

ILLINOIS CANNABIS: LOST IN THE WEEDS WITHOUT ACCESS TO INSURANCE AND BANKING SERVICES

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I. INTRODUCTION

Thirty-three states, the District of Columbia, and three United States Territories have implemented legal medical marijuana programs.² Additionally, the District of Columbia and eleven states – Alaska, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont and Washington – have legalized marijuana for recreational use for adults.³ Legal marijuana is estimated to be a \$9 billion industry, with projections to be valued anywhere from \$22 billion⁴ to \$50 billion in the coming years.⁵

After previously introducing a medical marijuana pilot program in 2014, Illinois legalized marijuana for recreational use for adults over the age of 21 on June 25, 2019.⁶ The legalization of recreational sales took effect on January 1, 2020, and sales totaled almost \$11 million in the first five days.⁷

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² *State Medical Marijuana Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 16, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

³ *State Marijuana Laws in 2019 Map*, GOVERNING THE STATES AND LOCALITIES (June 25, 2019), <https://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html>.

⁴ Kevin Murphy, *Legal Marijuana: The \$9 Billion Industry That Most Banks Won't Touch*, FORBES (Sept. 6, 2018), <https://www.forbes.com/sites/kevinmurphy/2018/09/06/legal-marijuana-the-9-billion-industry-that-most-banks-wont-touch/#1f5f38c93c68>.

⁵ A.M. Best, *New Opportunities for Insurers, But with Burgeoning Risks*, BEST'S SPECIAL REPORT (Mar. 12, 2019), <http://www3.ambest.com/bestweekpdfs/sr497749919749full.pdf>; Trey Williams, *Marijuana Industry Could be Worth \$50 Billion Annually by 2026*, MARKETWATCH (April 22, 2017), <https://www.marketwatch.com/story/marijuana-industry-could-be-worth-50-billion-annually-by-2026-2017-04-20>.

⁶ Compassionate Use of Medical Cannabis Pilot Program Act, 410 ILL. COMP. STAT. 130/1-999 (2020); Cannabis Regulation and Tax Act, 410 ILL. COMP. STAT. 705/1-999 (2020).

⁷ Ally Marotti, *Illinois Marijuana Dispensaries Sold More Than \$10.8 Million Worth of Recreational Weed in the First Five Days of Sales. Now, Some Have Halted Recreational Sales Amid Product Shortages*, CHICAGO TRIBUNE (Jan. 7, 2020), <https://www.chicagotribune.com/marijuana/illinois/ct-biz-legal-weed-shortages-close-dispensaries-20200106-xhy3lmtjnzdbnbotfibhpd74-story.html>.

While the sale of recreational marijuana is currently limited to dispensaries that were already licensed under the pilot program,⁸ many new cannabis businesses will enter the market.⁹ This will increase the demand for the ancillary services a business requires in order to operate.¹⁰

As with any business within a growing industry, legal marijuana-related businesses need financing and protection for their operations through banking services and insurance products. However, obtaining these financial services has proven to be difficult in light of the conflict between federal and state laws on the legality of marijuana.¹¹ Insurers and banks risk severe criminal liability by offering services to cannabis-related businesses.¹² Courts across the country have struggled to apply a consistent legal framework, resulting in a general haze of how businesses transacting with the marijuana industry should comport themselves to comply with federal law enforcement.¹³

This note will address how and why Illinois can and should foster the growth of marijuana businesses with policies and judicial decision-making that favor the industry's access to insurance and banking services. In light of state legislative action, continued signs of acceptance of state-legal marijuana programs from the federal government, and the financial position of the state, Illinois can make policy choices in its best interest to foster the responsible growth of its burgeoning legal marijuana industry. Additionally, federal and state courts should respect the actions and intent of the co-equal branches of their respective governments that have signaled their approval of allowing state-legal marijuana programs to operate through legislation and non-enforcement action. Also, state court judges should not find the Cannabis Regulation and Tax Act to be preempted by federal law in hearing disputes

⁸ 410 ILL. COMP. STAT. § 705/15-15(a) (2020) providing early approval for license for recreational sales to those already operating a licensed medical dispensary in Illinois. 410 ILL. COMP. STAT. § 705/20-10(a) (2020) provides the same for cultivation centers.

⁹ Katie Shepard, 'It's A Lot Happening All at Once': Illinois Shops Run Out of Marijuana Just Six Days After Start of Legalization, WASHINGTON POST (Jan. 7, 2020), <https://www.washingtonpost.com/nation/2020/01/07/illinois-runs-out-recreational-marijuana-first-week-legalized/>.

¹⁰ See Francis J. Mootz & Jason Horst, *Cannabis and Insurance*, 23 LEWIS & CLARK L. REV. 893 (2019).

¹¹ Kevin Murphy, *Legal Marijuana: The \$9 Billion Industry That Most Banks Won't Touch*, FORBES, (Sept. 6, 2018), <https://www.forbes.com/sites/kevinmurphy/2018/09/06/legal-marijuana-the-9-billion-industry-that-most-banks-wont-touch/#1f5f38c93c68>; *Insurance Coverage Remains Sparse, Confusing for Cannabis Industry*, CANNABIS WIRE (Apr. 15, 2019), <https://cannabiswire.com/2019/04/15/insurance-coverage-remains-sparse-confusing-for-cannabis-industry/>.

¹² 18 U.S.C. §§ 1961-68; See also Gene Markin, *RICO Liability for Marijuana Enterprises*, 10 NAT'L L. REV., no. 153, June 1, 2020, <https://www.natlawreview.com/article/rico-liability-marijuana-enterprises>.

¹³ See Jodi S. Greene, *High Risk or High Reward? Navigating the Emerging Insurance Market for the Cannabis Industry*, 29 INS. COVERAGE LITIG. 22, 25 (2019).

between those involved in the state-legal cannabis industry. This note asserts that the current legal climate for state-legal cannabis industries provides Illinois and the courts therein the latitude to adopt policies that will promote the growth of cannabis-related businesses while maintaining a successful and safely regulated market that benefits the state and its citizens.

In support of these proposals, this note will first present the background information of marijuana's current legal status, the current market participation of financial institutions, how the drug's legal status creates barriers into the market for such institutions, and how state-legal marijuana laws have been treated across the country. Then, an analysis of these laws under a Federalist theory towards preemption will illustrate why such proposals are both possible and sensible.

II. BACKGROUND INFORMATION ON THE CURRENT MARKET CONDITIONS

A. Current Legal Status of Marijuana

The legal status of marijuana is changing at both the state and federal levels of government. Marijuana's inclusion in the Controlled Substances Act of 1970 (CSA) forms the basis of its problematic legal status at the federal level.¹⁴ Marijuana is defined in the CSA as:

[A]ll parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.¹⁵

It is classified as a Schedule I drug alongside heroin and LSD,¹⁶ meaning there is a high potential for abuse associated with marijuana and there is no medically accepted use in the eyes of the federal government.¹⁷ Despite this almost 50 year-old classification, parts of the federal government are exploring new information on the medicinal value of marijuana.¹⁸

Against this stark background of federal prohibition, the last two decades have seen a legislative transformation in the way many states across

¹⁴ 21 U.S.C. §§801-904.

¹⁵ 21 U.S.C. § 802(16), where subsection A provides the definition and subsection B provides an exception for industrial hemp.

¹⁶ 21 U.S.C. § 812(c), Sched. I(c)(10).

¹⁷ 21 U.S.C. § 812(b)(1).

¹⁸ U.S. FOOD & DRUG ADMIN., *FDA Regulation of Cannabis and Cannabis-Derived Products, Including Cannabidiol (CBD)*, (Oct. 16, 2019), <https://www.fda.gov/news-events/public-health-focus/fda-regulation-cannabis-and-cannabis-derived-products-including-cannabidiol-cbd>.

the country view legalized medical and recreational marijuana.¹⁹ The legalized market for medical marijuana commenced over 20 years ago in California, where patients were issued an identification card after getting a recommendation for medical cannabis from a physician.²⁰ The recreational market was spearheaded by Washington and Colorado over 7 years ago after voters passed ballot initiatives.²¹ In 2013, Illinois passed the Compassionate Use of Medical Cannabis Pilot Program Act, introducing a state-legal medical marijuana program.²² In 2019, Illinois became the first state to legalize a recreational cannabis market through a legislative vote.²³ The previous acts of other states can provide guidance on how Illinois should go about promoting the success of its state-legal cannabis industry.

In addition to the medical and recreational markets for marijuana, the markets for cannabidiol (CBD) products and industrial hemp are included in the overall cannabis industry that is finding barriers to financial services.²⁴ CBD is the second-most widely known cannabinoid contained in the cannabis plant and is extracted to be used in different products that can effectively treat pain, anxiety, and epilepsy, but does not produce a narcotic effect.²⁵ Industrial hemp is the same cannabis plant but is harvested to make rope and textiles rather than for consumption, as it only contains trace amounts of psychoactive chemicals.²⁶ The Agriculture Improvement Act of 2018, also known as the Farm Bill, expressly removed cannabis plants with THC levels less than 0.3%, those being the plants used for CBD extraction and industrial hemp, from being subject to the CSA.²⁷ As a result, neither will be subject to the regulation of Drug Enforcement Administration (DEA).²⁸ Instead, CBD products will be regulated by the Federal Drug Administration (FDA) and industrial hemp production will fall under the purview of the

¹⁹ See Shelly B. DeAdder, *The Legal Status of Cannabidiol Oil and the Need for Congressional Action*, 9 N.C. CENT. SCI. & INTELL. PROP. L. REV. 68 (2016).

²⁰ Natalie Fertig, *The Great American Cannabis Experiment*, POLITICO (Oct. 14, 2019), <https://www.politico.com/agenda/story/2019/10/14/cannabis-legal-states-001031>.

²¹ *Id.*

²² Compassionate Use of Medical Cannabis Pilot Program Act, 410 ILL. COMP. STAT. 130/1-999 (2020).

²³ Cannabis Regulation and Tax Act, 410 ILL. COMP. STAT. 705/1-999 (2020); Natalie Fertig, *The Great American Cannabis Experiment*, POLITICO (Oct. 14, 2019), <https://www.politico.com/agenda/story/2019/10/14/cannabis-legal-states-001031>.

²⁴ See Shelly B. DeAdder, *The Legal Status of Cannabidiol Oil and the Need for Congressional Action*, 9 N.C. CENT. SCI. & INTELL. PROP. L. REV. 68 (2016).

²⁵ *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research*, NATIONAL ACADEMIES OF SCIENCES, ENGINEERING & MEDICINE, HEALTH & MEDICINE DIV. (Jan. 12, 2017), <https://www.ncbi.nlm.nih.gov/books/NBK425767/>.

²⁶ Shelly B. DeAdder, *The Legal Status of Cannabidiol Oil and the Need for Congressional Action*, 9 N.C. CENT. SCI. & INTELL. PROP. L. REV. 68, 73 (2016).

²⁷ Agriculture Improvement Act of 2018, 7 U.S.C. § 1639(o).

²⁸ Jodi S. Greene, *High Risk or High Reward? Navigating the Emerging Insurance Market for the Cannabis Industry*, 29 INS. COVERAGE LITIG. 22, 25 (2019).

Department of Agriculture.²⁹ While this action has marginally increased the availability of financial services to CBD and industrial hemp businesses, there are still issues that limit the industry's access to necessary financial services.³⁰

The executive branch of the federal government has also relaxed its stance against state-legal marijuana industries, even after a change in the political party in the White House.³¹ In 2009, the Department of Justice (DOJ) cited its commitment to using the Department's limited resources efficiently and rationally, along with a U.S. Attorney's "broad discretion" in prosecutorial decisions, to direct the Department to not prosecute those who are in compliance with their relevant state law legalizing medical marijuana.³² In June of 2011, as a response to inquiries from multiple U.S. Attorneys, the Deputy Attorney General issued further guidance that clarified where Department resources should be used.³³ It stated that the 2009 memorandum was only meant to direct federal authorities away from enforcement against patients or their caregivers that were in compliance with state law.³⁴ It provided that large-scale commercial operations were not to be protected by the previous guidance, and specifically made mention that "[t]hose who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws."³⁵ Such a threat to a business's operation is obviously worrisome for insurers and banks dealing with state-legal cannabis businesses.

²⁹ *Id.*

³⁰ Secure and Fair Enforcement Banking Act, H.R. 1595, 116th Cong. § 11(a)(2) (2019); *Insurance Coverage Remains Sparse, Confusing for Cannabis Industry*, CANNABIS WIRE (Apr. 15, 2019), <https://cannabiswire.com/2019/04/15/insurance-coverage-remains-sparse-confusing-for-cannabis-industry/>.

³¹ Tom Angell, *Trump Issues Signing Statement on Medical Marijuana Provision of Funding Bill*, MARIJUANA MOMENT (February 15, 2019), <https://www.marijuanamoment.net/trump-issues-signing-statement-on-medical-marijuana-provision-of-funding-bill/>. Despite Presidential signing statements on funding bills, the federal government has not increased enforcement of federal marijuana laws in states with medical or recreational programs.

³² Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to all U.S. Attys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), <https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states>.

³³ Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to all U.S. Attorneys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), <http://files.ctctcdn.com/201bc6cf001/10f50403-6ee6-4e47-bbc3-ed48d1912bbb.pdf>.

³⁴ *Id.*

³⁵ *Id.*

However, in 2013, the Department issued what is commonly referred to as the Cole Memorandum.³⁶ This guidance reversed the Department's position on consideration of the size of a state-legal marijuana operation in making enforcement decisions.³⁷ Instead, the Department provided that, because there are effective regulatory regimes being implemented by state and local authorities, U.S. Attorneys should only exercise their prosecutorial powers when an operation is not in compliance with the state regulatory program or interferes with the Department's enforcement priorities.³⁸

In 2014, the Rohrabacher-Farr Amendment was added to an omnibus spending bill passed by Congress.³⁹ The Amendment barred the DOJ from using appropriations to interfere with state-legal medical marijuana programs.⁴⁰ The DOJ's narrow interpretation of this amendment was reviewed in *McIntosh*, a case before the Ninth Circuit.⁴¹

In *McIntosh*, the consolidated interlocutory appeals of ten defendants prosecuted under the CSA in legal medical marijuana states requested the court to dismiss their indictments or enjoin the Department's prosecutions because the Department was prohibited from spending money on such prosecutions, as provided by the Rohrabacher-Farr Amendment.⁴² In holding that the amendment prohibits the Department of Justice from prosecuting those who are acting in accordance with state medical marijuana laws, the Ninth Circuit reasoned that federal prosecution of such individuals "prevent[s] the state from giving practical effect to its law providing for the non-prosecution of individuals who engage in the permitted conduct."⁴³ Despite the fact that the amendment only applies to medical marijuana state

³⁶ Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to all U.S. Attorneys, Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

³⁷ *Id.*

³⁸ Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to all U.S. Attorneys, Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. The Department's enforcement priorities are preventing: (1) sales of marijuana to minors; (2) revenue from the marijuana sales from funding criminal enterprises; (3) marijuana from states where it is legal under state law from being transferred to other states; (4) state-legal marijuana activity from being used as a cover for other drug trafficking operations; (5) violence and the use of guns in the manufacture and sale of marijuana; (6) drugged driving and other adverse public health risks associated with marijuana use; and (7) the growing, possession or use, of marijuana on public lands. *Id.*

³⁹ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 1230, 2217 (2014).

⁴⁰ *Id.*

⁴¹ *United States v. McIntosh*, 833 F.3d 1163, 1176-77 (9th Cir. 2016) (rejecting the Department of Justice's interpretation of the amendment that it was only barred from taking legal action against a state, as opposed to private individuals).

⁴² *Id.* at 1168-69.

⁴³ *Id.* at 1176-77.

laws and its temporary nature as an add-on to a spending bill, this decision was a big win for the cannabis industry.⁴⁴

Following the election of President Trump, Jeff Sessions took over as Attorney General and issued his own memorandum that rescinded the Obama-era guidance.⁴⁵ However, the Rohrabacher-Farr Amendment restricting the DOJ from using funds to prosecute those involved with state-legal medical marijuana programs has continued to be included in spending bills and signed by President Trump since taking office.⁴⁶ Notably, in an apparent effort to preserve executive power, the President has issued signing statements contrary to the Ninth Circuit's ruling in *McIntosh* pertaining to this amendment on two occasions.⁴⁷

The actions of the Trump administration have not resulted in any crackdowns on state-legal medical marijuana programs.⁴⁸ Furthermore, Sessions' replacement, William Barr, provided in his confirmation process that he would not direct the Department to target those who have been operating in reliance on the Cole Memorandum.⁴⁹

In addition to the Rohrabacher-Farr Amendment, the House of Representatives has passed the Secure and Fair Enforcement (SAFE) Banking Act.⁵⁰ The Act has been referred to the Senate Committee on

⁴⁴ *Id.* at 1177-78; Eugene Volokh, *Ninth Circuit Bars Federal Prosecutions for State-Law-Authorized Medical Marijuana*, WASH. POST, Aug. 16, 2016, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/16/ninth-circuit-bars-federal-prosecutions-for-state-law-authorized-medical-marijuana/>.

⁴⁵ Memorandum from Jefferson B. Sessions, Att'y Gen., U.S. Dep't of Justice, to all U.S. Attorneys, *Marijuana Enforcement* (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

⁴⁶ Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, § 537, 131 Stat. 135, 228 (2017); Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 537, 133 Stat. 13, 138 (2019).

⁴⁷ Presidential Statement on Signing the Consolidated Appropriations Act, 2017, 2017 DAILY COMP. PRES. DOC. 312 (May 5, 2017), <https://www.govinfo.gov/content/pkg/DCPD-201700312/pdf/DCPD-201700312.pdf> (indicating that the President would "treat this provision consistently with [his] constitutional responsibility to take care that the laws be faithfully executed."); Presidential Statement on Signing the Consolidated Appropriations Act, 2019, 2019 DAILY COMP. PRES. DOC. 82 (Feb. 15, 2019), <https://www.govinfo.gov/content/pkg/DCPD-201900082/pdf/DCPD-201900082.pdf> (issuing a similar statement, providing that he will treat the amendment in accordance with his "constitutional responsibility to faithfully execute the laws of the United States.>").

⁴⁸ Tom Angell, *Trump Issues Signing Statement on Medical Marijuana Provision Of Funding Bill*, MARIJUANA MOMENT, (Feb. 15, 2019), <https://www.marijuanamoment.net/trump-issues-signing-statement-on-medical-marijuana-provision-of-funding-bill/>.

⁴⁹ Sarah N. Lynch, *U.S. Attorney General Nominee Will Not Target Law-abiding Marijuana Businesses*, REUTERS, (Jan. 15, 2019), <https://www.reuters.com/article/us-usa-trump-barr-marijuana/us-attorney-general-nominee-will-not-target-law-abiding-marijuana-businesses-idUSKCN1P92JO>.

⁵⁰ Secure and Fair Enforcement Banking Act, H.R. 1595, 116th Cong. (2019); Veronica Stracqualursi, *House passes cannabis banking bill, but it faces uncertainty in the Senate*, CNN.COM, (Sept. 26 2019), <https://www.cnn.com/2019/09/26/politics/cannabis-banking-bill-house-vote/index.html>.

Banking, Housing, and Urban Affairs.⁵¹ Other than removing cannabis from Schedule I, passing this piece of legislation would be the most impactful action the legislature could undertake to increase marijuana-related businesses' access to financial services.⁵² The House passed the bill with the express purpose of ensuring cannabis-related businesses could access financial services in the interest of public safety.⁵³ It gives financial service providers, such as insurance companies and banks, the strong legislative authorization that protects them against criminal liability and lessens their regulatory burden.⁵⁴

The Act would have provided safe harbor to financial institutions by prohibiting a banking regulator from:

- (1) terminating or limiting deposit insurance provided by the Federal Deposit Insurance Act solely because the institution provides services to a cannabis-related legitimate;⁵⁵
- (2) discouraging in any way an institution from providing services to such businesses;⁵⁶
- (3) incentivizing a financial institution to terminate their services to a cannabis-related customer;⁵⁷
- (4) taking any adverse action over a cannabis-related loan;⁵⁸
- or
- (5) penalizing an institution in any way for providing services in the state-legal cannabis market.⁵⁹

It also would have established that proceeds from a marijuana-related business are not unlawful and that a financial institution is not criminally liable for providing their services to the industry, nor are they subject to forfeiture of assets related to cannabis clients.⁶⁰ Among other protections, the Act expressly states that hemp and CBD businesses should have all of the same protections, and further attempts to clarify the legal status of those

⁵¹ Secure and Fair Enforcement Banking Act, H.R. 1595, 116th Cong. (2019); Veronica Stracqualursi, *House passes cannabis banking bill, but it faces uncertainty in the Senate*, CNN.COM, (Sept. 26 2019), <https://www.cnn.com/2019/09/26/politics/cannabis-banking-bill-house-vote/index.html>.

⁵² Secure and Fair Enforcement Banking Act, H.R. 1595, 116th Cong. (2019). The SAFE Banking Act's purpose is "[t]o create protections for depository institutions that provide financial services to cannabis-related legitimate businesses and service providers for such businesses, and for other purposes." *Id.*

⁵³ Secure and Fair Enforcement Banking Act, H.R. 1595, 116th Cong. § 1(b) (2019).

⁵⁴ Secure and Fair Enforcement Banking Act, H.R. 1595, 116th Cong. (2019); Danielle Hunt & Vanessa Williams-Hall, *A Tale of Two Countries: Does Canada's Legalization of Cannabis Give It the First Mover Advantage in Franchising*, 39 FRANCHISE L. J. 55, 72 (2019).

⁵⁵ Secure and Fair Enforcement Banking Act, H.R. 1595, 116th Cong. § 2(a)(1) (2019).

⁵⁶ Secure and Fair Enforcement Banking Act, H.R. 1595, 116th Cong. § 2(a)(2) (2019).

⁵⁷ Secure and Fair Enforcement Banking Act, H.R. 1595, 116th Cong. § 2(a)(3) (2019).

⁵⁸ Secure and Fair Enforcement Banking Act, H.R. 1595, 116th Cong. § 2(a)(4) (2019).

⁵⁹ Secure and Fair Enforcement Banking Act, H.R. 1595, 116th Cong. § 2(a)(5) (2019).

⁶⁰ Secure and Fair Enforcement Banking Act, H.R. 1595, 116th Cong. §§ 3-4 (2019).

businesses by establishing that the CSA does not apply to their conduct.⁶¹ Illinois granted financial institutions similar protection from adverse action by a state agency in the Cannabis Regulation and Tax Act of 2019.⁶² The mirrored intent between the two acts emphasize how important it is that the state-legal cannabis industry gain increased access to insurance products and banking services.

B. Current Market Participation of Financial Institutions

While the number of banks offering services to the industry is increasing,⁶³ the availability of banking services is largely dependent on whether the state within which the business operates has robust regulations for financial transactions.⁶⁴ The more regulation there is in a market, such as the marijuana market, the more likely it is that firms will feel comfortable servicing clients in that market because regulatory risk is more defined.⁶⁵ As of September 30, 2019, 723 of the approximately 10,000 financial institutions in the nation are servicing state-legal cannabis industries.⁶⁶ Banks in Illinois have shown an above-average interest in servicing the businesses of the state's medical marijuana program.⁶⁷ However, to account for the regulatory workload banks and credit unions undertake in servicing cannabis clients, the fees an institution charges can increase costs significantly, creating even more burden on marijuana-related businesses.⁶⁸

⁶¹ Secure and Fair Enforcement Banking Act, H.R. 1595, 116th Cong. § 11 (2019).

⁶² Cannabis Regulation and Tax Act, 2019 Ill. Legis. Serv. P.A. 101-27, § 900-32 & 33 (West), amendments to the Banking Act and Credit Union Act.

⁶³ *Marijuana Banking Update Sept. 2019*, U.S. TREASURY, FINANCIAL CRIMES ENFORCEMENT NETWORK, https://www.fincen.gov/sites/default/files/shared/289465%204thQ%20FY2019%20Marijuana%20Banking%20Update_Public.pdf; Omar Sacirbey, *Cover Story: Landing a Bank Account*, MARIJUANA BUSINESS MAGAZINE (July 2019), <https://mjbizmagazine.com/landing-a-bank-account-for-your-marijuana-business/>. Only about 6% of the approximately 10,000 depository institutions serve marijuana-related businesses.

⁶⁴ Hilary Bricken, *Cannabis Banking Blues: How To Best Get A Bank Account*, ABOVE THE LAW (Jun. 6, 2018), <https://abovethelaw.com/2018/06/cannabis-banking-blues-how-best-to-get-a-bank-account/>.

⁶⁵ *Id.*

⁶⁶ *Marijuana Banking Update Sept. 2019*, U.S. TREASURY, FINANCIAL CRIMES ENFORCEMENT NETWORK, https://www.fincen.gov/sites/default/files/shared/289465%204thQ%20FY2019%20Marijuana%20Banking%20Update_Public.pdf. This number is inferred from the 563 banks and 160 credit unions that filed suspicious activity reports with the Financial Crimes Enforcement Network that contained the key phrases “marijuana limited,” “marijuana priority,” and “marijuana termination.”

⁶⁷ Omar Sacirbey, *Cover Story: Landing a Bank Account*, MARIJUANA BUSINESS MAGAZINE (July 2019), <https://mjbizmagazine.com/landing-a-bank-account-for-your-marijuana-business/>.

⁶⁸ *Id.*

Insurance providers have also been increasingly entering the state-legal marijuana marketplace.⁶⁹ Due to statutory requirements, marijuana-related businesses in Illinois require a surety bond.⁷⁰ Under the Cannabis Regulation and Tax Act, those wishing to obtain a license to operate a dispensary are required to make a showing of financial responsibility by purchasing a surety bond in the amount of \$50,000.⁷¹ In order to obtain a license for a cultivation center, the bond must be for \$2,000,000.⁷²

The surety bond requires the principal, or in this case, a state-legal marijuana business, to:

[T]imely and successfully [complete] dispensary construction, [operate] in a manner that provides an uninterrupted supply of cannabis, faithfully [pay] license renewal fees, [keep] accurate books and records, [make] regulatorily required reports, [comply] with State tax requirements, and [conduct] the dispensary in conformity with the Act and any administrative rules made pursuant to the Act.⁷³

However, the cultivation bond can be reduced by \$500,000 each time certain compliance goals are met over a three year period.⁷⁴ If the principal is found to be in violation of the terms of the bond, the bond issuer is immediately required to pay the amount of the bond to the obligee, or in this case, the State.⁷⁵ This expensive consequence acts to deter marijuana-related businesses from obtaining licenses and not making use of them, as licenses are limited and Illinois wants them issued to those who will use them.

⁶⁹ *What Cannabis Insurance Covers in Illinois*, MFE INSURANCE BROKERAGE (Oct. 25, 2019), <https://www.mfeinsurance.com/what-cannabis-insurance-covers-in-illinois/>.

⁷⁰ Cannabis Regulation and Tax Act, 2019 Ill. Legis. Serv. P.A. 101-27, § 705/15-55 (West).

⁷¹ *Id.*

⁷² ILL. ADMIN. CODE tit. 8, § 1000.40(g)(1)(A) (2019). The Cannabis Regulation and Tax Act did not specify this amount as it did for dispensaries, but it did grant the same rulemaking authority to the Illinois Department of Agriculture as it did under the medical marijuana bill. As such, because cultivation licenses are only being issued to those licensees already approved under the medical program, it can be inferred the same rules will apply.

⁷³ Illinois Department of Financial and Professional Regulation, Adult Use Dispensing Organization License Surety Bond, <https://www.idfpr.com/Forms/AUC/F2371.pdf>. The similar form for cultivators provides a slightly different wording, but in essence has same requirement. Department of Agriculture, Medical Cannabis Cultivation Center Surety Bond, <https://www2.illinois.gov/sites/mcpp/Documents/Cultivation%20Center%20Surety%20Bond%20Construction%20Form.pdf>.

⁷⁴ ILL. ADMIN. CODE tit. 8, § 1000.60 (2019). These goals are related to the operation of the grow facility, such as maintain compliance with state regulations.

⁷⁵ Illinois Department of Financial and Professional Regulation, Adult Use Dispensing Organization License Surety Bond, <https://www.idfpr.com/Forms/AUC/F2371.pdf>.

The fact that a surety bond is the only financial product Illinois requires does not mean that these businesses have any less of a need for more traditional insurance coverages. To protect against liability arising from claims made by those injured by a policyholder, businesses usually carry commercial policies for general liability, business property, business income, medical payments, and more.⁷⁶ In an attempt to assist the cannabis industry's access to these products, many states have approved products designed specifically for marijuana-related businesses.⁷⁷ For example, state departments of insurance in both Colorado and California have approved Cannabis Businessowners Policies (CannaBOP).⁷⁸ These policies include express provisions that provide coverage regardless of federal illegality when an insurer is compliant with state law.⁷⁹ The Illinois Department of Insurance should do the same.

Currently, only certain types of insurance companies, known as surplus-lines insurers, fill the needs of most of the businesses where state-approved insurance products from licensed carriers are yet to be offered.⁸⁰ While these insurers are regulated, they are less so than their licensed and admitted counterparts.⁸¹ The provided coverage can be limited in scope and fail to provide the limits of liability a marijuana-related business may need to adequately protect itself.⁸² Generally, insurers entering the legal marijuana market do so offering liability limits of just \$1,000,000 per occurrence and \$2,000,000 aggregate for commercial general liability, property liability, and product liability policies.⁸³

⁷⁶ Francis J. Mootz III & Jason Horst, *Cannabis and Insurance*, 23 LEWIS & CLARK L. REV. 893, 897 (2019); *What Cannabis Insurance Covers in Illinois*, MFE INSURANCE BROKERAGE, (Oct. 25, 2019), <https://www.mfeinsurance.com/what-cannabis-insurance-covers-in-illinois/>.

⁷⁷ Matthew Lerner, *AAS Cannabis Policy Program Approved in Colorado*, BUSINESS INSURANCE (Apr. 22, 2019); Press Release, California Department of Insurance, California's Cannabis Insurance Marketplace Continues to Grow with Commissioner's Latest Approval (June 4, 2018), <https://www.insurance.ca.gov/0400-news/0100-press-releases/2018/release064-18.cfm>.

⁷⁸ Matthew Lerner, *AAS Cannabis Policy Program Approved in Colorado*, BUSINESS INSURANCE (Apr. 22, 2019); Press Release, California Department of Insurance, California's Cannabis Insurance Marketplace Continues to Grow with Commissioner's Latest Approval (June 4, 2018), <https://www.insurance.ca.gov/0400-news/0100-press-releases/2018/release064-18.cfm>.

⁷⁹ Jodi S. Greene, *High Risk or High Reward? Navigating the Emerging Insurance Market for the Cannabis Industry*, 29 INS. COVERAGE LITIG., no. 2, 2019, at 22, 34.

⁸⁰ Symposium, *Regulating Marijuana at Home and Abroad: E/Insuring the Marijuana Industry*, 49 U. PAC. L. REV. 43, 46 (2017).

⁸¹ *Id.*

⁸² A.M. Best, *New Opportunities for Insurers, But with Burgeoning Risks*, BEST'S SPECIAL REPORT, Mar. 12, 2019, <http://www3.ambest.com/bestweekpdfs/sr497749919749full.pdf>; California Department of Insurance, Press Release: First commercial insurer to file cannabis business insurance is approved by insurance commissioner (Nov. 2, 2017), <https://www.insurance.ca.gov/0400-news/0100-press-releases/archives/release119-17.cfm>.

⁸³ A.M. Best, *New Opportunities for Insurers, But with Burgeoning Risks*, BEST'S SPECIAL REPORT, Mar. 12, 2019, <http://www3.ambest.com/bestweekpdfs/sr497749919749full.pdf>.

One explanation for the low limits insurers are willing to provide is that large reinsurance providers have largely avoided the state-legal marijuana market out of concern for its illegality under federal law.⁸⁴ For example, Lloyd's of London, a large international insurance marketplace based in the United Kingdom, provided their services in several states through member-formed syndicates before deciding to discontinue writing new business and not renew existing policies for cannabis-related businesses in 2015.⁸⁵ In a letter to syndicate members directing them to cease writing such business, Lloyd's pointed to the federal illegality as a reason for leaving the market, claiming non-enforcement policies of the federal government do not provide a stable enough legal backdrop to conduct business under.⁸⁶ However, Lloyd's is now servicing marijuana businesses again in Canada, as the country legalized the drug nationwide in 2018.⁸⁷

Such a development illustrates how important it is for financial institutions to have clear legal footing in the markets in which they operate. For state-legal cannabis businesses to have access to the insurance services they need, the federal government needs to remove marijuana from Schedule I status, rather than implement relatively weak and easily reversible non-enforcement policies.

While the involvement of multi-national reinsurance providers may be out of the State's hands, Illinois can signal its commitment to regulating the industry and fostering its responsible growth by seeking out and approving cannabis-focused insurance policies from state licensed insurance carriers. The State stands to realize immense economic gains by promoting such growth and citizens are in favor of a well-regulated legal market for marijuana.⁸⁸ Jobs within the legal marijuana industry are some of the fastest

⁸⁴ *Id.*

⁸⁵ Tony C. Dreibus, *Lloyd's of London to Exit U.S. Cannabis Insurance Industry*, MARIJUANA BUSINESS DAILY (May 29, 2015), <https://mjbizdaily.com/exclusive-lloyds-of-london-to-exit-u-s-cannabis-industry/>; see Robert McVay, *Marijuana Insurance in the Wake of Lloyd's Exit*, CANNA LAW BLOG (June 2, 2015), <https://www.cannalawblog.com/marijuana-insurance-in-the-wake-of-lloyds-exit/>. Lloyd's does not operate in the usual way insurance companies are understood to. Instead, Lloyd's brings members together to form "syndicates." These syndicates pool capital and work with agents in the U.S. to provide policies containing the requirements Lloyd's has set. The policy usually provides requirements for building security, weight and size of product safes, state law compliance and how much product can be displayed. By abiding by the requirements and paying premiums, insureds would be indemnified for losses for general liability, property liability, and even product liability and mislabeling claims.

⁸⁶ Tony C. Dreibus, *Lloyd's of London to Exit U.S. Cannabis Insurance Industry*, MARIJUANA BUSINESS DAILY (May 29, 2015), <https://mjbizdaily.com/exclusive-lloyds-of-london-to-exit-u-s-cannabis-industry/>.

⁸⁷ A.M. Best, *New Opportunities for Insurers, But with Burgeoning Risks*, BEST'S SPECIAL REPORT, 1 (Mar. 12, 2019), <http://www3.ambest.com/bestweekpdfs/sr497749919749full.pdf>.

⁸⁸ Ally Marotti, *Illinois Marijuana Dispensaries Sold More Than \$10.8 Million Worth of Recreational Weed in the First Five Days of Sales. Now, Some Have Halted Recreational Sales Amid Product Shortages*, CHICAGO TRIBUNE (Jan. 7, 2020), <https://www.chicagotribune.com/marijuana/illinois/ct-biz-legal-weed-shortages-close-dispensaries-20200106-xhy3lmtjnzdbnbotfibhpdif74->

growing categories of positions on online job sites.⁸⁹ By 2025, it is projected that as many as 63,000 people could be employed in the cannabis industry in Illinois.⁹⁰ Furthermore, once the recreational marijuana program scales to meet the expected demand of Illinois consumers, the industry could produce as much as \$440 million to \$676 million in annual tax revenue for the State.⁹¹ This revenue could be applied to some of the State's problematic financial issues, including a balance of unpaid bills projected to triple to \$19 billion in five years.⁹² Recently, nationwide support for the legalization of medical marijuana has been polled at 93%, while 63% supported legalization for recreational use.⁹³ In Illinois specifically, a poll of 1,000 randomly selected registered voters showed support for recreational legalization at 66%.⁹⁴ The desire of the citizens of Illinois to have a regulated marijuana industry and the State's current financial situation demonstrate the need for the State to do all it can to foster the growth of a safe and legal cannabis industry.

C. Legal Status Makes for Barrier to Entry for Financial Institutions

Without banking and insurance services, cannabis-related businesses operate under tough conditions. Marijuana-related businesses have been targeted for break-ins and robberies due to the all-cash nature of the business.⁹⁵ Cannabis companies cannot accept credit cards, nor can they wire

story.html; The Simon Poll, *Illinoisans Keen on Marijuana Decriminalization, Legalization*, PAUL SIMON PUBLIC POLICY INSTITUTE (Mar. 27, 2017), https://paulsimoninstitute.siu.edu/_common/documents/opinion-polling/simon-institute-poll/2017/march-27-psppi-simon-poll-marijuana.pdf.

⁸⁹ Conor Dougherty, *Cannabis, Marijuana, Weed, Pot? Just Call It a Job Machine*, N.Y. TIMES (Apr. 25, 2019), <https://www.nytimes.com/2019/04/25/business/economy/jobs-in-cannabis-weed-marijuana.html>. While online job postings cannot be said to give a perfectly accurate representation of the number of jobs, the United States Labor Department does collect information from legal cannabis farms and retailers but is yet to publish the data it has collected.

⁹⁰ Tom Schuba, *Number of Pot Jobs in Illinois to Grow to 63,000 by 2025, Report Says*, CHICAGO SUN-TIMES (Oct. 7, 2019), <https://chicago.suntimes.com/2019/10/7/20903738/pot-jobs-illinois-marijuana-recreational-legalization-employment>.

⁹¹ Jerry Nowicki, *Growing Marijuana Market Could Reach Nearly \$700 Million in Annual Tax Revenue*, CHICAGO SUN-TIMES (Mar. 1, 2019), <https://chicago.suntimes.com/2019/3/1/18403555/growing-marijuana-market-could-reach-nearly-700-million-in-annual-tax-revenue>.

⁹² Doug Finke, *Illinois' Bill Backlog Could Hit \$19 Billion by 2025 Without Changes*, STATE-JOURNAL REGISTER (Oct. 23, 2019), <https://www.sj-r.com/news/20191023/illinois-bill-backlog-could-hit-19-billion-by-2025-without-changes>.

⁹³ *Support for Marijuana Hits New High*, QUINNIPIAC UNIVERSITY POLL (Apr. 16, 2018), <https://poll.qu.edu/national/release-detail?ReleaseID=2539>.

⁹⁴ The Simon Poll, *Illinoisans Keen on Marijuana Decriminalization, Legalization*, PAUL SIMON PUBLIC POLICY INSTITUTE (Mar. 27, 2017), https://paulsimoninstitute.siu.edu/_common/documents/opinion-polling/simon-institute-poll/2017/march-27-psppi-simon-poll-marijuana.pdf.

⁹⁵ Will Yakowicz, *The Highly Trained Security Force Protecting Colorado's Weed Stash*, INC. (Apr. 20, 2015), <https://www.inc.com/will-yakowicz/inside-the-backbone-of-the-cannabis-industry.html>.

money or write a check to pay payroll taxes.⁹⁶ Dispensary owners are forced to make cash payments of millions of dollars directly to the Internal Revenue Service.⁹⁷ The federal government's inaction forces these companies to be a cash-intensive business, which attracts public safety concerns, such as crime,⁹⁸ and makes the industry difficult to accurately tax and regulate.⁹⁹

These operating conditions demonstrate not only the need for access to banking, but also the unpredictable liabilities the industry presents that deter insurers. Insurance is essential to state-legal cannabis business for proper capitalization and licensing¹⁰⁰ and can help manage risk.¹⁰¹ It promotes the public good by providing a fund to compensate those who have sustained a loss that could be covered by available insurance coverage.¹⁰² However, adequate coverage has proven tough for marijuana-related businesses to find.¹⁰³ The legal volatility associated with the cannabis industry along with the lack of actuarial data available hampers an insurer's ability to assess risk and determine optimal premiums.¹⁰⁴

The quasi-legal status of state marijuana industries is the primary reason that insurance companies and banks are hesitant to enter the market.¹⁰⁵ A financial institution that chooses to do business with a state-legal marijuana business could face criminal liability for "aiding and abetting" a federal crime and violating money laundering statutes.¹⁰⁶ Some insurance companies have

⁹⁶ Kevin Murphy, *Legal Marijuana: The \$9 Billion Industry That Most Banks Won't Touch*, FORBES, (Sept. 6, 2018), <https://www.forbes.com/sites/kevinmurphy/2018/09/06/legal-marijuana-the-9-billion-industry-that-most-banks-wont-touch/#1f5f38c93c68>.

⁹⁷ *Id.*

⁹⁸ Stuart Leavenworth, *When does too much cash become a health risk? When you own a marijuana shop*, MCCLATCHY DC (Feb. 7, 2018), <https://www.mcclatchydc.com/news/nation-world/national/article198941964.html> (discussing many instances of criminals targeting legal marijuana businesses).

⁹⁹ See e.g. Susan Cleary Morse, Stewart Karlinsky & Joseph Bankman, *Cash Businesses and Tax Evasion*, 20 STAN. L. & POLICY REV., 37 (2009).

¹⁰⁰ Jodi S. Greene, *High Risk or High Reward? Navigating the Emerging Insurance Market for the Cannabis Industry*, 29 INS. COVERAGE LITIG., no. 2, 2019, at 22, 34.

¹⁰¹ Francis J. Mootz III & Jason Horst, *Cannabis and Insurance*, 23 LEWIS & CLARK L. REV. 893, 894 (2019).

¹⁰² *Id.* at 895.

¹⁰³ Jodi S. Greene, *High Risk or High Reward? Navigating the Emerging Insurance Market for the Cannabis Industry*, 29 INS. COVERAGE LITIG., no. 2, 2019, at 22, 34.

¹⁰⁴ Francis J. Mootz III & Jason Horst, *Cannabis and Insurance*, 23 LEWIS & CLARK L. REV. 893, 923 (2019); A.M. Best, *New Opportunities for Insurers, But with Burgeoning Risks*, BEST'S SPECIAL REPORT (Mar. 12, 2019), <http://www3.ambest.com/bestweekpdfs/sr497749919749full.pdf> ("As the industry matures and insurers have greater access to quality statistics on actual loss history, insightful actuarial data, and more clarity on the effects of cannabis, more carriers are likely to enter the market.")

¹⁰⁵ Jodi S. Greene, *High Risk or High Reward? Navigating the Emerging Insurance Market for the Cannabis Industry*, 29 INS. COVERAGE LITIG., no. 2, 2019, at 22, 34.

¹⁰⁶ Kevin Murphy, *Legal Marijuana: The \$9 Billion Industry That Most Banks Won't Touch*, FORBES, (Sept. 6, 2018), <https://www.forbes.com/sites/kevinmurphy/2018/09/06/legal-marijuana-the-9-billion-industry-that-most-banks-wont-touch/#1f5f38c93c68>.

been targeted with civil suits brought under the Racketeer Influenced and Corrupt Organizations Act (RICO) for their dealings with state-legal marijuana enterprises.¹⁰⁷ In one case, the defendant insurer was dismissed prior to trial¹⁰⁸ while another case is currently ongoing after defendant insurer's motion to dismiss was denied.¹⁰⁹

Another barrier to entry of the state-legal cannabis market is the extensive regulatory burden financial services companies must bear in order to serve their clients.¹¹⁰ The Financial Crimes Enforcement Network, under the umbrella of the U.S. Treasury, issued guidance providing that financial service companies are required to complete a suspicious activity report (SAR) for every transaction with a client involved in the cannabis business.¹¹¹ The financial institution must file a "marijuana limited" SAR if, after completing its own due diligence, the institution reasonably believes the client is *not* in violation of any of the Cole Memo priorities.¹¹² If one of the Cole Memo enforcement priorities are reasonably believed to have been violated, an institution will either file a "marijuana priority" SAR to keep an investigation open, or a "marijuana termination" SAR if they determine that they will no longer provide services to the client.¹¹³ Due to the burdensome and inefficient regulatory policy, marijuana-related businesses are subject to

¹⁰⁷ *Safe Streets All. v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017); *Crimson Galeria Ltd. P'ship v. Healthy Pharms, Inc.*, 337 F. Supp. 3d 20 (D. Mass. 2018).

¹⁰⁸ *Safe Streets All. v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017).

¹⁰⁹ *Crimson Galeria Ltd. P'ship v. Healthy Pharms, Inc.*, 337 F. Supp. 3d 20 (D. Mass. 2018).

¹¹⁰ Aaron Klein, *Legal Marijuana Businesses Deserve Better Than to be Treated as Potentially Criminally Enterprises*, NBC NEWS (Apr. 20, 2018), <https://www.nbcnews.com/think/opinion/legal-marijuana-businesses-deserve-better-be-treated-potentially-criminal-enterprises-ncna867816>; *BSA Expectations Regarding Marijuana-Related Businesses*, FINANCIAL CRIMES ENFORCEMENT NETWORK, (Feb. 14, 2014), <https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses>.

¹¹¹ *BSA Expectations Regarding Marijuana-Related Businesses*, FINANCIAL CRIMES ENFORCEMENT NETWORK, (Feb. 14, 2014), <https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses>.

¹¹² *BSA Expectations Regarding Marijuana-Related Businesses*, FINANCIAL CRIMES ENFORCEMENT NETWORK, (Feb. 14, 2014), <https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses>; Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, to all U.S. Attorneys, Marijuana Enforcement (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. The Department's enforcement priorities are preventing: (1) sales of marijuana to minors; (2) revenue from the marijuana sales from funding criminal enterprises; (3) marijuana from states where it is legal under state law from being transferred to other states; (4) state-legal marijuana activity from being used as a cover for other drug trafficking operations; (5) violence and the use of guns in the manufacture and sale of marijuana; (6) drugged driving and other adverse public health risks associated with marijuana use; and (7) the growing, possession or use, of marijuana on public lands).

¹¹³ *BSA Expectations Regarding Marijuana-Related Businesses*, FINANCIAL CRIMES ENFORCEMENT NETWORK, (Feb. 14, 2014), <https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses>.

very high fees from the financial service providers that serve them to account for the effort required to be in compliance.¹¹⁴

The SAFE Banking Act can render these onerous regulations moot with its passing. The Act defines the Financial Crimes Enforcement Network as one of the “federal banking regulators” that financial institutions would have safe harbor from for their transactions with state-legal marijuana businesses.¹¹⁵ However, waiting for the federal government to pass legislation is not a reliable strategy to help foster the legal cannabis industry’s growth from its current quasi-legal status to a safe, well-regulated marketplace that invites the participation of ancillary businesses.

D. How State-Legal Marijuana Has Been Handled by Courts Generally

In cases before state and federal courts where state law permits medical or recreational use of cannabis, the illegal status under federal law has made for inconsistent outcomes. Without clear jurisprudence on the matter, it can be extremely difficult for insurance companies to calculate risk and for insureds to rely on coverage. Insurance products promote an important public policy by providing an available fund to compensate those injured by a policyholder and courts usually read policies broadly in favor of coverage while interpreting exclusions from coverage narrowly.¹¹⁶ However, there is a countervailing public policy against allowing parties to shield themselves from liability for injuries resulting from illegal activity.¹¹⁷ Courts almost always rule against coverage when a loss is a result of illegal activity under both federal and state law and the policy provides an exclusion for illegal activity.¹¹⁸ For example, a case from Illinois ruled in favor of the insurer where a claim arose from the policyholder’s son causing the death of a young woman by spiking her drink with methamphetamine.¹¹⁹ The court found that the policy’s provision excluding coverage for losses resulting from use, possession, or transfer of a controlled substance barred the insured’s claim.¹²⁰ Similarly, when an activity is legal under state law, but a loss stems from an

¹¹⁴ Omar Sacirbey, *Cover Story: Landing a Bank Account*, MARIJUANA BUSINESS MAGAZINE (July 2019), <https://mjbizmagazine.com/landing-a-bank-account-for-your-marijuana-business/>.

¹¹⁵ Secure and Fair Enforcement Banking Act, H.R. 1595, 116th Cong. § 14(6) (2019).

¹¹⁶ Francis J. Mootz III, *Regulating Marijuana at Home and Abroad: E/Insuring the Marijuana Industry*, 49 U. PAC. L. REV. 43, 46 (2017).

¹¹⁷ Francis J. Mootz III & Jason Horst, *Cannabis and Insurance*, 23 LEWIS & CLARK L. REV. 893, 897 (2019).

¹¹⁸ Francis J. Mootz III, *Regulating Marijuana at Home and Abroad: E/Insuring the Marijuana Industry*, 49 U. PAC. L. REV. 43, 48-51 (2017) (describing many cases where the insured was denied coverage per a policy exclusion for illegal activity when illegal under federal and state law. Even when the insured was an innocent landlord or homeowner and the loss caused by third party, courts are likely to still rule against coverage).

¹¹⁹ *Westfield Nat’l Ins. Co. v. Long*, 811 N.E.2d 776, 777 (Ill. App. Ct. 2004).

¹²⁰ *Id.* at 778-780.

insured who was not compliant with said state law, courts will deny coverage in favor of the public policy against contracting for illegal activity.¹²¹

Alternatively, when a loss results from an activity that is federally illegal but permitted under state law, a court may be inclined to uphold a contract when the parties have knowingly entered into an agreement that relates to state-legal cannabis and does not require the court to order a party to carry out an illegal act.¹²²

For example, in *Green Earth Wellness*, the Federal District Court of Colorado ruled in favor of coverage for a claim where a fire destroyed \$40,000 of the insured cannabis company's harvested marijuana product.¹²³ The insurance company, Atain Specialty Insurance, pointed to the policy's exclusion for "contraband" as a justification for denial of the claim but the court found the exclusion to be ambiguous in light of "the difference between the federal government's de jure and de facto public policies regarding state-regulated medical marijuana."¹²⁴ The court was careful to articulate that its order to indemnify the insured was a result of the insurance company's breach of contract, and not an instruction to "pay for damages to marijuana plants and products."¹²⁵ In this case, because the insurer knew that Green Earth Wellness was a cannabis business and "knowingly and intelligently" issued the policy, the court found the insurer obligated to comply with the policy and indemnify the policyholder.¹²⁶

In *Mann*, another federal district court denied a breaching party's motion for summary judgment because a contract for the purchase of a cannabis-related business was enforceable.¹²⁷ At issue in *Mann* was an agreement for the sale of a consulting business for marijuana companies and a hydroponic retail franchise.¹²⁸ The buyer failed to make payments required by the agreement and argued the contract was unenforceable since marijuana was prohibited by the CSA.¹²⁹ The court rejected this argument, reasoning

¹²¹ Francis J. Mootz III, *Regulating Marijuana at Home and Abroad: E/Insuring the Marijuana Industry*, 49 U. PAC. L. REV. 43, 53 (2017).

¹²² *Green Cross Med., Inc. v. Gally*, 395 P.3d 302 (Ariz. Ct. App. 2017); *Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821 (D. Colo. 2016); *Greenwood v. Green Leaf Lab LLC*, 2017 U.S. Dist. LEXIS 125143 (D. Or. July 13, 2017); *Mann v. Gullickson*, 2016 U.S. Dist. LEXIS 152125 (N.D. Cal. Nov. 2, 2016); *Staffin v. County of Shasta*, 2013 U.S. Dist. LEXIS 64625 (E. D. Cal. May 6, 2013).

¹²³ *Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821, 835 (D. Colo. 2016).

¹²⁴ *Id.* at 832-33 (finding the contraband exclusion to be ambiguous, the court saw the public policy argument against illegal conduct as wanting of evidence due to federal authorities' "ambivalence towards enforcement" of the CSA).

¹²⁵ *Id.* at 834.

¹²⁶ *Id.*

¹²⁷ *Mann v. Gullickson*, No. 15-cv-03630-MEJ, 2016 U.S. Dist. LEXIS 152125, at *1 (N.D. Cal. Nov. 2, 2016).

¹²⁸ *Id.*

¹²⁹ *Id.* at *5.

that the issue was really whether a party asks the court to order another party to commit an illegal act, which was not the case here because nothing in the agreement required the buyer to use or possess marijuana in violation of the CSA.¹³⁰ Furthermore, the court often cited the “less than clear” policy from the federal government regarding the enforcement of the CSA to refute the breaching party’s claim that the contract was unenforceable as a matter of law.¹³¹ Additionally, the court explained that because the provisions of the contract did not specify a choice of law, the court applied the law where the contracting was done or where services were performed.¹³² While not a case strictly dealing with an insurance contract, it is illustrative of how courts view the federal policy of CSA enforcement when determining whether contracts involving state-legal cannabis businesses are enforceable. Courts have applied the same line of reasoning in other cases dealing with lease agreements¹³³ and employment related claims under the Fair Labor Standards Act.¹³⁴

There are some cases that do not, on their face, seem to follow the same general rule outlined in the cases discussed above. However, such cases are distinguishable by their facts and can still be said to follow the rule.

For example, in *Tracy*, the U.S. District Court of Hawaii granted defendant insurance company’s motion for summary judgment when an insured challenged the denial of her claim for the theft of marijuana plants from her home being grown in accordance with Hawaii’s medical cannabis program.¹³⁵ The court in *Tracy* relied on the fact that state law expressly excluded insurance coverage for medical marijuana, as well as the fact that it was not foreseeable to the insurer that such a policy would cover marijuana plants as they were unaware of the grow operation in the plaintiff’s home.¹³⁶

In *McDermott*, another federal case that touched on an insurer’s lack of knowledge of the underwritten risk, the court ruled against coverage for damage from a fire that resulted from an insured making cannabis concentrates.¹³⁷ The insured was a licensed caregiver and in compliance with state law, but coverage was still denied on the basis that the policyholder failed to inform the insurance company of an increased risk at the property.¹³⁸ The insurer’s knowledge about the nature of the risk they were insuring is the distinguishable feature between these cases, as well as the fact that *Tracy*

¹³⁰ *Id.* at *20.

¹³¹ *Id.* at *12, 30, 34.

¹³² *Id.* at *17.

¹³³ *Green Cross Med., Inc. v. Gally*, 242 Ariz. 293 (Ariz. Ct. App. 2017).

¹³⁴ *Greenwood v. Green Leaf Lab LLC*, No. 3:17-cv-00415-PK, 2017 U.S. Dist. LEXIS 125143 (D. Or. July 13, 2017).

¹³⁵ *Tracy v. USAA Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 35913, at *2-3 (Mar. 16, 2012).

¹³⁶ *Id.* at *6.

¹³⁷ *Nationwide Mut. Fire Ins. Co. v. McDermott*, 603 Fed. Appx. 374, 376, 379 (6th Cir. 2015).

¹³⁸ *Id.* at 379.

was decided well before the others, when the federal government's policy on CSA enforcement was stricter. Also, it appears as if the express exclusion from the Hawaii statute regarding insurance for medical marijuana influenced the decision of the court.

As case law shows, in light of the wavering federal policy regarding enforcement of the CSA's marijuana prohibition, a court will likely rule to uphold a contract when the parties have knowingly entered into an agreement that relates to state-legal cannabis and does not require the court to order a party to carry out an illegal act. The federal government's non-enforcement policies from both Congress and the executive branch color the analysis on this rule. Illinois' marijuana statutes also do not exclude indemnification as Hawaii's did in *Tracy*.¹³⁹ Accordingly, courts in Illinois should adopt this rule favoring the public policy in favor of coverage in the interest of increasing the participants in the insurance marketplace for marijuana businesses. Applying such a general rule is a helpful way for courts to establish a consistent legal framework for cannabis businesses and provide a predictable litigation process for insurers when calculating their risk, which in turn will encourage their participation in the marijuana marketplace and increase access to insurance products for state-legal marijuana companies.

III. ANALYSIS AND PROPOSAL

A. Federalism/Preemption

Applying the general rule set out above – that a court will rule to uphold a contract when the parties have knowingly entered into an agreement that relates to state-legal cannabis and does not require the court to order a party to carry out an illegal act – to cases dealing with state-legal marijuana programs is respectful of our federalist system of competing governments. As the state-legal cannabis industry in Illinois grows with the introduction of adult recreational use, courts in the state will undoubtedly hear more cases on insurance claims arising from operations of these businesses. The conflict of laws on marijuana between states like Illinois and the federal government asks whether Illinois' Cannabis Regulation and Tax Act is preempted by the CSA.

The state-legal marijuana business is based on the idea that property rights in marijuana will be protected by the law because businesses must assume that contracts relating to their dealings involving cannabis will be enforced.¹⁴⁰ It is a long-standing tenet of property law that states generally

¹³⁹ *Tracy v. USAA Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 35913, at *6 (Mar. 16, 2012).

¹⁴⁰ John G. Sprankling, *Owning Marijuana*, 14 DUKE J. CONST. LAW & POL'Y 1, 12 (2019).

have the authority to determine what can be property.¹⁴¹ The Supreme Court has provided that “[g]enerally speaking, state law defines property interests” and “[s]tates may allocate property rights as they see fit.”¹⁴² When a state legalizes medical or recreational marijuana possession, it effectively grants a person core property rights in marijuana that exist under the state’s law that were previously unavailable due to the prohibition.¹⁴³

In his article *Owning Marijuana*, Professor John Sprankling explains that the framers of the Constitution, in the interest of sovereignty and power over real property, the main source of wealth at that time, left defining property rights to the states.¹⁴⁴ Out of concern for the possibility the federal government might infringe on state property rights, like the British had before the Revolution, the Framers provided the Second, Third, and Fifth Amendments to the Constitution that in one way or another protected property rights.¹⁴⁵ These amendments recognized those property rights by protecting firearms possession, prohibiting the federal government from quartering troops on private property, and requiring due process for any taking of one’s property, respectively.¹⁴⁶ The Framers also included the Tenth Amendment, which provides that powers not granted in the Constitution to the federal government are left to the states or the people, including the power to define property rights.¹⁴⁷ Both federal and state governments possess “elements of sovereignty the other is bound to respect.”¹⁴⁸ Laws implemented by the federal government, such as the CSA under Congress’s Commerce Clause power, could still have an effect on property rights.¹⁴⁹

The breadth of that Commerce Clause authority was challenged in the case *Gonzalez v. Raich*, where two defendants that were compliant with state medical marijuana law were charged under the CSA.¹⁵⁰ The Court found that Congress was in line with its constitutional authority in prohibiting the intrastate manufacture and possession of marijuana for the stated purpose of eliminating the market for marijuana “among the several states,” because it was convinced that Congress had a rational basis to think that not regulating the intrastate market would defeat the purpose of the Act.¹⁵¹ The federalist system of government under which we operate can make for inherent

¹⁴¹ *Id.* at 10.

¹⁴² *Id.* at 7; quoting *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 560 U.S. 702, 707 (2010); quoting *Giles v. California*, 554 U.S. 353, 375 (2008).

¹⁴³ *Id.* at 18.

¹⁴⁴ *Id.* at 7.

¹⁴⁵ *Id.* at 9.

¹⁴⁶ U.S. CONST. amend. II, III, V.

¹⁴⁷ John G. Sprankling, *Owning Marijuana*, 14 DUKE J. CONST. LAW & POL’Y 1, 7 (2019).

¹⁴⁸ *Id.* at 19; quoting *Arizona v. United States*, 567 U.S. 387, 398 (2012).

¹⁴⁹ See *Gonzales v. Raich*, 545 U.S. 1 (2005).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 9, 19.

conflicts where a state and federal government may define property differently.¹⁵²

Criminal statutes like the CSA affect property rights by classifying certain things as contraband per se, meaning property rights cannot exist therein.¹⁵³ As previously explained, the issue in *Raich* is one that is still plaguing the state-legal marijuana industry: a person or business participating in a state-legal marijuana program is illegal under federal law but legal under state law.¹⁵⁴ However, the Court in *Raich* only held that Congress had the power to implement the outright ban but did not determine if the CSA preempts state law, an important distinction to bear in mind when determining whether the CSA actually has preemptive power over state property rights.¹⁵⁵

The preemption doctrine stems from the Supremacy Clause of the Constitution that makes federal law the “supreme law of the land.”¹⁵⁶ There are two principles that guide a preemption inquiry; first, it must be determined that Congress’s intent was to preempt state law; second, it must be assumed that the police powers of the States were not to be preempted unless it was the clear and manifest purpose of Congress to do so.¹⁵⁷ State law can either be expressly or impliedly preempted by federal law.¹⁵⁸ Express preemption means that Congress declared in the Act itself that it preempts state laws.¹⁵⁹ Implied preemption has three possibilities: (1) field preemption, where Congress regulates exclusively; (2) conflict preemption, where it would be impossible to comply with both federal and state statute; and (3) conflict preemption, where state law acts as an obstacle to the “accomplishment and execution of the full purposes and objectives of Congress.”¹⁶⁰ There is a strong presumption against preemption when Congress legislates in an area where the states usually do.¹⁶¹ Since the determination of property rights is generally left to the states, it follows that the presumption is that the Illinois’ Cannabis Regulation and Tax Act is not preempted by the CSA.¹⁶²

¹⁵² John G. Sprankling, *Owning Marijuana*, 14 DUKE J. CONST. LAW & POL’Y 1, 7 (2019).

¹⁵³ *Id.* at 10.

¹⁵⁴ *Id.* at 3.

¹⁵⁵ Robert A. Nikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1441-43 (2009).

¹⁵⁶ Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 102 (2015).

¹⁵⁷ *Id.* at 104.

¹⁵⁸ *Id.*

¹⁵⁹ John G. Sprankling, *Owning Marijuana*, 14 DUKE J. CONST. LAW & POL’Y 1, 19 (2019).

¹⁶⁰ *Id.* quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹⁶¹ *Id.* at 19-20.

¹⁶² *Id.* at 10.

The CSA allows for states to implement their own drug laws, and Section 903 of that Act states there is not field preemption.¹⁶³ The Act also does not provide any express preemption.¹⁶⁴ Section 903 does provide that the CSA preempts a state law when it conflicts with federal law such that it would be physically impossible to comply with both laws, meaning the state law would require violation of the CSA.¹⁶⁵ However, there is nothing in state-legal marijuana laws requiring anyone to possess, manufacture, or distribute marijuana contrary to the CSA.¹⁶⁶ Also, state laws do not contradict the purpose of the CSA because they do not prevent the federal government from enforcing their own laws if they choose to.¹⁶⁷ Additionally, “[t]he preemption power is constrained by the Supreme Court’s anti-commandeering rule. That rule stipulates that Congress may not command state legislatures to enact laws nor order state officials to administer them.”¹⁶⁸

Professor Robert A. Nikos provides a “state of nature” standard to assess whether an action is preempted or commandeered.¹⁶⁹ A state is in its “state of nature” when it simply permits an activity, rather than banning or supporting it.¹⁷⁰ The federal government can only take preemptive action to move a state back to its “state of nature.”¹⁷¹ It is when the federal government requires a state action in support or opposition of a certain behavior that it violates the anti-commandeering rule.¹⁷² The exception to the “state of nature” rule is that the federal government can make a state depart from its “state of nature” and take positive action if the same duty is imposed on citizens.¹⁷³ Therefore, because state-legal marijuana laws simply relax or eliminate marijuana prohibitions, it is returning to a “state of nature,” so such laws will never be preempted by the CSA.¹⁷⁴

¹⁶³ 21 U.S.C. § 903; John G. Sprankling, *Owning Marijuana*, 14 DUKE J. CONST. LAW & POL’Y 1, 19-20 (2019).

¹⁶⁴ Controlled Substance Abuse Act of 1970, 21 U.S.C. §§ 801-904; John G. Sprankling, *Owning Marijuana*, 14 DUKE J. CONST. LAW & POL’Y 1, 20-21 (2019).

¹⁶⁵ 21 U.S.C. § 903; Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 105-06 (2015).

¹⁶⁶ Erwin Chemerinsky, Jolene Forman, Allen Hopper & Sam Kamin, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 106 (2015).

¹⁶⁷ John G. Sprankling, *Owning Marijuana*, 14 DUKE J. CONST. LAW & POL’Y 1, 20-23 (2019).

¹⁶⁸ Robert A. Nikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1446 (2009).

¹⁶⁹ *Id.* at 1448.

¹⁷⁰ *Id.* at 1446.

¹⁷¹ *Id.* at 1449.

¹⁷² *Id.* at 1446.

¹⁷³ *Id.* at 1450. An example would be minimum wage laws because the state must conform but so does every other employer. *Id.*

¹⁷⁴ Robert A. Nikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1448-49 (2009).

Both state and federal courts should not find the Cannabis Regulation and Tax Act to ever be preempted by the CSA.¹⁷⁵ Courts in Illinois should apply the law of Illinois, even if the conduct in question is illegal under federal law but legal in Illinois. This will build a reliable system of adjudications and promulgate solid rules that cannabis businesses and their financial service providers can rely on and comport their conduct to. As discussed earlier, one of the biggest barriers to a market for an insurer is unpredictability. Additionally, doing so will signal that the court embraces the policy of federalism by allowing states to be “laborator[ies]” for experimentation.¹⁷⁶ In holding Illinois’ marijuana legislation to not be preempted, courts give practical effect to the state’s law, one the majority of the state wants to see implemented.¹⁷⁷

Furthermore, Illinois courts should follow the lead of other courts to find the non-enforcement policies of the federal government to be another reason to resist allowing claims of illegality under the CSA to undermine agreements entered into knowingly. The policy signals a weak public interest in enforcing federal law in a state with legal marijuana.¹⁷⁸ The Ninth Circuit in *McIntosh* held that when legislative and some executive authorities adopt a policy of non-enforcement of state-permitted conduct that is federally illegal, the judicial enforcement of such conduct “prevent[s] the state from giving practical effect to its law.”¹⁷⁹ Such a holding supports the notion that a court should not give rise to breach defenses that invoke the CSA prohibition on marijuana. Instead courts should focus on the legality of the conduct at the state level.

B. Proposal

In order to ensure a safe marketplace for the legal marijuana industry in Illinois, the state should make policy decisions that will help marijuana-related businesses operate successfully. This includes approving insurance

¹⁷⁵ John G. Sprankling, *Owning Marijuana*, 14 DUKE J. CONST. LAW & POL’Y 1, 24 (2019).

¹⁷⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

¹⁷⁷ The Simon Poll, *Illinoisans Keen on Marijuana Decriminalization, Legalization*, PAUL SIMON PUBLIC POLICY INSTITUTE (Mar. 27, 2017), https://paulsimoninstitute.siu.edu/_common/documents/opinion-polling/simon-institute-poll/2017/march-27-psppi-simon-poll-marijuana.pdf.

¹⁷⁸ Francis J. Mootz III, *Regulating Marijuana at Home and Abroad: Insuring the Marijuana Industry*, 49 THE U. OF PAC. L. REV. 43, 62 (2017).

¹⁷⁹ *United States v. McIntosh*, 833 F.3d 1163, 1176-77 (9th Cir. 2016); *see also* *Green Earth Wellness Ctr., LLC v. Atain Specialty Ins. Co.*, 163 F. Supp. 3d 821 (D. Colo. 2016); *Mann v. Gullickson*, No. 15-cv-03630-MEJ, 2016 U.S. Dist. LEXIS 152125 (N.D. Cal. Nov. 2, 2016); *Greenwood v. Green Leaf Lab LLC*, No. 3:17-cv-00415-PK, 2017 U.S. Dist. LEXIS 125143 (D. Or. July 13, 2017); *Green Cross Med., Inc. v. Gally*, 242 Ariz. 293 (Ariz. Ct. App. 2017).

products for the marijuana industries through the Department of Insurance, similar to what was done in California and Colorado. Illinois is justified in making such policy decisions in light of state legislative action to legalize recreational and medicinal marijuana programs, continued signs of acceptance of state-legal marijuana programs from the federal government in the form of non-enforcement policies and advancing legislation, and the financial position of the State. Furthermore, state and federal courts should rule in cases dealing with state-legal marijuana favoring state legalization laws. Doing so properly respects the actions of the other branches of both the federal and state governments by adhering to their intentions of creating regulated marketplaces. Such rulings are also justified by the weak preemptive power of the CSA. Illinois and the courts therein should adopt policies that will promote the growth of cannabis-related businesses while maintaining a successful and safely regulated market that benefits the State and its citizens.

IV. CONCLUSION

In light of legislative action from the General Assembly and Congress, the financial situation of the State, as well as continued signs of approval from federal enforcement authorities, Illinois acts in its best interest by being as proactive as possible in increasing access to banking and insurance services for its marijuana-related businesses. Taking such action fosters responsible growth for the industry, improves public safety, and provides jobs to the State in a new growing industry. The State should follow the lead of others before it and entice admitted state-licensed insurers to service the market.

Courts in Illinois should give effect to the laws of the State by finding that the Cannabis Regulation and Tax Act is not preempted by the CSA. Doing so provides that parties can contract on sure-footing and not be surprised by defenses to breach for federally illegal conduct. In turn, more insurers will feel comfortable entering the market and state-legal cannabis businesses in the State will have more options for coverage.