



4-1-2023

Cannabis and Commercial Leases: Should Maryland be “Under the Influence” of Other States?

Alina Pargamanik

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Pargamanik, Alina (2023) "Cannabis and Commercial Leases: Should Maryland be “Under the Influence” of Other States?," *University of Baltimore Law Review*. Vol. 52: Iss. 2, Article 4.

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CANNABIS AND COMMERCIAL LEASES: SHOULD
MARYLAND BE “UNDER THE INFLUENCE” OF OTHER
STATES?

*Alina Pargamanik**

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I. INTRODUCTION

What happens if you are a landlord and your tenant runs a business deemed illegal under federal law? What kind of remedies can you seek regarding possession of property? Where should you litigate issues when cannabis and property law clash? Cannabis¹ law is a novel and developing area of law, but the laws governing the sale and transfer of land are firmly entrenched in the English common law upon which the United States legal system was built.² As cannabis laws change and marijuana legalization soars, new legal issues arise for cannabis businesses seeking to engage in commercial property transactions.³ Marijuana use and possession are currently illegal under federal law; therefore, real estate practitioners must be cautious drafting commercial leases for clients in the cannabis industry to ensure they are in clear compliance with state and local regulations and to ensure that the landlord is at minimal risk for liability.⁴

Maryland real estate law practitioners should not shy away from dealing with commercial leases involving cannabis-industry tenants, but they should remain vigilant throughout the lease drafting process.⁵ Marylanders voted in favor of full marijuana legalization on November 8, 2022, and the legalization will take effect July 2023.⁶ In

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1. For purposes of this article, any use of the term “cannabis” means “marijuana” and not “hemp” (as those terms are defined in the Controlled Substances Act (the CSA)), except as otherwise expressly provided herein. The CSA makes certain plants, drugs, and chemicals illegal under federal law. *See* 21 U.S.C. § 812(c); discussion *infra* Section II.A.
2. *See generally* Pines v. Perssion, 111 N.W.2d 409, 594 (Wis. 1961) (holding that the common law doctrine of the implied warranty of habitability applies to the students’ lease).
3. *See infra* Section II.B.
4. *See infra* Section II.F.
5. *See infra* Part III.
6. *See* Brian Witte, *Maryland Voters Approve Recreational Marijuana Legalization*, AP NEWS (Nov. 9, 2022), <https://apnews.com/article/marijuana-legalization-recreational-maryland-constitutions-613d0bc692afd6e3ac8625dd4e33692a> [https://perma.cc/D5Q7-5G2G] (“The constitutional amendment defines that recreational marijuana would not be legal until July 2023 for people 21 and over, subject to a requirement

other jurisdictions, full legalization had an *immediate* impact on the real estate market.⁷ With an imminent boom in the real estate market, uninformed Maryland landlords and property owners could invite disaster as they chase the money, while risk-averse landlords could leave money on the table. To avoid future compliance issues and an influx of litigation, practitioners should urge state lawmakers to address gray areas in the law regarding cannabis-related leases.⁸

This comment explores two major issues affecting commercial lease provisions for tenants in the cannabis industry: (1) remedies that involve taking possession of property and the liability implications of such remedies⁹ and (2) the effects of forum selection clauses and conflict of laws issues.¹⁰ Part II of this comment provides the history and background of federal and state cannabis laws, conflict of law and preemption issues, commercial cannabis remedies, and commercial lease provisions for cannabis-industry tenants used in various states.¹¹ Part III analyzes how various states navigate forum selection clauses and remedies for cannabis-industry tenants, presents the strengths and weaknesses of each, and offers suggestions and model provisions for commercial leases.¹²

II. BACKGROUND

A. *The Controlled Substances Act*

Cannabis is illegal both for medical and recreational use under federal law, and violators may be subject to significant civil and criminal penalties.¹³ The Controlled Substances Act (the CSA) is the primary federal legislation governing cannabis in the United States.¹⁴

that the General Assembly pass legislation in its next session regarding distribution, regulation and taxation of cannabis.”).

7. See Margaret Jackson, *Marijuana Boom Squeezes Denver Industrial Space*, CONFLUENCE DENVER (Jan. 7, 2015), https://www.confluence-denver.com/features/marijuana_real_estate_010715.aspx [<https://perma.cc/2UV6-DWL8>]; see also Aviva Sonenreich, *The Effects Of Marijuana Legalization On American Real Estate*, FORBES (Jan. 22, 2021, 7:20 AM), <https://www.forbes.com/sites/forbesrealestatecouncil/2021/01/22/the-effects-of-marijuana-legalization-on-american-real-estate> [<https://perma.cc/8DE8-KKM5>].

8. See *infra* Section III.A.

9. See discussion *infra* Section II.B.

10. See discussion *infra* Section II.C.

11. See *infra* Part II.

12. See *infra* Part III.

13. See 21 U.S.C. § 801.

14. See *id.*

The CSA categorizes certain plants, drugs, and chemicals into one of five schedules based on the substance's medical use, potential for abuse, safety risk level, or potential for psychological dependence.¹⁵ Marijuana is classified as a "Schedule I" controlled substance; thus, it is deemed to have "a high potential for abuse" with "no currently accepted medical use in treatment in the United States" and lacks "accepted safety for use of the drug under medical supervision."¹⁶ As a Schedule I controlled substance, marijuana cannot be prescribed and may only be used for bona fide, federal government-approved research studies.¹⁷

It is a federal crime to manufacture, distribute, import, or possess controlled substances in violation of the CSA, and violators are subject to significant civil and criminal penalties.¹⁸ Criminally, a person who cultivates, distributes, or possesses marijuana with the intent to distribute it is subject to imprisonment for a term of five years to life.¹⁹ Any property associated with the offense may be subject to forfeiture, regardless of any prior or accompanying criminal conviction.²⁰

Under the CSA, the United States Department of Justice (DOJ) may also seek civil forfeiture remedies.²¹ The DOJ administers civil judicial forfeiture through in rem proceedings, meaning against the property itself, where the property is the defendant, and no criminal charge against the owner is necessary.²² Property seized by the Attorney General may be (1) placed under seal, (2) removed to a place designated by the Attorney General, or (3) placed in the custody of General Services Administration and removed "to an appropriate location for disposition in accordance with law" if practicable.²³ The Attorney General "may direct the destruction" of all Schedule I controlled substances and has the authority to "enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry off, or destroy" any plants used to produce a Schedule I controlled substance.²⁴ Marijuana in any capacity is

15. *Id.* § 812(b)(1)–(5).

16. *Id.*

17. *See id.* § 823(f).

18. *Id.* § 841(a).

19. *Id.* §§ 841(b)(1)(D), 848(a).

20. *Id.* § 853(a).

21. *Id.* § 881(e).

22. *Types of Federal Forfeiture*, U.S. DEP'T OF JUST. (Feb. 17, 2022), <https://www.justice.gov/afp/types-federal-forfeiture> [https://perma.cc/7ZK9-U7U9].

23. 21 U.S.C. § 881(c).

24. *Id.* § 881(f)–(g).

illegal under federal law, but certain states have legalized the use of marijuana—medical, recreational, or both—on the state level.²⁵

B. Maryland Medical Marijuana Laws

Although marijuana remains illegal under federal law, Maryland legalized medical marijuana and adopted extensive regulations for Maryland licensed cannabis growers, processors, and retailers.²⁶ On November 8, 2022, Maryland voters also approved legalizing recreational marijuana via a constitutional amendment, which is expected to take effect July 2023, but legislators have yet to enact further regulations regarding the retail sale of recreational marijuana.²⁷ The Maryland General Assembly began enacting the Maryland Medical Marijuana Laws²⁸ (MMM Laws) in 2013, along with a series of accompanying administrative regulatory rules added to the Code of Maryland Regulations (COMAR).²⁹ The laws and regulations provide exceptions for licensees from arrest, prosecution, or any civil or administrative penalty, regarding the possession³⁰ of “Medical Cannabis,” “Medical Cannabis Concentrate,” “Medical Cannabis Finished Product,” or “Medical Cannabis Infused Products.”³¹

25. See *State Medical Cannabis Laws*, NAT’L CONF. STATE LEGISLATURES (July 18, 2022), <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx> [<https://perma.cc/K9DH-WYBW>].

26. See *infra* notes 28–29 and accompanying text.

27. See Witte, *supra* note 6; see also Karina Elwood, *Maryland Legalized Recreational Marijuana. Here’s What You Should Know.*, WASH. POST (Nov. 9, 2022, 5:04 PM), <https://www.washingtonpost.com/dc-md-va/2022/11/09/maryland-legalized-recreational-marijuana-faq/> [<https://perma.cc/QBB6-QWDT>].

28. See *Medical Marijuana—Academic Medical Centers—Natalie M. LaPrade Medical Marijuana Commission*, 2013 Md. Laws ch. 403 (codified as amended at MD. CODE ANN., HEALTH–GEN. §§ 13-3301 to -3316 (West 2022)) (establishing the Natalie M. LaPrade Medical Marijuana Commission, and directing the Commission to license cannabis growers to process and provide medical marijuana to approved academic medical centers only); *Medical Marijuana—Natalie M. LaPrade Medical Marijuana Commission*, 2014 Md. Laws ch. 240 (codified as amended at §§ 13-3301 to -3316) (providing for the Commission to license retailers as well as qualifying patients, and requiring the Commission to adopt regulations to implement the statutes).

29. See MD. CODE REGS. 10.62.01–.37 (2022).

30. See HEALTH–GEN. § 13-3313(a)(2), (6)–(7); see also *id.* §§ 13-3306(h), -3307(g), -3309(g) (providing immunity for licensed growers, processors, and retailers).

31. Compare *id.* § 13-3313(a)(2), (6)–(7) (providing exceptions for licensed growers, dispensaries, and processors from arrest, prosecution, and penalties), with MD. CODE REGS. 10.62.01, .08, .19, .23, .24–.27, .29 (defining licensed growers, processors, and dispensaries, and propounding regulatory requirements surrounding medical cannabis,

On September 14, 2015, the Maryland Department of Health and Mental Hygiene's Natalie M. LaPrade Maryland Medical Cannabis Commission (the Commission) released license application materials for medical cannabis growers, processors, and dispensaries, intending to "work with a wide variety of public and private agencies, organizations[,] and groups to publicize the application and registration processes and encourage all interested persons to contact the Commission for additional information or assistance."³²

Maryland-licensed cannabis growers, processors, and retailers are subject to announced and unannounced compliance inspections.³³ If "an inspector has reasonable suspicion of an operational failure or of conditions that create a likelihood of diversion, contamination, or a risk to the public health," the inspector may (1) "[s]uspend the distribution of some or all medical cannabis from the licensed or registered premises," (2) "[o]rder immediate evacuation of the premises and seal the entry door," or (3) "[q]uarantine some or all medical cannabis."³⁴ The Commission, upon a review of inspection findings, may (1) "[r]equest a recall of the medical cannabis," (2) "[r]equest independent testing of affected medical cannabis," (3) "[a]pprove a procedure to reprocess the medical cannabis," (4) "[n]otify the Maryland State Police if diversion is suspected," or (5) "[o]rder the destruction of contaminated or substandard medical cannabis."³⁵ Any property removed in the course of an inspection requires a receipt and a documented chain of custody from the Commission.³⁶

The Commission's application for a medical cannabis growing license includes an acknowledgement of risk taken under the CSA.³⁷

medical cannabis concentrate, medical cannabis-infused products, and medical cannabis finished product).

32. MD. CODE REGS. 10.62.02.04(C).

33. *Id.* at 10.62.33.02-.04.

34. *Id.* at 10.62.33.06.

35. *Id.*

36. *Id.* at 10.62.33.07.

37. Compare MD. MED. CANNABIS COMM'N, MARYLAND CANNABIS GROWER LICENSE APPLICATION 3 (2019) [hereinafter MARYLAND CANNABIS APPLICATION], <https://mmcc.maryland.gov/Documents/03.25.2019%20MMCC%20Grower%20Application%20copy.pdf> [https://perma.cc/MHJ5-FL6S] (instructing Maryland Medical Cannabis Grower License applicants to submit required attachments), and MD. MED. CANNABIS COMM'N, MEDICAL CANNABIS GROWER LICENSE APPLICATION: GENERAL INSTRUCTIONS 9-10 (2019), [https://mmcc.maryland.gov/Documents/03.25.2019%20MMCC%20Grower%20-%20General%20Instructions%20\(March%202025,%202019\).pdf](https://mmcc.maryland.gov/Documents/03.25.2019%20MMCC%20Grower%20-%20General%20Instructions%20(March%202025,%202019).pdf) [https://perma.cc/43HF-A55E] (requiring Maryland Medical Cannabis Grower License applicants to submit Attachment J), with MD. MED. CANNABIS COMM'N, ATTACHMENT J: OWNER AND INVESTOR CERTIFICATION ¶ 9 (2019) [hereinafter

Applicants must acknowledge that the “[m]anufacture, distribution, cultivation, processing, possession, or possession with intent to distribute . . . are offenses subject to harsh penalties under federal law and could result in arrest, prosecution, conviction, incarceration, fine, seizure of property, and loss of licenses or other privileges.”³⁸ The applicant must also acknowledge that a violation of state law could result in “arrest, prosecution, conviction, incarceration, fine, seizure of property, and loss of licenses or other privileges.”³⁹ The Commission requires applicants to acknowledge that growing, processing, or distributing marijuana is still illegal under federal law, even if their actions comply with Maryland law.⁴⁰ Interestingly, the Commission does not specify how an applicant can avoid violating the CSA, leaving the applicant to navigate MMM Laws and federal criminal charges without much clarity.⁴¹ This creates a paradoxical situation in which an applicant cannot escape being outside the bounds of compliance in at least one jurisdiction, either Maryland or federal.⁴²

MARYLAND CANNABIS GROWER CERTIFICATION], [https://mmcc.maryland.gov/Documents/2019GrowerLicenseApplications/Attachment%20J%20-%20Owner%20and%20Investor%20Certification%20\(Grower\).pdf](https://mmcc.maryland.gov/Documents/2019GrowerLicenseApplications/Attachment%20J%20-%20Owner%20and%20Investor%20Certification%20(Grower).pdf) [https://perma.cc/VB29-R4QV] (requiring applicants to sign and notarize their acknowledgement that cannabis is a Schedule I controlled substance under federal law which may make the licensees subject to harsh penalties under federal law).

38. MARYLAND CANNABIS GROWER CERTIFICATION, *supra* note 37.

39. *Id.*

40. *Id.*

41. *See generally id.* (offering no instruction on how to avoid violating the statute). *See also* MARYLAND CANNABIS APPLICATION, *supra* note 37 (offering no guidance on how to avoid federal liability).

42. *See supra* note 39 and accompanying text. Maryland has a strict regime governing cannabis at the state level. *See supra* notes 28–30 and accompanying text. Part of the requirement is filing all information that carefully accounts for and documents a licensee’s cannabis product: what they do with it, where it goes, etc. *See* MD. CODE REGS. 10.62.32.01–.03 (2022). At the same time, the state requires a potential licensee to acknowledge everything they are doing is illegal federally. MARYLAND CANNABIS GROWER CERTIFICATION, *supra* note 37 and accompanying text. In some ways, the real paradox is that, in order to obtain a license, the state warns potential licensees that they will be in violation of the CSA while simultaneously requiring potential licensees to show that they will create a detailed evidentiary record of their violation to comply with state law. *See* MARYLAND CANNABIS APPLICATION, *supra* note 37, at 13, 15–17, 21–22, 24–25, 30.

C. *Conflict of Laws and Preemption*

Most contracts, including commercial leases, can include forum selection clauses and choice of law clauses allowing drafters to control where cases will be litigated and under what law.⁴³ Barring unreasonable circumstances, courts routinely enforce these provisions.⁴⁴

1. The Supremacy Clause

Because cannabis is illegal under federal law but legal in certain states, the United States Constitution's Supremacy Clause provides a foundation for the preemption analysis needed to distinguish between relevant federal and state law.⁴⁵ The Supremacy Clause states that federal laws made pursuant to the Constitution comprise the "supreme law of the land" and, thus, supersede state laws.⁴⁶ Congress generally has the discretion to determine the extent to which a federal law operates preemptively.⁴⁷ State laws are preempted if (1) compliance with both the federal and state law is "impossible" or (2) if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁴⁸ The Supreme Court determines whether a state law stands as an obstacle to the purposes and objectives of Congress on a case-by-case basis without the use of "any rigid formula or rule which can be used as a universal pattern."⁴⁹

The CSA explicitly states that it is not the federal government's intent to wholly preempt state legislation regarding the regulation of controlled substances.⁵⁰ The CSA reserves the authority to preempt

43. See 16 AM. JUR. 2D *Conflict of Laws* §§ 77–78 (2022).

44. See, e.g., *Dessert Beauty, Inc. v. Platinum Funding Corp.*, 519 F. Supp. 2d 410, 418–19 (S.D.N.Y. 2007); *J3 Engineering Group, LLC v. Mack Indus. of Kalamazoo, LLC*, 390 F. Supp. 3d 946, 953 (E.D. Wis. 2019); *Golden Palm Hosp., Inc. v. Stearns Bank Nat'l. Ass'n*, 874 So. 2d 1231, 1234–35 (Fla. Dist. Ct. App. 2004).

45. See *Nat'l City Bank of Ind. v. Turnbaugh*, 367 F. Supp. 2d 805, 814 (D. Md. 2005), *aff'd*, 463 F.3d 325 (4th Cir. 2006).

46. See U.S. CONST. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.").

47. See *id.* art. I, § 8, cl. 18.

48. *Hillman v. Maretta*, 569 U.S. 483, 490 (2013) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

49. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

50. 21 U.S.C. § 903 ("No provision of [the CSA] shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates . . . to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict

laws that come into “positive conflict between that provision of the subchapter and that State law so that the two cannot consistently stand together.”⁵¹ For example, in *Gonzales v. Oregon*, the Supreme Court held that the CSA’s silence on the practice of medicine generally and its recognition of state regulation of the medical profession “did not grant federal authority to regulate medicine.”⁵²

When enacting laws, Congress must be watchful of the distinctions between “lawful preemption” and “unconstitutional commandeering.”⁵³ The action/inaction distinction maintains that Congress may not command state action (constituting unconstitutional commandeering) but may command state inaction (constituting lawful preemption).⁵⁴ The Supremacy Clause and the distinctions between lawful preemption and unconstitutional commandeering guide the preemption analysis practitioners must perform to diligently ensure that cannabis commercial lease provisions comply with federal and state law.⁵⁵

2. Local Legislation Preemption

In addition to a preemption analysis between federal and state law, practitioners must perform a similar analysis to ensure commercial lease provisions fully comply with state and local laws.⁵⁶ The preemption doctrine similarly applies to state and local law, rendering local legislation that conflicts with state law void;⁵⁷ however, preemption of state law over local is more extensive than preemption of federal law over state law.⁵⁸ Local legislation conflicts

between that provision of this title and that State law so that the two cannot consistently stand together.”); *see also* *Gonzales v. Oregon*, 546 U.S. 243, 251 (2006) (explaining that § 903 does not preempt States’ authority to regulate controlled substances).

51. Michael A. Cole Jr., *Functional Preemption: An Explanation of How State Medical Marijuana Laws Can Coexist with the Controlled Substances Act*, 16 MICH. STATE U. J. MED. & L. 557, 563 (2012).

52. *Gonzales*, 546 U.S. at 269–70.

53. Cole, *supra* note 51, at 565.

54. *Id.*

55. *See* JAY B. SYKES & NICOLE VANATKO, CONG. RSCH. SERV., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 1 (2019).

56. *See* Shari Hunn, *Commercial Leasing and the Cannabis Market*, JD SUPRA (Aug. 17, 2022), <https://www.jdsupra.com/legalnews/commercial-leasing-and-the-cannabis-3535025/> [<https://perma.cc/P824-CTDX>].

57. *See Preemption*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/preemption> [<https://perma.cc/3GWM-9ZZ7>] (last visited Jan. 12, 2023).

58. *See Wheeler v. App. Div. of Super. Ct.*, 287 Cal. Rptr. 3d 763, 771 (Cal. Ct. App. 2d Dist. 2021).

with state law if it “duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.”⁵⁹ Local legislation duplicates state law if it is “coextensive therewith, regulating or prohibiting exactly the same conduct.”⁶⁰ Local legislation contradicts state law if it is “‘inimical or cannot be reconciled with state law,’ such that it is impossible to comply with both.”⁶¹ Local legislation “enters an area fully occupied by general law” when “the Legislature has expressly manifested its intent to ‘fully occupy’ the area [], or when it has impliedly done so” in a manner that makes it clear that the legislation is fully under state control.⁶²

3. State of Nature Theory

Practitioners should recognize that Congress intentionally attempted to avoid issues of preemption and unconstitutional commandeering in the CSA by including the anti-preemption intent in the language of the federal statute.⁶³ Some scholars argue that because Congress prohibits particular conduct, states must then follow suit; therefore, the CSA must preempt all state laws permitting medical marijuana⁶⁴ use.⁶⁵ Other scholars, such as Professor Robert A. Mikos of Vanderbilt University Law School, argue that the CSA does not preempt state medical marijuana law based on the State of

59. *Id.*

60. *Id.* (citing *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*, 300 P.3d 494, 499 (Cal. 2013)).

61. *Id.* (quoting *O’Connell v. City of Stockton*, 162 P.3d 583, 588 (Cal. 2007)).

62. *Id.*

63. *See* 21 U.S.C. § 903.

64. Practitioners should note that the preemption issue exists for recreational marijuana as well. *See* MD. CODE ANN., HEALTH-GEN. §§ 13-3301 to -3316 (West 2022).

65. *See Wheeler*, 287 Cal. Rptr. 3d at 771; *see also, e.g.,* Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PA. L. REV. 1745, 1759 n.61 (2005) (“The [Oakland Cannabis] Court found that the Controlled Substances Act . . . preempted California’s Compassionate Use Act of 1996 . . .”); K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 286–93 (2001) (arguing Congress may preempt state laws allowing medical marijuana use but Congress had not expressed the intent to do so); Bradford C. Mank, *After Gonzales v. Raich: Is the Endangered Species Act Unconstitutional?*, 78 U. COLO. L. REV. 375, 459 (2007) (claiming that *Raich* held that it was rational for “Congress to preempt state regulation of medical marijuana”); Brian W. Walsh, *Doing Violence to the Law: The Over-Federalization of Crime*, 20 FED. SENT. REP. 295, 298 n.16 (2008) (asserting that *Raich* held that the “federal [CSA] preempted California’s so-called medical marijuana law”).

Nature theory on federal preemptions.⁶⁶ Under the State of Nature theory, “when a state chooses to legalize or decriminalize medicinal marijuana, it simply chooses to no longer prosecute or pursue claims against those users,” thus making it a mere inaction by the state.⁶⁷ Mikos argues that “as long as states go no further [than passive legalization]—and do not actively assist marijuana users, growers, and so on—they may continue to look the other way when their citizens defy federal law.”⁶⁸

If Congress forced states to ban or enforce the CSA, then it would cross the line into unconstitutional commandeering.⁶⁹ By including the anti-preemption intent in the language of the federal statute, Congress avoided issues of unconstitutional commandeering.⁷⁰ Based on the State of Nature theory, Congress can “push states into, or prevent states from leaving, the state of nature (preemption),” but “may not force states to depart from, or prevent them from returning to, the state of nature (commandeering).”⁷¹ By decriminalizing marijuana, states return to the “state of nature” prior to marijuana illegalization.⁷²

D. *Conflicting Courts and Preemption Case Law*

1. *Gonzales v. Raich*

In *Gonzales*, the respondents were residents of California who cultivated and ingested medical marijuana legally under California law but ultimately had their six cannabis plants seized and destroyed by federal agents.⁷³ The Court held that despite the cultivation and use complying with California law, Congress had the power to seize the plants under the Commerce Clause due to the plants’ potential effect on supply and demand in the national market and, therefore, interstate commerce.⁷⁴ Some scholars argue *Gonzales* does not state that the CSA preempts any state medical marijuana law but merely establishes that it is within Congress’ commerce power to prohibit

66. Cole, *supra* note 51, at 565.

67. *Id.* at 566.

68. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1424 (2009).

69. Cole, *supra* note 51, at 567.

70. *See id.* at 566–67.

71. *Id.* at 567.

72. *Id.*

73. *Gonzales v. Raich*, 545 U.S. 1, 6–7 (2005).

74. *See id.* at 28; *see also* Cole, *supra* note 51, at 570.

marijuana use at the federal level.⁷⁵ Based on the State of Nature theory, it is valid to assume the *Gonzales* court followed the principle that the decriminalization of medical marijuana was simply a choice to no longer prosecute or pursue claims against those users.⁷⁶

2. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industry*

In *Emerald Steel*, the employer argued that state law does not require an employer to accommodate an employee's use of marijuana to treat a disability because marijuana possession is illegal under federal law.⁷⁷ The Supreme Court of Oregon held that the CSA preempted the Oregon Medical Marijuana Act (the OMMA) to the extent that ORS 475.306(1) authorized those holding medical marijuana licenses to engage in conduct the CSA explicitly prohibits based on a distinction between decriminalization and authorization of medical marijuana use in the language of the OMMA.⁷⁸ The court explicitly emphasized that the CSA does not preempt provisions of the OMMA that exempt the possession, manufacture, or distribution of medical marijuana from state criminal liability.⁷⁹ Such a preemption would constitute unconstitutional commandeering by commanding state action.⁸⁰

3. *White Mountain Health Center, Inc. v. Maricopa County*

In *White Mountain Health*, Maricopa County refused to issue necessary zoning documents to establish a medical marijuana dispensary (MMD) pursuant to the Arizona Medical Marijuana Act (the AMMA), leading White Mountain to file suit.⁸¹ Similar to Maryland's MMM Laws, the AMMA decriminalizes and provides protections against discrimination under state law for the use, possession, cultivation, and sale of marijuana for medicinal purposes.⁸² The Arizona Court of Appeals held that "the CSA does not preempt the AMMA to the extent the AMMA requires the

75. See Cole, *supra* note 51, at 570.

76. See discussion *supra* Section II.C.3.

77. *Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus.*, 230 P.3d 518, 520 (Or. 2010).

78. *Id.* at 536; see Nicole M. Lacoste Folks et al., *Maryland's Medical Marijuana Law: Transactional and Ethical Perspectives for Real Estate Practitioners*, 5 U. BALT. J. LAND & DEV. 85, 92 (2016) [hereinafter *MMM Law Perspectives*].

79. *Emerald Steel Fabricators*, 230 P.3d at 536.

80. See discussion *supra* Section II.C.3.

81. *White Mountain Health Ctr., Inc. v. Maricopa Cty.*, 386 P.3d 416, 418 (Ariz. Ct. App. 2016).

82. See ARIZ. REV. STAT. ANN. §§ 36-2802, -2811, -2813 to -2814 (2022).

County to pass reasonable zoning regulations for MMDs and process papers concerning zoning compliance or requires the State to issue documents to allow MMDs to operate.”⁸³

The court declined to adopt *Emerald Steel*'s distinction between decriminalization and authorization of medical marijuana use and argued that the “AMMA’s decriminalization of patients’ production, possession, and use of marijuana within the terms of the AMMA is no less an authorization to produce, possess, and use marijuana than authorizing MMDs to operate by producing, possessing, and selling marijuana within the terms of the AMMA.”⁸⁴ In other words, “authorization . . . is merely another term for the absence of penalties or criminal sanctions under state law.”⁸⁵

4. *Ter Beek v. City of Wyoming*

In *Ter Beek v. City of Wyoming*, a property owner and qualified medical marijuana patient under Michigan Medical Marijuana Act (MMMA) filed action against the city, challenging the city’s zoning ordinance prohibiting use of land in a manner that was contrary to federal law.⁸⁶ The court held that the CSA did not preempt the MMMA provision legalizing medical marijuana under Michigan state law because the provision provided individuals with a “limited *state-law* immunity” from punishment; however, it did not provide for immunity from federal criminalization of, or punishment for, that conduct.⁸⁷ Conversely, the court held that the MMMA provision preempted the zoning ordinance because the ordinance directly conflicts with the MMMA by permitting registered qualifying patients to be penalized for engaging in MMMA-compliant medical marijuana use.⁸⁸

Based on preemption case law of various states, cannabis businesses generally have the right to navigate state versus federal conflicts.⁸⁹ Until cannabis is legalized federally, practitioners should be prepared to be challenged by state courts that choose to shy away from principles of federalism and uphold federal views on cannabis legalization despite conflicting state law.⁹⁰

83. *White Mountain Health*, 386 P.3d at 419.

84. *Id.* at 430.

85. *Id.*

86. *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 534 (Mich. 2014).

87. *Id.* at 537.

88. *Id.* at 544.

89. *See supra* text accompanying notes 73–84.

90. *See Ter Beek*, 846 N.W.2d at 544.

E. Commercial Cannabis Remedies

Because of the high risk of litigation in state courts regarding cannabis legalization, Maryland practitioners should be aware of the remedies available in the event of commercial cannabis lease disputes.⁹¹ Commercial landlords in Maryland have several remedy options under Maryland state law, but they should also consider how other states deal with commercial lease remedies, such as self-help, foreclosures, and repossession.⁹² Commercial landlords should be aware of the remedies available to them in the case of a lease default.⁹³

1. Commercial Landlord Remedies in Maryland

Maryland law provides several options for commercial landlords seeking remedies for a lease default, depending on the nature of the default.⁹⁴ These remedies include actions for repossession of the rented premises when the tenant fails to pay rent;⁹⁵ repossession of the premises when the tenant holds over beyond the lease term;⁹⁶ repossession of the premises when the tenant has substantially breached the lease;⁹⁷ damages due to a lease default; and distraint⁹⁸ when the tenant has past-due rent.⁹⁹ Though discouraged by the courts, landlords may use self-help as a means of repossessing the premises upon termination of the commercial lease, as long as the landlord can repossess peacefully.¹⁰⁰

In Maryland, generally, a landlord cannot consent to the search of a tenant's property while the lease is still valid.¹⁰¹ This legal concept arises from the theory that the objective of the Fourth Amendment is not to deny law enforcement the opportunity to use reasonable inferences from evidence but to offer protection by requiring that

91. See discussion *supra* Section II.D.

92. See *infra* text accompanying notes 94–119.

93. See PRAC. L. REAL EST., LANDLORD'S RIGHTS AND REMEDIES (COMMERCIAL LEASE) § 2 (2022), Westlaw W-034-7962.

94. See MD. CODE ANN., REAL PROP. §§ 8-401 to -02, -405 (West 2022).

95. *Id.* § 8-401.

96. *Id.* § 8-402.

97. *Id.* § 8-402.1.

98. Distraint is the noun form of the verb distraint, meaning, “[t]o force (a person, usu. a tenant), by the seizure and detention of personal property, to perform an obligation (such as paying overdue rent).” *Distraint*, BLACK’S LAW DICTIONARY (11th ed. 2019).

99. REAL PROP. § 8-302.

100. *K & K Mgmt., Inc. v. Lee*, 557 A.2d 965, 985 (Md. 1989).

101. *Frobouck v. State*, 67 A.3d 572, 579 (Md. Ct. Spec. App. 2013) (citing *Chapman v. United States*, 365 U.S. 610, 616 (1961)).

“those inferences be drawn by a neutral and detached magistrate.”¹⁰² This same principle applies to the prohibition on landlords’ consent to the search of a tenant’s property, as a landlord is not a “neutral and detached magistrate.”¹⁰³

a. Thornton Mellon, LLC v. Frederick County Sheriff

Sheriffs in Frederick County, Baltimore County, Anne Arundel County, and Howard County, Maryland adopted a “movers policy,” allowing sheriffs to hire movers to remove personal belongings from a property forfeited through a tax sale¹⁰⁴ or eviction.¹⁰⁵ In *Thornton Mellon*, the Appellate Court of Maryland¹⁰⁶ held that such movers policies are a valid exercise of the sheriff’s fairly implied power, and the choice between using the movers policy or changing locks and allowing the former owner to pick up their belongings at an arranged time is in the sheriff’s discretion.¹⁰⁷ Currently, there is no Maryland case law or statutory law explicitly explaining how a movers policy would apply to an eviction with a cannabis-industry tenant, but applying a movers policy to cannabis commercial leases could pose significant risks regarding the removal of federally illegal cannabis and cannabis-related equipment.¹⁰⁸

102. *Chapman*, 365 U.S. at 614.

103. *See id.* at 614–16.

104. *See Thornton Mellon, LLC v. Frederick Cty. Sheriff*, 258 A.3d 1032, 1037 (Md. Ct. Spec. App. 2021).

105. *See id.*

106. This court was formerly known as the Court of Special Appeals of Maryland. In November 2022, Maryland voters ratified a constitutional amendment changing the name to the Appellate Court of Maryland, effective December 14, 2022. The highest court in Maryland is now known as the Supreme Court of Maryland. Governor Lawrence J. Hogan Jr., Governor’s Proclamation Declaring the Result of the Election of November 8, 2022, for Const. Amends. (Dec. 14, 2022), <https://www.courts.state.md.us/sites/default/files/import/reference/pdfs/proclamation20221213.pdf> [<https://perma.cc/HTN8-N9Q7>].

107. *See Thornton Mellon*, 258 A.3d at 1040.

108. *See, e.g., Margaret Jackson, An Ironclad Lease Can Help Marijuana Companies Avoid Eviction in State-Legal Markets*, MJBIZDAILY (Dec. 17, 2021), <https://mjbizdaily.com/ironclad-lease-marijuana-companies-avoid-eviction/> [<https://perma.cc/VH5L-UZR4>] (acknowledging that both tenants and landlords face heightened risk because of the federally illegal nature of marijuana).

2. Commercial Landlord Remedies in Colorado

a. *In re Arenas*

To avoid issues at the federal level, parties in a commercial lease should consider contractually agreeing to not seek relief in bankruptcy courts.¹⁰⁹ In *In re Arenas*, the debtor legally produced and distributed wholesale marijuana in Colorado with all required permits and licenses, but he could not operate his business legally under the CSA.¹¹⁰ The Colorado Bankruptcy Court cited Professor Mikos and interpreted his State of Nature theory to suggest that “[s]tate legalization works . . . only because it is the states that have been on the forefront of enforcement of marijuana laws.¹¹¹ Once the states decriminalize marijuana and stop enforcing a prohibition on its distribution and use, the federal government lacks the resources to fill that void.”¹¹² The court ultimately held that, as a federal court, it could not force the debtor’s trustee to administer assets because the “mere act of estate administration would require him to commit federal crimes under the CSA” and, thus, prevent “the orderly operation of a case under either Chapter 7 or Chapter 13 of the Bankruptcy Code.”¹¹³

b. *In re Rent-Rite Super Kegs W. Ltd.*

The United States Bankruptcy Court for the District of Colorado ruled that leasing a property to licensed cannabis-industry tenants equates to a federal crime under the CSA.¹¹⁴ Thus, the landlord-debtor (the Debtor) would have “unclean hands,” prohibiting the landlord from seeking relief and the right to reorganize under a Chapter 11 bankruptcy.¹¹⁵

In *In re Rent-Rite*, the Debtor leased warehouse space to tenants engaged in the business of growing marijuana legally under Colorado

109. Because marijuana remains illegal at the federal level, bankruptcy courts cannot provide relief to debtors. See U.S. DEP’T OF JUST., EXEC. OFF. U.S. TRS., Director Letter (2017) (“It is the policy of the United States Trustee Program that United States Trustees shall move to dismiss or object in all cases involving marijuana assets on grounds that such assets may not be administered under the Bankruptcy Code . . .”).

110. *In re Arenas*, 514 B.R. 887, 888 (Bankr. D. Colo. 2014).

111. *Id.* at 890 (citing Mikos, *supra* note 68).

112. *Id.*

113. *Id.* at 895.

114. *In re Rent-Rite Super Kegs W. Ltd.*, 484 B.R. 799, 805 (Bankr. D. Colo. 2012); see also *MMM Law Perspectives*, *supra* note 78, at 106.

115. *Rent-Rite*, 484 B.R. at 807; see also *MMM Law Perspectives*, *supra* note 78, at 106.

state law.¹¹⁶ The tenant-creditor (the Creditor) argued that the Debtor's activities, which are illegal under the CSA, made it "unworthy of the equitable protection of the bankruptcy court."¹¹⁷ The court held that "unless and until Congress changes [federal drug] law, the Debtor's operations constitute a continuing criminal violation of the CSA and a federal court cannot be asked to enforce the protections of the Bankruptcy Code in aid of a Debtor whose activities constitute a continuing federal crime."¹¹⁸ The Debtor's decision to continue renting space to marijuana-growing tenants who were violating the CSA placed the Debtor's collateral at risk because federal law allows the United States Government to seize property that was being used for illegal purposes.¹¹⁹

F. Commercial Lease Provisions for Cannabis-Industry Tenants

Landlords and real estate attorneys must exercise great caution in drafting commercial leases to ensure each party is in compliance with state and local laws and regulations and to avoid potential prosecution and liability.¹²⁰ In New Jersey and Colorado, two states that have legalized both medical and recreational marijuana,¹²¹ real estate law practitioners carefully navigated commercial leases and recommended provisions for leases concerning cannabis-industry clients to avoid issues of compliance under federal and state law.¹²²

1. New Jersey

New Jersey legalized medical marijuana in 2009 through the Jake Honig Compassionate Use Medical Cannabis Act.¹²³ The state then

116. *Rent-Rite*, 484 B.R. at 802.

117. *Id.*

118. *Id.* at 805.

119. *Id.* at 805–06.

120. See Alyssa Adams, *What are Landlord-Tenant Laws and Why is Compliance Important?*, BAY PROP. MGMT. GRP. (Sept. 29, 2021), <https://www.baymgmtgroup.com/blog/landlord-tenant-laws-and-compliance/> [<https://perma.cc/BY5G-ZD4K>].

121. See New Jersey Compassionate Use Medical Marijuana Act, 2009 NJ Sess. Law Serv. Ch. 307 (West) (codified as N.J. STAT. ANN. § 24:6I-1 *et seq* (West 2022)); see also COLO. CONST. art. XVIII, § 16.

122. See Jack Fersko et al., *'Legal' Marijuana: The Implications for Commercial Real Estate*, 2018 N.J. LAW. 54, 56 (2018) [hereinafter *NJ Commercial Real Estate*]; see also Ben Leonard & Brett Williams, *Commercial Leases Involving Cannabis Businesses: A Practical Guide for Landlords and Their Counsel*, 50 COLO. LAW. 42 (2021) [hereinafter *CO Commercial Leases*].

123. See New Jersey Compassionate Use Medical Marijuana Act, 2009 NJ Sess. Law Serv. Ch. 307 (West) (codified as N.J. STAT. ANN. § 24:6I-1 *et seq* (West 2022)). New

legalized recreational marijuana on August 26, 2021, through the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act.¹²⁴ New Jersey real estate law practitioners set forth a series of guidelines and suggestions for commercial leases involving tenants in the cannabis industry.¹²⁵

First, a lease agreement should “require that the tenant observe all federal guidelines that have been or may be issued by the Department of Justice, the Department of Treasury and other federal agencies with respect to cannabis businesses.”¹²⁶ While the CSA still broadly prohibits any business from growing, processing, or selling cannabis products, such a provision omits potential liability if federal guidelines regarding cannabis-related business activity change.¹²⁷ With respect to preemption, as long as states merely regulate and do not actively assist marijuana users, growers, etc., they may continue to overlook tenants defying federal law.¹²⁸

Second, a lease agreement should also provide an “early termination option” giving the landlord “the right to terminate the lease if the tenant fails to comply with state law and applicable federal guidelines or if any enforcement action is commenced or threatened against the landlord as a result of the tenant’s activities.”¹²⁹ This provision addresses the criminal liability landlords may face at both the state and local levels, while ensuring the tenant complies with the law during the entire duration of the lease.¹³⁰ This provision should also include an additional subsection requiring the tenant to be responsible for removing “all cannabis product and equipment from the leased premises in compliance with the law.”¹³¹ Such a provision gives the landlord a cause of action for breach if the tenant does not remove all cannabis-related products and equipment and gives the landlord a cause of action against the tenant for the

Jersey subsequently expanded the legalization efforts in 2019, via the New Jersey legalized medical marijuana in 2009, through the Jake Honig Compassionate Use Medical Cannabis Act. *See* Jake Honig Compassionate Use Medical Cannabis Act, 2019 NJ Sess. Law Serv. Ch. 153 (West) (codified as N.J. STAT. ANN. § 24:6I-1 *et seq* (West 2022)).

124. *See* New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act, 2021 NJ Sess. Law Serv. Ch. 16 (West) (codified as N.J. STAT. ANN. § 24:6I-31 *et seq* (West 2022)).

125. *See* *NJ Commercial Real Estate*, *supra* note 122, at 54, 56.

126. *Id.* at 56.

127. *See id.* at 57.

128. *See* Mikos, *supra* note 68, at 1424.

129. *NJ Commercial Real Estate*, *supra* note 122, at 56.

130. *Id.*

131. *Id.*

financial obligations of a loss relating to the landlord's potential criminal liability of being forced to repossess the premises which contains equipment and inventory illegal under the CSA.¹³²

2. Colorado

Colorado legalized marijuana for recreational sale and use in 2012.¹³³ The Colorado Department of Revenue, Marijuana Enforcement Division (MED) oversees the cannabis industry in Colorado and is responsible for “issuing business licenses, vetting potential licensees, and monitoring licensees’ activities.”¹³⁴ Colorado also has a dual-licensing system requiring cannabis businesses to be approved to operate by the applicable local jurisdictions.¹³⁵ Similar to New Jersey, Colorado real estate law practitioners have released several guidelines on how to construct commercial leases involving tenants in the cannabis industry.¹³⁶

Colorado law requires that all marijuana licensees have full control over their licensed premises by and through direct ownership of the property or a lease that “affords the tenant legally sufficient control,” meaning that the tenant has “full control of and exclusive access to the property.”¹³⁷ The MED also suggests that “a tenant’s permitted use under its lease include the specific contemplated marijuana operations (e.g., cultivation, manufacturing, and/or dispensing).”¹³⁸ Such explicit consent from the landlord prevents unexpected liability resulting from an unauthorized use of the premises, either under state law or federal regulations.¹³⁹

132. *See id.*

133. *See* COLO. CONST. art. XVIII, § 16.

134. *CO Commercial Leases*, *supra* note 122, at 42–44.

135. *Id.* at 44.

136. *See supra* text accompanying notes 111–16.

137. *CO Commercial Leases*, *supra* note 122, at 45.

138. *Id.* An example of such a permitted use provision is:

The premises shall be used and occupied by tenant only for the sale of medical and retail marijuana and marijuana related products and for no other purpose. Tenant shall not initiate, submit an application for, or otherwise request any land use approvals or entitlements with respect to the premises, including, without limitation, any variance, conditional use permit, or rezoning, without first obtaining landlord's prior written consent, which may be given or withheld in landlord's sole discretion.

Id.

139. *See id.*

Additionally, Colorado law requires a licensee to have full control over restricted areas of its licensed premises, including prohibiting unauthorized access by landlords.¹⁴⁰ Commercial leases should include specific provisions that allow for exceptions to this general rule, such as “access to perform environmental testing, access in the event of default, and access for purposes of auditing books and records.”¹⁴¹

Colorado law expressly specifies that cannabis-related contracts are enforceable in Colorado courts,¹⁴² but real estate practitioners should still note the importance of selecting and specifying the governing law and venue in leases with cannabis-industry tenants.¹⁴³ “The enforceability of cannabis-related contracts must be considered because courts generally may not enforce contracts where the subject matter of the agreement is illegal.”¹⁴⁴

III. ANALYSIS

Maryland real estate practitioners should take special care to advise their clients on the pros and cons of contractually agreeing to various forum selection clauses before adding such provisions to a lease.¹⁴⁵ Commercial landlords in Maryland should be aware of the remedies available under Maryland state law, but they should also consider how other states deal with commercial lease remedies.¹⁴⁶ Maryland real estate law practitioners should not shy away from dealing with commercial leases involving cannabis-industry tenants, but they should remain vigilant throughout the drafting process and follow suggested guidelines to ensure all parties are in compliance with federal, state, and local laws.¹⁴⁷

A. *Forum Selection Clauses and Conflict of Laws*

Maryland lawmakers should consider following Colorado’s lead by explicitly instituting a state law that cannabis-related contracts are enforceable in Maryland courts.¹⁴⁸ Lease provisions stating that the lease should be governed by Maryland law and that the venue for

140. See COLO. CODE REGS. § 212-3:3-205 (2022).

141. *CO Commercial Leases*, *supra* note 122, at 45.

142. COLO. REV. STAT. ANN. § 13-22-601 (West 2022).

143. See *CO Commercial Leases*, *supra* note 122, at 46.

144. *Id.*

145. See *infra* Section III.A.

146. See *infra* Section III.B.

147. See *infra* Section III.C.

148. See COLO. REV. STAT. ANN. § 13-22-601 (West 2022).

disputes should be limited to the state or county courts of Maryland may ameliorate conflict of law issues.¹⁴⁹

Parties could also choose to select a dispute resolution forum outside of federal or state courts.¹⁵⁰ Parties could prefer to have “disputes resolved in binding arbitration to maintain the privacy of their involvement in the cannabis industry.”¹⁵¹ An arbitration provision would be sensible to use in a commercial lease because lawmakers have not yet expressly established that cannabis-related contracts are enforceable in Maryland.¹⁵² There is a risk that federal courts, even those located in states like Colorado, will refuse to enforce contracts related to cannabis activity, so practitioners should weigh the benefits and risks of choosing a proper venue.¹⁵³

Federal bankruptcy courts made it clear that landlords cannot seek relief or the right to reorganize under a Chapter 11 bankruptcy if they have “unclean hands” from dealing with transactional matters with cannabis-industry clients.¹⁵⁴ To avoid issues at the federal level, parties in commercial leases should consider contractually agreeing not to seek relief in bankruptcy courts.¹⁵⁵ Although courts have generally held that waiving or contracting away the right to file for relief under the Bankruptcy Code is contrary to public policy, a number of courts have held that operating agreement provisions limiting the authority of members or managers of a limited liability company to file a bankruptcy case are enforceable.¹⁵⁶ The underlying premise of the holdings allowing operative agreement provisions to limit the use of bankruptcy is that limited liability companies are “primarily creatures of contract.”¹⁵⁷

149. See *CO Commercial Leases*, *supra* note 122, at 45–46.

150. See *id.* at 46.

151. *Id.*

152. See *id.*

153. See *id.*

154. See *In re Rent-Rite Super Kegs W. Ltd.*, 484 B.R. 799, 805 (Bankr. D. Colo. 2012).

155. See *supra* Section II.E.2.a.

156. Paul R. Hage, *Border Control: The Enforceability of Contractual Restraints on Bankruptcy Filings, Part 1*, ABA (Dec. 14, 2019), https://www.americanbar.org/groups/business_law/publications/blt/2019/12/border-control/ [https://perma.cc/N3GL-DVKX].

157. *Id.*; see also *In re Simplexity, LLC*, No. 14-10569, 2017 WL 2385404, at *3, *5 (Bankr. D. Del. June 1, 2017) (citing *TravelCenters of Am., LLC v. Brog*, No. 3516, 2008 WL 1746987, at *1 (Del. Ch. Apr. 3, 2008) (finding that, under Delaware law, “limited liability companies are creatures of contract” and, thus, drafters enjoy broad freedom in creating bylaws)).

There is no prior case law addressing such a solution for lease agreements, but assuming the provision is valid under all local and state regulations, this could be a creative solution for both parties to repossess property in the event of a tenant's bankruptcy.¹⁵⁸ Similar to limited liability companies, lease agreements are "creatures of contract" with both parties having a maximum amount of freedom to contract.¹⁵⁹ However, having a forum selection clause stating that disputes shall not go to bankruptcy court presents two immediate questions: (1) does the clause potentially bar bankruptcy as an avenue of relief for either party and (2) would an attempt to access bankruptcy relief force litigation to take place in another venue to decide if such a potential bankruptcy proceeding is permissible under the terms of the contract and other applicable law?¹⁶⁰ The latter question presents additional forum selection issues, requiring parties to either account for forum selection provisions for side disputes or potentially face litigation in forums not anticipated by the parties.¹⁶¹ Therefore, the parties to a cannabis commercial lease should strongly consider the pros and cons of contractually agreeing to not seek relief in bankruptcy courts before adding such a provision to the lease.¹⁶²

B. Remedies for Repossession of Cannabis-Related Property

Depending on the nature of the default, Maryland law provides several options for commercial landlords seeking remedies for a lease default, including self-help, foreclosures, and repossession.¹⁶³ These remedies include actions for repossession of the rented premises when the tenant fails to pay rent;¹⁶⁴ repossession of the premises when the tenant holds over beyond the lease term;¹⁶⁵ repossession of the premises when the tenant has substantially breached the lease;¹⁶⁶ damages due to a lease default; and distraint when the tenant has past-due rent.¹⁶⁷ Landlords may use self-help for commercial lease evictions as a means of repossessing the premises upon termination

158. See Hage, *supra* note 156.

159. See *Simplexity*, 2017 WL 2385404, at *5.

160. See Hage, *supra* note 156.

161. See Hannah L. Buxbaum, *The Interpretation and Effect of Permissive Forum Selection Clauses under U.S. Law*, 66 AM. J. COMP. L. 127, 135 (2018).

162. See *id.*

163. See *supra* Section II.E.

164. MD. CODE ANN., REAL PROP. § 8-401(a) (West 2022).

165. *Id.* § 8-402.

166. *Id.* § 8-402.1(a)(1)(i).

167. *Id.* § 8-302.

of the commercial lease, as long as the repossession can be performed peacefully.¹⁶⁸

Using repossession or self-help in the event of default or eviction could pose complicated issues for landlords with commercial cannabis tenants because, potentially, some of the property they are repossessing is illegal under federal law.¹⁶⁹ To avoid such issues, leases for cannabis-industry tenants should compel the tenant to dispose of its cannabis and any cannabis-related equipment in accordance with state rules.¹⁷⁰ Maryland's current MMM Laws do not explicitly state how parties should dispose of cannabis and cannabis-related equipment, but real estate practitioners should encourage Maryland lawmakers to acknowledge this issue and create regulations addressing it.¹⁷¹

Commercial cannabis-tenant leases should also include indemnification provisions requiring the cannabis tenant to indemnify the landlord against "criminal prosecution, forfeiture seizures, and the other events triggering default and immediate termination rights."¹⁷² Indemnification provisions give the landlord a cause of action against the tenant for any financial losses from any criminal liability for repossessing premises containing equipment and inventory illegal under the CSA.¹⁷³ Clear and explicit indemnification clauses hold landlords harmless from various kinds of liability associated with the special risks of leasing to a cannabis business.¹⁷⁴

168. *K & K Mgmt., Inc. v. Lee*, 557 A.2d 965, 985 (Md. 1989).

169. *See, e.g., NJ Commercial Real Estate*, *supra* note 122, at 55.

170. David J. Petersen, *Things to Think About for Commercial Cannabis Leases in Oregon*, PORTLAND BUS. J. (Sept. 5, 2019), <https://www.bizjournals.com/portland/news/2019/09/05/things-to-think-about-for-commercial-cannabis.html> [<https://perma.cc/CG3U-8JA2>].

171. Virginia, for example, requires any seized controlled substances, marijuana, and/or paraphernalia to be destroyed pursuant to a court order specifying "the existence and nature of the substance or paraphernalia, the quantity thereof, the location where seized, the person or persons from whom the substance or paraphernalia was seized, if known, and the manner whereby such item shall be destroyed." VA. CODE ANN. § 19.2-386.23 (West 2022).

172. Glenn S. Demby, *Get 10 Protections When Leasing to a Marijuana Business*, COM. LEASE L. INSIDER (Oct. 23, 2014), <https://www.commercialleaselawinsider.com/article/get-10-protections-when-leasing-marijuana-business> [<https://perma.cc/4XPS-2Q3N>] (discussing that such indemnification provisions prevent landlords from incurring criminal liability for indirect possession of the tenant's cannabis or cannabis-related equipment).

173. *See NJ Commercial Real Estate*, *supra* note 122, at 54.

174. *See id.*

C. *Suggestions for Commercial Leases Involving Cannabis-Industry Tenants in Maryland*

Some legal scholars and practitioners suggest that the wisest option for commercial property landlords is to “just say no” to recreational cannabis licensees looking to lease commercial, industrial, or retail space to operate growing and production facilities.¹⁷⁵ Although leasing to a cannabis-industry tenant is a federal crime under the CSA,¹⁷⁶ numerous courts have ruled that state laws governing marijuana are not preempted by the CSA.¹⁷⁷ While Maryland real estate law practitioners should not shy away from dealing with commercial leases involving cannabis-industry tenants, they should remain vigilant throughout the drafting process to ensure the landlord is at minimal risk for liability in such a transaction.¹⁷⁸ To achieve minimal risk of liability, commercial leases should include the following provisions: (1) strict state and federal law compliance, (2) non-curable defaults, (3) early lease termination, and (4) tenant responsibilities upon lease termination.

Although the risk of federal prosecution cannot be contracted away,¹⁷⁹ landlords and real estate attorneys must be exceptionally cautious in drafting commercial leases to ensure each party follows state and local laws and regulations.¹⁸⁰ Consider this model compliance provision:

Compliance with Laws. The parties acknowledge that myriad regulations and local, state, and federal laws and private persons shall govern the operation of Tenant’s use and that Tenant alone will be responsible for compliance with all mandates and requirements of any nature. The

175. See *MMM Law Perspectives*, *supra* note 78, at 109.

176. See *supra* Section II.A.

177. See, e.g., *Emerald Steel Fabricators, Inc. v. Bureau of Lab. & Indus.*, 230 P.3d 518, 536 (Or. 2010) (holding that the CSA does not preempt provisions of the OMMA that exempt the possession, manufacture, or distribution of medical marijuana from state criminal liability); *White Mountain Health Ctr., Inc., v. Maricopa Cty.*, 386 P.3d 416, 419 (holding that “the CSA does not preempt the AMMA to the extent the AMMA requires the County to pass reasonable zoning regulations for MMDs”); *Hager v. M&K Constr.*, 247 A.3d 864, 886 (N.J. 2021) (holding that New Jersey’s Compassionate Use Act is not preempted by the CSA).

178. See *NJ Commercial Real Estate*, *supra* note 122, at 56.

179. *Id.*

180. See *Minimize Marijuana Risks With Special Lease Clauses*, PARTRIDGE SNOW & HAHN LLP (Sept. 27, 2017) [hereinafter *Special Lease Clauses*], <https://www.psh.com/minimize-marijuana-risks-with-special-lease-clauses> [<https://perma.cc/D4A6-GFRE>]; see also *supra* text accompanying notes 120–22.

parties also acknowledge that under federal law, the production, distribution and sale of cannabis remains a violation of the Controlled Substances Act and that, as between Landlord and Tenant, the risk of enforcement of such laws is on Tenant. Tenant's foregoing obligation shall encompass (i) all state and local laws and regulations from any governmental authority with jurisdiction over Tenant's use, including but not limited to [insert specific applicable regulations], and local zoning ordinances; and (ii) all federal laws to the extent those laws are not inconsistent with state and local laws allowing Tenant to use the Premises for the Permitted Use. The covenant to comply encompasses all applicable laws that become effective before and during the Lease Term, as may be extended (collectively, the "Mandates"), regardless of the cost of such compliance. Tenant's inability to comply with the Mandates shall be grounds for termination of this Lease.¹⁸¹

Such commercial leases should follow the guidance of New Jersey practitioners and include protective provisions requiring the tenant to strictly comply with "all state laws governing the operation of the cannabis business, all applicable zoning restrictions, and the requirements of any easements, covenants or restrictions that benefit or burden the property."¹⁸² Commercial leases for cannabis tenants should provide "non-curable defaults"¹⁸³ for "federal intervention, changes in federal enforcement policy, forfeiture threats, and federal enforcement actions" in order to give the landlord a better negotiating position with the DOJ should the need arise.¹⁸⁴

181. *Special Lease Clauses*, *supra* note 180.

182. *NJ Commercial Real Estate*, *supra* note 122, at 56.

183. A "non-curable default" means any of the following: (a) a breach of a material representation or warranty; (b) a breach of any restriction on assignment, hypothecation or other transfer; (c) a breach constituting gross negligence, fraud, bad faith, or willful misconduct; (d) a breach of any exclusive, first offer, or non-competition covenant; (e) taking action that is beyond the scope of authority established by the agreement; or (f) a Bankruptcy/Dissolution Event. *Noncurable Default Definition*, L. INSIDER, <https://www.lawinsider.com/dictionary/noncurable-default> [<https://perma.cc/LXV6-9YYS>] (last visited Dec. 15, 2022).

184. *Landlords and Cannabis Clients: How to Handle Commercial Leases with Green Tenants*, EARP COHN (Oct. 2016), <https://earpcohn.com/blogs/landlords-and-cannabis-clients-how-to-handle-commercial-leases-with-green-tenants/> [<https://perma.cc/B8Q4-T4ZW>].

Additionally, the commercial lease should include an early lease termination provision.¹⁸⁵ Consider this model early termination provision:

Early Termination. Landlord shall have the right upon Landlord's sole election, upon five (5) days prior written notice to Tenant or, if sooner, upon the effective date of any court order, to terminate this Lease in the event any of these causes ("Early Termination Causes") arise:

- (a) The seizure by any governmental authority seeking forfeiture of the Premises, whether or not the court proceeding has actually commenced;
- (b) The entry of judgment (whether final or not) that has the effect (whether by restraining order, injunction, declaration, or otherwise) of establishing the Tenant's use of the Premises constitutes a public or private nuisance;
- (c) The commencement of an action under any federal, state, or local law (ordinance) or regulation seeking remediation of the Premises as a result of a violation by Tenant of any mandate pertaining to environmental sensitivity or commission of waste, irrespective of Tenant's intent and course of action following its commencement.¹⁸⁶

If a tenant fails to comply with applicable state statutes or regulations, an early termination provision can protect the landlord from the risk of criminal prosecution, civil liability, and forfeiture under federal law resulting from the cannabis tenant's non-compliance.¹⁸⁷

Commercial leases for cannabis-industry tenants should also include a provision regarding responsibilities upon lease termination.¹⁸⁸ Consider this model responsibilities upon lease termination provision:

Disposal and Removal of Alterations. Tenant hereby covenants to dispose, according to Mandates, all unused inventory, refuse, and scrap materials and thereafter to clean to commercially acceptable standards (including

185. *Special Lease Clauses*, *supra* note 180; *see also supra* text accompanying note 129.

186. *Special Lease Clauses*, *supra* note 180.

187. *Id.*

188. *Id.*; *see also supra* text accompanying notes 131–32.

sterilization of impermeable surfaces, wall to wall and ceiling to floor) all floors, walls, immovable fixtures, and air ducts serving the Premises. Tenant's covenant to comply with all applicable Mandates shall apply equally to dismantling Tenant's operations at the end of the Lease Term and surrender of the Premises. Landlord shall not return the Security Deposit to Tenant until an inspection of the Premises discloses that the above cleaning and disposal and removal of Alterations required by this Lease have been satisfactorily completed.¹⁸⁹

This provision should explicitly specify that the tenant is responsible for removing all "marijuana equipment at the termination of a lease and clean[ing] the premises of all marijuana-related product and residue."¹⁹⁰

IV. CONCLUSION

As an increasing number of states are legalizing marijuana for medicinal and recreational use, landlords and real estate law practitioners must carefully navigate commercial leases for clients in the cannabis industry to ensure clear compliance with state and local statutes and regulations and to minimize the landlord's liability risk.¹⁹¹ The peculiarities of leasing commercial real estate to cannabis-industry tenants require both landlords and tenants to fully consider the impact of local, state, and federal laws regulating cannabis use, production, and sale.¹⁹²

Maryland practitioners should encourage state lawmakers to enact a law explicitly stating that cannabis-related contracts are enforceable in Maryland to allow Maryland's medical and recreational marijuana businesses to thrive.¹⁹³ Maryland lawmakers should also consider drafting regulations governing how cannabis and cannabis-related equipment should be disposed of under state law.¹⁹⁴ Maryland real estate law practitioners should not "just say no" to dealing with commercial leases involving cannabis-industry tenants. There are

189. *Special Lease Clauses*, *supra* note 180.

190. *Id.*

191. *See supra* Section III.A.

192. *See Commercial Leasing to an Arizona Cannabis Business*, SACKS TIERNEY (Jan. 14, 2020), <https://www.sackstierney.com/articles/commercial-leasing-cannabis-business.htm> [<https://perma.cc/XQQ9-86C6>].

193. *See supra* text accompanying notes 148–49.

194. *See supra* Section III.B.

significant opportunities available in the cannabis industry, and the industry is only expected to grow as more states, including Maryland, pivot towards full legalization of cannabis.¹⁹⁵ Instead, practitioners should merely remain cautious, vigilant, and proactive throughout the drafting process and urge state lawmakers to address gray areas in the law regarding cannabis-related leases.¹⁹⁶ The legalization of cannabis may greatly benefit the commercial real estate industry, and uncertainty should not temper these high expectations of growth.

195. *See supra* Part III.

196. *See supra* Section III.C.