivery, possession, and sale of marijuana.[12] These activities, however, remain illegal under federal law. Under the CSA, it is illegal to manufacture, distribute, or possess marijuana, or maintain any place for the purpose of manufacturing marijuana.[13] The CSA criminalizes these activities regardless of whether permitted under state law.[14]

Relying on the Supremacy Clause of the U.S. Constitution, the district court in *J. Lilly* concluded that allowing the grower to recover these damages would force the defendants to violate the CSA.[15] The sale of a greenhouse or other product that might ultimately be used in the production or sale of marijuana, without more, may not directly run afoul of federal law. But allowing a party to recover lost profits for the sale of marijuana somehow connected to the transaction does.[16] Those damages relate to the very activities that are prohibited by the CSA.[17] Notably, the court reached this conclusion without invalidating the parties' contract. This presumably occurred because lost profits were damages outside of the contract.

This ruling suggests that some federal judges may be unwilling to allow a party to seek damages for claims that violate the CSA even if the underlying contract does not. This appears to be a growing trend among at least some federal courts.[18] Only time will tell whether other

courts, including state courts, come to the same conclusion or if these types of damages are uniformly allowed to be recovered in disputes involving cannabis.

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[1] 21 U.S.C. § 801 et seq.
[2] *J. Lilly, LLC v. Clearspan Structures International, Inc. et al*, 3:18-cv-01104-HZ, 2020 WL 1855190 (D. Or. April 13, 2020).
[3] *Id.* at *2.
[4] Id.
[5] *Id.*
[6] *Id.* at *4-5.
[7] *Id.* at *5-6.
[8] *Id.* at *11.
[9] *Id.* at *9-11.
[10] *Id.* at *10.
[11] *Id.* at *12.
[12] ORS 475B.005 et seq.
[13] 21 U.S.C. §§ 841, 844, 856.
[14] *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).
[15] *J. Lilly*, 2020 WL 1855190 at *12.
[16] *Id.* at *11-12.
[17] *Id.*
[18] *See, e.g., Bart St. III v. ACC Enters., LLC*, No. 2:17-cv-00083-GMN-VCF, 2018 WL 4682318, at *5 (D. Nev. Sept. 27, 2018) (holding that contract provision requiring the use of funds for operating capital for marijuana cultivation was unenforceable because it violated federal law); *Hemphill v. Liberty Mut. Ins. Co.*, No. 10-861 LH/RHS, 2013 WL 12123984, at *2 (D.N.M. Mar. 28, 2013) (refusing to require insurance company to pay plaintiff's future medical expenses for medical marijuana); *Tracy v. USAA Cas. Ins. Co.*, No. 11-00487 LEK-KSC, 2012 WL 928186, at *13 (D. Haw. Mar. 16, 2012) (declining to order insurer to pay claim for theft of marijuana plants).