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# A Cannabis Constitutional Fight, And The Calif. Atty Behind It

By **Sam Reisman**

Law360 (April 19, 2024, 10:17 PM EDT) -- Federal appellate courts are mulling multiple challenges to state and local cannabis licensure programs, all brought by one California-based attorney and each alleging that the dormant commerce clause of the U.S. Constitution must apply to federally illegal marijuana.

Within the last year, lawyer Jeffrey Mark Jensen has litigated challenges in New York, California, Maryland and Washington state, asserting the dormant commerce clause's primacy over policies which he alleges privilege in-state cannabis entrepreneurs over out-of-state players.

These challenged policies have included regulators' granting priority to candidates with an in-state cannabis conviction or who reside in neighborhoods that were disproportionately impacted by enforcement of cannabis laws.

In addition to representing the would-be licensees in court, Jensen is often a minority stakeholder in the plaintiff businesses. According to court documents, the majority stakeholders partnered with Jensen match the criteria set by state and local regulators for social equity considerations, such as having a cannabis conviction on their record or residency in a "disproportionately impacted" area.

Jensen, an alum of O'Melveny & Myers LLP who launched his solo practice in Beverly Hills last year, declined requests to be interviewed or comment for this story.

A graduate of Loyola Law School, Los Angeles, he launched his legal career with a focus on corporate transactions. From 2010 to 2023, he practiced at law firms Freeman Freeman & Smiley LLP and Atkinson Andelson Loya Ruud & Romo PLC, as well as O'Melveny, where he focused on complex commercial litigation, including business torts and employment and securities matters.

In his recent court filings, Jensen has noted that only one appellate court has ruled on the intersection of dormant commerce and pot, when a 2-1 panel of the First Circuit **ruled in 2022** that the constitutional doctrine applied to Maine's medical marijuana market.

The dormant commerce clause generally restricts states from enforcing policies that impede interstate trade. Since cannabis is federally illegal, and each state-regulated market exists in its own silo, these cases have usually turned on whether an interstate cannabis market can be said to exist at all.

Federal trial court judges in Washington state, Maryland and New York have recently disagreed with Jensen's arguments, finding support in the dissent in that First Circuit case and asserting that cannabis' continued federal illegality means dormant commerce doctrine does not apply to state regimes governing the drug's sale.

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## Dormant Commerce and Cannabis Cases

Attorney Jeffrey M. Jensen has brought multiple dormant commerce clause marijuana cases across the country, which have made their way to the federal circuit courts. Here's how they currently stand.

#### Second Circuit (New York)

**The Argument:** The challenge takes aim at New York's social equity criteria prioritizing applicants who have a cannabis conviction on their record or a family member with such a conviction.

"New York residents are more likely than out-of-state residents to have been convicted of a cannabis crime in New York, or to have a spouse, parent, dependent, or child convicted of a cannabis crime in New York," according to the original complaint. "Thus, the law discriminates against out-of-state residents on its face in violation of the dormant commerce clause of the United States Constitution."

**The Disposition:** The trial court in February rejected Jensen's bid for a preliminary injunction halting licensing, and he appealed the denial to the Second Circuit. Jensen asked the circuit court in March to expedite consideration of this appeal on the grounds that, absent an intervention, regulators could award all the licenses at issue before the appeal was resolved. The court denied the motion earlier this month. Regulators' response is due in July.

#### The Cases:

- Variscite NY Four LLC et al. v. New York State Cannabis Control Board et al., case no. 24-384, in the U.S. Court of Appeals for the Second Circuit
- Variscite NY Four LLC et al. v. New York State Cannabis Control Board et al., case number 1:23-cv-1599, in the U.S. District Court for the Northern District of New York

#### Ninth Circuit (Washington)

**The Argument:** The case alleges it is unconstitutional for Washington state to enforce a rule requiring that the majority stakeholder of a business applying for a social equity license reside in the state for six months prior to application. The lawsuit also alleges that it is discriminatory to enact policies giving preferential treatment to someone who lived in a disproportionately impacted area in the state, has a state cannabis conviction or who operated a medical marijuana business in the state.

**The Disposition:** A trial court judge denied a preliminary injunction bid, a decision which Jensen has appealed to the Ninth Circuit. The state filed its response in the circuit court earlier this month. At the trial court level, a motion to dismiss the case is pending.

#### The Cases:

- Peridot Tree WA Inc. v. Washington State Liquor and Cannabis Control Board et al., case number 24-209, in the U.S. Court of Appeals for the Ninth Circuit
- Peridot Tree WA Inc. v. Washington State Liquor and Cannabis Control Board et al., case number 3:23-cv-06111, in the U.S. District Court for the Western District of Washington

#### Ninth Circuit (California)

**The Argument:** In California, where cannabis licensure is handled at the municipal and local levels, Jensen companies have brought separate federal lawsuits against regulators in Sacramento and Los Angeles, each alleging their social equity requirements effectively privilege applicants with residencies in those respective cities.

**The Disposition:** The Ninth Circuit ruled in March that the trial judge in the Sacramento case erred in abstaining from the case and remanded the matter to the district court. The circuit court did not weigh in on the relationship between dormant commerce and marijuana. The Los Angeles case had been stayed pending an outcome in the Sacramento matter, but city officials asked the court earlier this month to lift the stay.

#### The Cases:

- Peridot Tree Inc. et al. v. City of Sacramento et al., case number 22-16783, in the U.S. Court of Appeals for the Ninth Circuit
- Peridot Tree Inc. v. City of Sacramento et al., case no. 2:22-cv-00289, in the U.S. District Court for the Eastern District of California
- Variscite Inc. et al. v. City of Los Angeles et al., case no. 2:22-cv-08685, in the U.S. District Court for the Central District of California

#### Fourth Circuit (Maryland)

**The Argument:** The lawsuit alleges the state's social equity criteria violate the dormant commerce clause since one qualifier is two years of attendance at a Maryland college where at least 40% of students received Pell Grants, and the suit alleges that Maryland residents are more likely to have attended college in the state. The plaintiff is Jensen's wife, Justyna.

**The Disposition:** The Maryland federal trial judge in February denied Jensen's motion for an injunction to block the state's social equity license lottery. Jensen appealed the decision to the Fourth Circuit and requested an expedited appeal, which the court has deferred until the matter is assigned to a panel. Jensen's opening brief is due in May. At the trial court level, a motion to dismiss remains pending.

#### The Cases:

- Justyna Jensen v. Maryland Cannabis Administration, case no. 24-1216, in the U.S. Court of Appeals for the Fourth Circuit
- Justyna Jensen v. Maryland Cannabis Administration et al., case no. 1:24-cv-00273, in the U.S. District Court for the District of Maryland

Jensen has appealed those district court decisions, and with the matters pending in the Second, Fourth and Ninth circuits, more appellate judges are poised to weigh in on the issue, with potentially huge ramifications for states' ability to regulate their intrastate cannabis markets.

In more than one of the pending appeals, Jensen has warned of a circuit split if the appellate judges side with the state regulators.

"Unless the Second Circuit reverses the Northern District of New York's order, it will create a circuit split with the First Circuit, the only circuit to address the issue to date, which concluded the dormant commerce clause applies to state cannabis licenses notwithstanding the Controlled Substances Act," a brief Jensen filed with the Second Circuit said earlier this month.

A brief Jensen filed in the Ninth Circuit a week prior similarly warned that, in the 2022 case, the First Circuit had already considered all the same arguments now being invoked by Washington state regulators, and rejected them.

That brief continued, "Satisfied that an interstate market in cannabis exists, the First Circuit applied the dormant commerce clause to prohibit state discrimination against out-of-state ownership of cannabis dispensaries."

In that same brief, Jensen cited case law where Ninth Circuit judges wrote, "Absent a strong reason to do so, we will not create a direct conflict with other circuits."

Attorneys, regulators and academics who track these issues have told Law360 that the terrain has shifted since the First Circuit's landmark 2022 decision and since courts generally began fielding **legal challenges** to marijuana license residency rules.

In the early years of cannabis legalization, some states would explicitly require that business licenses went to in-state residents, typically on the grounds that residency made it easier to vet them or because of a policy preference that state residents should absorb the material benefits of legalization.

That has changed in recent years, thanks in part to lawsuits such as the ones brought by Jensen and his companies.

"When crafting equity programs, regulators are leaning away from residency requirements and looking more closely at eligibility that is based on evidence other than residency," Shaleen Title, a former regulator with the Massachusetts Cannabis Control Commission and co-founder and CEO at

Parabola Center for Law and Policy, told Law360.

Title added, "This could include arrest, conviction, or incarceration of a person or their family member. It could also include other measurements of impact like assets, income level, or loss of housing through eviction or foreclosure."

As state policymakers have more carefully tailored their programs to withstand precisely such a challenge on dormant commerce grounds, challengers like Jensen as well as the state attorneys general tasked with defending the policies have likewise sharpened arguments in court, experts said.

"I think the arguments in these cases, the best arguments on both sides, are starting to crystallize and become clear," Robert Mikos, a professor at Vanderbilt Law School who has studied the intersection of federalism and drug policy, told Law360.

"It was muddled in those first few cases; it was hard to reply to a hodgepodge of arguments that were difficult to make sense of," Mikos said. The new clarity "will help in predicting where these current courts are headed."

Jensen's arguments have zeroed in on prongs of different states' social equity programs — such as residency in a neighborhood disproportionately impacted by enforcement of cannabis laws or attendance at an in-state college — and alleged that these are de facto residency requirements and therefore impermissible.

As the briefing in these cases continued, the allegations of geographic discrimination have gotten increasingly granular. In a brief filed in the Second Circuit earlier this month, Jensen argued that New York's "disproportionate impact" criteria was unfair to people who lived in states that were early to legalize cannabis, since cannabis arrests would have ended and those residents would have had less opportunity to live in an area hit heavily by marijuana enforcement.

States have responded typically by asserting that their criteria are within defensible public policy, in keeping with state marijuana legalization laws that direct regulators to award licenses with an eye toward restorative justice, and that the balance of equities does not favor granting one aspiring cannabis seller an injunction that would halt licensing for dozens or hundreds of other applicants.

But for the most part, states defending their licensure policies still invoke the continued fact of marijuana's federal illegality and assert that dormant commerce cannot apply since the product at issue is federally illegal. Even this illegality defense has been honed through repeated litigation.

According to Mikos, states' arguments were "previously framed as: 'There is no interstate commerce in cannabis,' which is preposterous. People scratched their head — there's a huge interstate market for this drug. I think instead, they've started to recast it as: 'The ban found in the Controlled Substances Act really amounts to congressional authorization to engage in some discrimination.'"

For challengers like Jensen, the federal illegality of cannabis products is beside the point, since none of the would-be licensees are proposing to bring marijuana across state lines and his cases deal strictly with equity ownership and investment.

"Appellants do not ask the court to permit transfers of cannabis products across state lines," Jensen told the Ninth Circuit earlier this month. "This case is about out-of-state persons owning Washington dispensaries."

Similarly, in the Second Circuit, Jensen wrote: "Appellants do not challenge New York's laws or regulations regarding the handling, processing, tracking, taxing, etc. of cannabis. Rather, the only issue presented in this litigation is whether New York may favor its own residents over out-of-state residents in investing in the ownership of a state-licensed cannabis business."

The issue remains a hot topic for the cannabis bar, with many advocates unsure that legal clarity will emerge on the issue absent federal rescheduling or a U.S. Supreme Court decision that resolves the matter, which a circuit split could potentially prompt further down the line.

"We continue to be skeptical that there is currently an interstate market in the state-legal marijuana

industry, and thus remain unconvinced that the [dormant commerce clause] applies currently in the context of state-legal marijuana," said Andrew Kline, senior counsel at Perkins Coie LLP and co-chair of the firm's cannabis industry group. "It's hard to see how one impedes interstate commerce if there is no interstate commerce."

Kline last year co-authored a cannabis industry-backed **report urging** the Biden administration to stop classifying marijuana as a Schedule I substance under the federal Controlled Substances Act. He said he was bullish about federal cannabis reform and noted that these cases could serve as a clarion call for state regulators to standardize their rules to make them consistent with other state requirements in anticipation of a true, legal interstate cannabis market emerging in the near future.

According to Kline, this consistency could be applied to topics other than social equity and licensure. He added, "Every state could be testing for the same heavy metals and toxins so [as] not to impede interstate commerce. Those seem like low-hanging fruit and the best first steps to avoid inevitable dormant commerce implications down the road."

Speaking of dormant commerce challenges to state and local marijuana licensure programs, Jonathan Havens, co-chair of the cannabis law practice at Saul Ewing LLP, told Law360, "Unless and until we have marijuana no longer as Schedule I, these issues are still going to crop up no matter what courts say."

Until then, he added, litigants will "continue to find sympathetic courts."

--Editing by Kelly Duncan and Lakshna Mehta.

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