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Up in Smoke: The Looming Insolvency of Oregon Marijuana Growers and the Case for Chapter 12 Bankruptcy Relief

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INTRODUCTION

The Oregon marijuana industry is a bubble ready to burst. The Oregon Liquor Control Commission (OLCC) began issuing

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licenses to recreational marijuana producers¹ in April 2016² and the number of recreational marijuana growers has surged in the state.³ Today, the price of marijuana in Oregon is falling precipitously, and there is more marijuana in the state than can be legally consumed.⁴ It is only a matter of time before a wave of Oregon marijuana growers come knocking at the doors of federal court, bankruptcy petitions in hand.

To date, marijuana-related debtors have found little relief in bankruptcy.⁵ Marijuana is illegal under federal law⁶ and is listed as a Schedule I drug under the Controlled Substances Act (CSA).⁷ The CSA prohibits a wide range of activities surrounding the use, production, and distribution of marijuana, such as managing property for growing marijuana or deriving any profit or proceeds from a marijuana operation.⁸ With the illegal status of marijuana under federal law,

¹ A marijuana grower is referred to as a “producer” under the OLCC’s administrative rules. OR. ADMIN. R. 845-025-1015(66) (2018) (defining “produces” as the “manufacture, planting, propagation, cultivation, growing or harvesting of marijuana.”). The Oregon Medical Marijuana Program (OMMP) generally refers to marijuana growers as “growers,” not producers. *See, e.g.*, OR. ADMIN. R. 333-008-0010(59) (2018) (defining “growing” as “planting, cultivating, growing, trimming or harvesting marijuana”). The different use of the terms “grower” and “producer” by the OLCC and the OMMP is likely a way to easily differentiate between those growers who are licensed with the OLCC and those licensed under the OMMP. *See* Vince Sliwoski, *Oregon Marijuana Production: Terms, Tiers and Really Big Grows*, CANNA L. BLOG (Nov. 4, 2015), <https://www.cannalawblog.com/oregon-marijuana-production-terms-tiers-and-really-big-grows>.

² Noelle Crombie, *Recreational Marijuana Sales in Oregon: A Timeline*, THE OREGONIAN (Sept. 30, 2016), http://www.oregonlive.com/marijuana/index.ssf/2016/09/recreational_marijuana_sales_i.html.

³ Dylan Darling, *Pot Prices Plummet*, REGISTER GUARD (Feb. 16, 2018, 12:01 AM), <http://www.registerguard.com/rg/news/local/36452278-75/price-of-marijuana-in-oregon-plummets-as-the-number-of-recreational-pot-growers-explodes.html.csp>.

⁴ *Id.*; Grace Guarnieri, *Oregon Marijuana Overproduction: State Produces Three Times More Pot than Can Be Legally Consumed*, NEWSWEEK (Feb. 4, 2018, 9:36 AM), <http://www.newsweek.com/oregon-marijuana-overproduction-three-times-799090>.

⁵ *See In re Arenas*, 535 B.R. 845 (B.A.P. 10th Cir. 2015) (denying a medical marijuana grower relief under chapter 7 and chapter 13); *In re Medpoint Mgmt., L.L.C.*, 528 B.R. 178 (Bankr. D. Ariz. 2015) (denying chapter 7 relief to debtor operating a marijuana-related business); *In re Rent-Rite Super Kegs W. Ltd.*, 484 B.R. 799 (Bankr. D. Colo. 2012) (denying chapter 11 relief to debtor leasing warehouse space to marijuana growers); *In re McGinnis*, 453 B.R. 770 (Bankr. D. Or. 2011) (denying chapter 13 relief to a debtor seeking to use profits from a medical marijuana operation and warehouse space leased to medical marijuana growers to fund a bankruptcy plan).

⁶ Controlled Substances Act, 21 U.S.C.A. §§ 801–971 (West 2012).

⁷ 21 U.S.C.A. § 812(c) (West 2012).

⁸ *See, e.g.*, 21 U.S.C.A. §§ 855–856 (West 2012).

bankruptcy courts—as federal courts⁹—are reticent to grant marijuana-related businesses bankruptcy relief. Doing so might place a federal court in the position of furthering a federally criminal enterprise by helping a marijuana business reorganize to continue operating successfully. With that illegality concern looming over the bankruptcies of marijuana-related debtors, bankruptcy courts have turned away marijuana-related debtors on the grounds of plan feasibility,¹⁰ lack of good faith¹¹ and illegal means,¹² and general cause for dismissal based on concerns of asset forfeiture, public health, and the criminal liability of the trustee under the CSA.¹³ A central concern consistently voiced by bankruptcy courts is a bankruptcy trustee’s criminal liability risk under the CSA; a trustee, in overseeing the reorganization or liquidation of a marijuana-related debtor, may be found criminally liable under the CSA for handling and distributing proceeds generated by a marijuana business to creditors under a reorganization plan.¹⁴ Concern for the trustee’s criminal liability has also been voiced by the U.S. Trustee Program (USTP).¹⁵

⁹ 28 U.S.C.A. §§ 157(a), 1334(a) (West 2012).

¹⁰ “Because the sale and cultivation of marijuana as envisioned in Debtor’s [plan for reorganization] is illegal under federal law, I cannot find that the predicted income stream from the marijuana operations is reasonably certain to produce sufficient income to fund the [p]lan . . .” *McGinnis*, 453 B.R. at 773 (dismissing, in part, on grounds of plan feasibility under 11 U.S.C.A. § 1325(a)(6) (West 2012)).

¹¹ *Id.* at 772–73 (dismissing, in part, on grounds that the plan proposed means forbidden by law—cultivation of marijuana in violation of federal law and not in compliance with state law governing for-profit medical marijuana operations).

¹² *In re Arenas*, 535 B.R. 845, 851–53 (B.A.P. 10th Cir. 2015) (dismissing, in part, on grounds that the plan was not proposed in good faith, as “[a]ny plan proposed by the Debtor would necessarily be executed by unlawful means . . . [and, therefore, it is proposed in] bad faith due to their inability to propose a confirmable [c]hapter 13 plan.”).

¹³ *In re Medpoint Mgmt., L.L.C.*, 528 B.R. 178, 185–86 (Bankr. D. Ariz. 2015) (dismissing pursuant to 11 U.S.C.A. § 707(a) (West 2012) because the trustee should yield to the government’s public health interests expressed by the CSA, the trustee risked potential guilt or facilitation of a crime under the CSA, and there was an unacceptable risk of potential forfeiture of assets by the estate and the trustee); *Rent-Rite Super Kegs W. Ltd.*, 484 B.R. 809 (dismissing due to gross mismanagement pursuant to 11 U.S.C.A. § 1112(b)(4)(B) (West 2012), as a result of the debtor’s exposure to criminal liability, violation of the CSA, and forfeiture of the estate assets). See also Vivian Chang, *Medical Marijuana Dispensaries in Chapter 11 Bankruptcy*, 30 EMORY. BANKR. DEV. J. 106, 112–16 (2013).

¹⁴ See, e.g., *Arenas*, 535 B.R. at 853–54; *Medpoint*, 528 B.R. at 185.

¹⁵ Letter from Clifford J. White III, Dir., U.S. Dep’t of Justice, Exec. Office for U.S. Trs., to Chapter 7 and Chapter 13 Trustees (April 26, 2017), https://www.justice.gov/ust/file/marijuana_assets.pdf/download.

This Comment argues that chapter 12 bankruptcy and the enjoinder of funds for Department of Justice (DOJ) actions that interfere with state medical marijuana laws pursuant to the Rohrabacher-Farr amendment present a solution to the looming insolvency of Oregon marijuana growers. Chapter 12 is a compelling avenue for Oregon marijuana growers seeking debt relief for two reasons. First, chapter 12 and the Rohrabacher-Farr amendment go a long way in addressing concerns raised by the DOJ and bankruptcy courts regarding marijuana-related debtors: a chapter 12 trustee is the least involved with the debtor and the estate's assets in contrast to chapters 7, 11, and 13; the DOJ has not addressed chapter 12 trustees in its statements discussing trustees handling marijuana-related assets; and any criminal liability of the chapter 12 trustee and the debtor will likely be enjoined. The Rohrabacher-Farr amendment acts to shield the chapter 12 trustee from criminal prosecution for any lingering criminal liability under the CSA; the Rohrabacher-Farr amendment prohibits the DOJ from spending congressionally appropriated funds in a manner that prevents certain states from effectuating their medical marijuana laws.¹⁶ In turn, the amendment prevents the DOJ from prosecuting individuals (e.g., a chapter 12 trustee) who are working legally under a state's medical marijuana laws.¹⁷ Second, broader policy considerations, such as the public health interest in regulated marijuana for medical marijuana cardholders, weigh in favor of chapter 12 bankruptcy for marijuana growers.

Marijuana growers who wish to keep their farms and are operating in strict compliance with state law should consider chapter 12 bankruptcy. For those marijuana growers who wish to get out of the business and liquidate their assets, the bankruptcy courthouse doors, for all intents and purposes, are closed. However, for marijuana growers seeking to liquidate their assets, Oregon's receivership law may provide relief.¹⁸ Although this Comment does not address Oregon's new receivership law, receiverships may be a welcome alternative to bankruptcy for some marijuana growers; a marijuana grower's creditors may encourage the marijuana grower to seek a

¹⁶ *United States v. McIntosh*, 833 F.3d 1163, 1176–77 (9th Cir. 2016).

¹⁷ *Id.* “By officially permitting certain conduct, state law provides for non-prosecution of individuals who engage in such conduct. If the federal government prosecutes such individuals, it has prevented the state from giving practical effect to its law providing for non-prosecution of individuals who engage in the permitted conduct.” *Id.*

¹⁸ 2017 Or. Laws Ch. 358.

receivership in lieu of bankruptcy.¹⁹ This Comment also does not address the option of filing chapter 7, 11, or 13 for marijuana growers. Such possibilities have been heavily litigated, numerous articles and practitioners have weighed in on the arguments for and against marijuana-related debtors in the other chapters, and those articles and other treatises have provided thorough discussions of the case law to date.²⁰

In making the argument for chapter 12 as a compelling solution to the insolvency of Oregon marijuana growers, Part I of this Comment discusses Oregon marijuana law and the current market conditions of Oregon marijuana growers. Part II delves into the shift in the DOJ's approach to marijuana enforcement and the enforcement restrictions imposed on the DOJ by Congress through the Rohrabacher-Farr amendment. Part III discusses the intricacies of chapter 12 bankruptcy, how a marijuana grower may operate in chapter 12, and the role of the trustee in chapter 12 in comparison to a trustee in chapters 7, 11, and 13. Part IV concludes the Comment, addressing the public policy interests served by allowing marijuana growers access to chapter 12 bankruptcy.

I

OREGON MARIJUANA LAWS AND CURRENT MARKET CONDITIONS

The legal and economic landscape for Oregon marijuana growers changed drastically following legalization. Prior to legalization, the only state-sanctioned marijuana grows were for medical marijuana. Under the Oregon Health Authority's Oregon Medical Marijuana Program (OMMP), growers were subject to strict plant limits,²¹ could grow for only a limited number of patients,²² and could not operate on a for-profit basis.²³ After legalization, the restrictions on plant limits,

¹⁹ 2017 Or. Laws Ch. 37.

²⁰ See, e.g., Chang, *supra* note 13; Keith Lundin, *Up in Smoke – Bankruptcy Workshop*, LUNDIN ON CHAPTER 13 (Episode 3, Season 2), <http://www.lundinonchapter13.com>; Steven J. Boyajian, *Just Say No to Drugs? Creditors Not Getting a Fair Shake When Marijuana-Related Cases Are Dismissed*, AM. BANKR. INST., Sept. 2017, at 1–5; Fern L. Kletter, Annotation, *Bankruptcy Proceedings Involving Production and Distribution of Marijuana Legal Under State Law*, 19 A.L.R. Fed. 3d Art. 8 (2017).

²¹ OR. REV. STAT. § 475B.428 (2015).

²² § 475B.428(2)(a).

²³ § 475B.420(8).

patients, and for-profit operations were lifted for marijuana growers who registered as producers with the OLCC to grow marijuana that could be sold recreationally.²⁴

The opening of the recreational market wrought a significant change to Oregon marijuana growers. On the eve of legalization, more than 46,000 growers and 35,000 grow sites were registered with the OMMP.²⁵ As of January 2018, there were 25,615 registered growers, a 45% drop since 2015, and 20,025 grow sites.²⁶ The decline in medical marijuana growers was likely a result of legalization. Many marijuana growers likely transferred to licensing with the OLCC to grow at a profit and to produce more marijuana, as permitted under licensing with the OLCC; as of 8:00 AM October 9, 2018, there were 2,406 producer licensing applications at various stages before the OLCC, and 1,102 are active.²⁷ Additionally, many marijuana growers likely consolidated operations following legalization.²⁸

Beyond the shift in the marijuana grower market in Oregon since legalization, there has been a significant shift in medical marijuana patients and applications. At the start of 2015, there were 70,139 medical marijuana patients registered with the OMMP, and the number of patients peaked at 77,155 at the start of 2016.²⁹ By the beginning of 2018, the number of medical marijuana patients had dropped to 50,400.³⁰

The decline in medical marijuana cardholders is likely a result of cardholders—while still needing marijuana for medicinal purposes³¹—not purchasing enough marijuana in a given year to make the tax-free benefit of the card economically feasible against the \$200 annual fee.³²

²⁴ OR. ADMIN. R. 845-025-2040 (2018); §§ 475B.070–075.

²⁵ PUB. HEALTH DIV., OR. HEALTH AUTH., THE OREGON MEDICAL MARIJUANA PROGRAM STATISTICAL SNAPSHOT 7 (2018) [hereinafter STATISTICAL SNAPSHOT].

²⁶ *Id.* at 2.

²⁷ *Marijuana License Applications*, OR. LIQUOR CONTROL COMM'N (Oct. 9, 2018), http://www.oregon.gov/olcc/marijuana/documents/mj_app_stats_by_county.pdf.

²⁸ PUB. HEALTH DIV., OR. HEALTH AUTH., THE OREGON MEDICAL MARIJUANA PROGRAM DISPENSARY SALES REPORT 2016 7 (April 12, 2017).

²⁹ STATISTICAL SNAPSHOT, *supra* note 25, at 7.

³⁰ *Id.*

³¹ *Id.* at 4. Oregon medical marijuana patients rely on medical marijuana to treat a number of conditions, including PTSD, cancer, glaucoma, and HIV/AIDS. The most commonly reported medical issue addressed with medical marijuana, reported by 88.4% of patients, is severe pain. *Id.*

³² See OR. DEP'T OF REVENUE, *OMMP Cardholder Fees*, OR. HEALTH AUTH. (Jan. 27, 2019), <http://www.oregon.gov/oha/PH/DISEASES/CONDITIONS/CHRONIC>

As such, those 26,000 patients are likely purchasing marijuana without a card recreationally but are still using marijuana for a medicinal purpose. Moreover, a significant number of cardholders, close to 17,000,³³ do not have designated growers, meaning that the marijuana they purchase from a dispensary is likely grown by a recreational grower; the cardholders do not own their own plants through a grower but only purchase the marijuana that is available at a dispensary.

As a result of this shift in cardholder dynamics, the lines between medical marijuana and recreational marijuana have become blurred. If medical marijuana is defined by the marijuana being consumed for a medicinal purpose, then marijuana grown by a recreational grower licensed with the OLCC may be classified as medical marijuana. Therefore, when considering how various activities by the DOJ affect Oregon's effectuation of its medical marijuana laws, actions taken against marijuana growers licensed by the OLCC have a direct impact on the effectuation of Oregon's medical marijuana laws; any actions against the growers will have a direct impact on those cardholders who do not grow their own plants and those former cardholders who have foregone the medical cards as a result of legalization.

The implications of legalization for Oregon, as relates to the viability of chapter 12 bankruptcy for marijuana growers, are significant. The blurring of medical and recreational marijuana means that any action taken by the DOJ against Oregon marijuana growers likely falls within the scope of enjoinderment per the Rohrabacher-Farr amendment, which is discussed below in Part II.³⁴ As such, there is likely protection from prosecution under the CSA for the trustee and a marijuana grower in chapter 12. Moreover, marijuana growers licensed recreationally under

DISEASE/MEDICALMARIJUANAPROGRAM/Pages/OMMP-Fees.aspx#patient; Noelle Crombie, *Big Change: Medical Marijuana Dispensaries No Longer Selling Rec Pot*, OREGONIAN (Jan. 9, 2017), http://www.oregonlive.com/marijuana/index.ssf/2017/01/oregon_reaches_another_pot_mil.html; Cf. Brad Branan, *Does It Make Financial Sense to Keep Your Medical Marijuana Card After Jan. 1?* (Dec. 28, 2017, 4:00 AM), <http://www.sacbee.com/news/state/california/california-weed/article191869959.html> (discussing a similar phenomenon in California).

³³ STATISTICAL SNAPSHOT, *supra* note 25, at 6.

³⁴ As a result of the gray area between Oregon's medical marijuana laws and recreational marijuana laws regarding marijuana growers, the term "medical marijuana laws" as used in this Comment includes Oregon's marijuana laws that govern OLCC-licensed marijuana growers, not just laws and regulations under the purview of the OMMP.

the OLCC are growing marijuana that meets the significant public policy interests in medical marijuana.

II

CLASHING OBJECTIVES: THE WHITE HOUSE AND CONGRESS

The current White House administration under President Donald Trump is hostile to the marijuana industry. Although the illegality of marijuana on the federal level has not changed since the passage of the CSA in 1971, the Trump administration has taken a remarkably different tone toward states' legalization efforts compared to former President Barack Obama's administration. On January 4, 2018, former Attorney General Jeff Sessions released a DOJ memorandum effectively repealing the majority of the Obama administration's prior DOJ guidance that had pushed a narrowed, less broad-scale enforcement of the CSA in relation to marijuana.³⁵ In April 2018, following in the footsteps of Jeff Sessions's more hawkish approach to marijuana enforcement, the USTP issued a letter to all chapter 7 and chapter 13 trustees.³⁶ The letter called on the trustees to promptly notify a U.S. Trustee of any case dealing with a marijuana asset and to "move to dismiss or object in all cases involving marijuana assets on the

³⁵ Jeff Sessions, Att'y Gen., *Memorandum for All United States Attorneys: Marijuana Enforcement* (Jan. 4, 2018) ("[P]revious nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately."); see Luke M. Scheuer, *Are "Legal" Marijuana Contract "Illegal"?*, 16 U.C. DAVIS BUS. L.J. 31, 37 (discussing the DOJ's position under the Obama administration, as expressed through the now rescinded memos, as not prioritizing the stopping of "the sale of marijuana generally or to shut down marijuana business," but rather focusing on more egregious criminal behavior related to marijuana); James M. Cole, Deputy Att'y Gen., *Memorandum for all United States Attorneys: Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013).

³⁶ Letter from Clifford J. White III, Dir., U.S. Dep't of Justice, Exec. Office for U.S. Trs., to Chapter 7 and Chapter 13 Trustees, *supra* note 15. The shift in policy within the U.S. Trustee Program and the broader DOJ is also illustrated in changes to the U.S. Trustee Program's website, questions addressing marijuana assets included in the FAQs after February 20, 2017. *Compare Frequently Asked Questions (FAQs) – Consumer Information*, U.S. TRUSTEE PROGRAM (June 21, 2017), https://www.justice.gov/ust/frequently-asked-questions-faqs-consumer-information#marijuana_fa2, with *Frequently Asked Questions (FAQs) – Consumer Information*, U.S. TRUSTEE PROGRAM (Feb. 20, 2017), <https://web.archive.org/web/20170220013619/https://www.justice.gov/ust/frequently-asked-questions-faqs-consumer-information>, and *Frequently Asked Questions (FAQs) – Consumer Information*, U.S. TRUSTEE PROGRAM (May 5, 2017), <https://web.archive.org/web/20170505064844/https://www.justice.gov/ust/frequently-asked-questions-faqs-consumer-information>.

grounds that such assets may not be administered under the Bankruptcy Code.”³⁷

In the letter, the USTP raised a concern that has reared its head throughout cases involving marijuana debtors in bankruptcy: “[O]ur goal is to ensure that trustees are not placed in the untenable position of violating federal law by liquidating, receiving proceeds from, or in any way administering marijuana assets.”³⁸ Clifford J. White III, director of the USTP, expressed the same concern again in an article published in the American Bankruptcy Institute’s (ABI) journal, writing that “bankruptcy trustees and other estate fiduciaries should not be required to administer assets if doing so would cause them to violate federal criminal law.”³⁹ In the article, Mr. White, responding to an article published in an earlier issue of the ABI Journal⁴⁰ also opined

Illegal enterprises simply do not come through the doors of the bankruptcy courthouse seeking to help further their criminal activity.

...

Although cases involving illicit proceeds of Ponzi schemes and other criminal activities—seen in such notorious cases as Enron, Dreier LLP, and Madoff—are administered in bankruptcy, they deal with the aftermath of fraud, usually after individual wrongdoers had been removed from the business [None] of those cases involved proposed chapter 11 and 13 plans where the feasibility of the plan itself is directly premised on the continued receipt of profits from an illegal enterprise. And none of them requires the courts or trustees to deal with property of the kind described in the CSA, for which mere possession is a federal crime.

...

Rather than make its own marijuana policy, the USTP will continue to enforce the legislative judgment of Congress by preventing the

³⁷ Letter from Clifford J. White III, Dir., U.S. Dep’t of Justice, Exec. Office for U.S. Trs., to Chapter 7 and Chapter 13 Trustees, *supra* note 15.

³⁸ *Id.*

³⁹ Clifford J. White III & John Sheahan, *Why Marijuana Assets May Not Be Administered in Bankruptcy*, AM. BANKR. INST. 1 (Dec. 2017).

⁴⁰ *Id.* at 2 n.2 (responding to Steven J. Boyajian, “Just Say No to Drugs? Creditors Not Getting a Fair Shake When Marijuana-Related Cases Are Dismissed,” AM. BANKR. J., Sept. 1, 2017, at 24).

bankruptcy system from being used for purposes that Congress has determined are illegal.⁴¹

Mr. White's comments in the article raise deeper questions, which are addressed in Part IV, on the role of bankruptcy courts in the furtherance of criminal schemes and the perpetuation of social and political inequality. In the context of understanding the current political environment at the federal level on marijuana enforcement under the CSA, what is most striking about Mr. White's letter is Mr. White's claim to defer to the legislative judgment of Congress. Congress, since 2014, has taken a remarkably different tone than the current White House administration on marijuana enforcement, and Mr. White's claim to defer to Congress as an excuse for stonewalling marijuana debtors out of bankruptcy is shaky at best.

A. The Rohrabacher-Farr Amendment

The Rohrabacher-Farr amendment (also known as the Rohrabacher-Blumenauer amendment) prohibits the DOJ from using funds to prevent certain states "from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."⁴² In essence, the amendment prohibits the DOJ from using funds to prosecute individuals or entities that are engaged in legal activity under a state's medical marijuana laws, even if the activity is illegal under federal law. First passed in 2014, Congress has consistently renewed the amendment eleven times, most recently on March 21, 2018, including the amendment in its budget deals and omnibus spending measures.⁴³ The amendment has continued to pass successfully with

⁴¹ The inclusion of chapter 11 in the article indicates that the USTP will not tolerate trustees overseeing marijuana-related debtors in chapter 11. The letter sent by the USTP in April 2017, Clifford J. White III, Dir., U.S. Dep't of Justice, Exec. Office for U.S. Trs., to Chapter 7 and Chapter 13 Trustees, *supra* note 15, was addressed only to chapter 7 and chapter 13 trustees. One is left to wonder why the USTP did not include chapter 11 trustees in the letter sent to chapter 7 and chapter 13 trustees.

⁴² Tom Angell, *Congress Protects Medical Marijuana from Jeff Sessions in New Federal Spending Bill*, FORBES (Mar. 21, 2018, 8:02 PM), <https://www.forbes.com/sites/tomangell/2018/03/21/congress-protects-medical-marijuana-from-jeff-sessions-in-new-federal-spending-bill/#54ff102b3575>.

⁴³ *Trump Signs Spending Bill That Includes Medical Marijuana Protections*, MARIJUANA BUS. DAILY (Mar. 23, 2018), <https://mjbizdaily.com/trump-signs-spending-bill-includes-medical-marijuana-protections/>.

strong bipartisan support, even in the face of Jeff Sessions's request to congressional leaders to kill the amendment.⁴⁴

A bankruptcy court first addressed the impact of the Rohrabacher-Farr amendment on marijuana-related debtors shortly the amendment passed in 2014.⁴⁵ In *In re Medpoint Management, L.L.C.*, the court expressed incredulity about the longevity of the amendment and its efficacy in shielding the debtor and the trustee from prosecution by the DOJ under the CSA; the court noted the temporal nature of the amendment per its inclusion in short-term appropriations bills and the potential that the DOJ may use its Asset Forfeiture Program as an alternative source of funding.⁴⁶ However, since *Medpoint*, Congress has continued to support the amendment, even after the shift in policy from the Obama administration to the Trump administration.⁴⁷ And most significantly, in 2016, the Ninth Circuit in *United States v. McIntosh* addressed the applicability of the Rohrabacher-Farr amendment.⁴⁸ In *McIntosh*, the Ninth Circuit determined that DOJ actions under the CSA's marijuana prohibition may be enjoined⁴⁹ if the prosecuted individual satisfies a strict-compliance standard.⁵⁰

In *McIntosh*, the court interpreted the Rohrabacher-Farr amendment to, "at a minimum . . . prohibit[] [the] DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the [s]tate [m]edical [m]arijuana laws

⁴⁴ See Sean Williams, *Sorry, Jeff Sessions: Congress Aims to Extend Medical Marijuana Protections*, MOTLEY FOOL (Mar. 25, 2018, 11:41 AM), <https://www.fool.com/investing/2018/03/25/sorry-jeff-sessions-congress-aims-to-extend-medica.aspx>; *AG Sessions to Congress: Kill Medical Marijuana Protections*, MARIJUANA BUS. DAILY (June 13, 2017), <https://mjbizdaily.com/ag-sessions-asks-congress-kill-medical-marijuana-protections>; Tom Angell, *Exclusive: Sessions Asks Congress to Undo Medical Marijuana Protections*, MASSROOTS (June 12, 2017), <https://www.massroots.com/news/exclusive-sessions-asks-congress-to-undo-medical-marijuana-protections> (citing Letter from Jeff Sessions, Att'y Gen., to Mitch McConnell, Senate Majority Leader; Charles Schumer, Senate Minority Leader; Paul Ryan, Speaker for the House of Representatives; and Nancy Pelosi, Minority Leader in the House of Representatives (May 1, 2017)).

⁴⁵ *In re Medpoint Mgmt., L.L.C.*, 528 B.R. 178, 186 (Bankr. D. Ariz. 2015).

⁴⁶ *Id.*

⁴⁷ Angell, *supra* note 42.

⁴⁸ *United States v. McIntosh*, 833 F.3d 1163, 1169–70 (9th Cir. 2016).

⁴⁹ *Id.*

⁵⁰ To date, courts have applied the *McIntosh* strict compliance standard. See, e.g., *United States v. Kleinman*, 880 F.3d 1020 (9th Cir. 2017); *United States v. Daleman*, 2017 WL 1256743 (E.D. Cal. Feb. 17, 2017).

and who fully complied with such laws.”⁵¹ The court determined that “individuals [must] strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana” and that individuals who have not have engaged in unauthorized conduct are not protected by the amendment.⁵² The Ninth Circuit, like the court in *Medpoint*, noted the temporal nature of the amendment, as it may expire if Congress fails to regularly renew the amendment in its budget deals and omnibus spending measures.⁵³ However, rather than ceding to the temporality of the amendment, the court instructed district courts to balance the temporal nature of the amendment along with an individual’s right to a speedy trial; the temporal nature of the amendment did not act as an absolute.⁵⁴ The court also warned that individuals are still committing crimes under the CSA, even if the government does not have the funds to prosecute them.⁵⁵ The government may prosecute individuals under the CSA for up to five years after crimes occur.⁵⁶ So, if the amendment expires, the DOJ could conceivably go after parties that the DOJ had been enjoined from pursuing prior to the expiration of the amendment.⁵⁷

The Rohrabacher-Farr amendment should enjoin the DOJ from pursuing actions under the CSA in the chapter 12 bankruptcy of an Oregon marijuana grower licensed with the OLCC and operating in strict compliance with Oregon law. The DOJ would prevent Oregon from implementing laws that authorize the “use, distribution, possession, or cultivation” of medical marijuana if it prosecuted a chapter 12 trustee overseeing a marijuana grower’s business authorized by state law. The chapter 12 trustee’s actions, such as handling the proceeds generated by the marijuana grower and distributing those proceeds to the marijuana grower’s creditors, would be legal under Oregon law.⁵⁸ Beyond thwarting the legal activity authorized by Oregon’s medical marijuana laws, the DOJ’s prosecution of the trustee would prevent Oregon from giving practical effect to the policy objectives and goals of Oregon medical marijuana laws.

⁵¹ *McIntosh*, 833 F.3d at 1177.

⁵² *Id.* at 1178.

⁵³ *Id.*

⁵⁴ *Id.* at 1179.

⁵⁵ *Id.* at 1179, n. 5.

⁵⁶ *Id.* at 1179.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1176–77.

Insofar as Oregon medical marijuana laws seek to provide a readily available market of regulated marijuana for medical marijuana cardholders, DOJ actions in the chapter 12 bankruptcy of a marijuana grower would significantly disrupt the medical marijuana market. With the current steady decline in prices, DOJ actions going after growers in chapter would not only disadvantage the growers by leaving them at the mercy of creditors and forcing them to shut their doors but would also leave medical cardholders scrambling to find legal marijuana for their medical needs. Moreover, Oregon medical marijuana laws are designed to prevent marijuana growers and medical marijuana cardholders from turning to the black market to buy and sell marijuana, providing the state valuable tax dollars⁵⁹ and preventing the empowerment of malicious criminal enterprises.⁶⁰ DOJ actions that would operate to prevent marijuana growers from accessing chapter 12 bankruptcy would drive marijuana growers to the black market to survive and limit medical marijuana cardholders' access to legal marijuana, thwarting the intent and broader policy goals of Oregon's medical marijuana laws. With DOJ actions not only thwarting the policy goals of Oregon's medical marijuana laws but also preventing the state from giving practical effect to its laws providing for non-prosecution of marijuana growers, the DOJ actions likely run afoul of the Rohrabacher-Farr amendment.

While the Rohrabacher-Farr amendment should act to shield a marijuana grower in chapter 12 and the chapter 12 trustee from any marijuana-related criminal prosecution under the CSA by the DOJ, the nature of chapter 12 bankruptcy, in comparison to chapters 7, 11, and 13, also narrows the scope of the criminal liability of the trustee.

III

MARIJUANA GROWERS IN CHAPTER 12 BANKRUPTCY

Before discussing the trustee's role in chapter 12, it is important to establish whether a marijuana grower qualifies for chapter 12 and, if so, how a marijuana grower operates in chapter 12.

⁵⁹ STATISTICAL SNAPSHOT, *supra* note 26, at 4.

⁶⁰ See Christopher Ingraham, *Legal Marijuana is Finally Doing What the Drug War Couldn't*, THE WASH. POST (Mar. 3, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/03/03/legal-marijuana-is-finally-doing-what-the-drug-war-couldnt/?utm_term=.e30fa7220715.

A. Requirements for Filing: Farming Operation

Marijuana growers, while growing an unorthodox crop, satisfy the requirements to file chapter 12 bankruptcy. Chapter 12 bankruptcy is available to family farmers with regular annual income.⁶¹ To qualify for chapter 12, a debtor must be “engaged” in a “farming operation” and meet certain debt limits, income limits, and asset requirements.⁶² The definition of farming operation should be “construed liberally in order to further Congress’[s] purpose of helping family farmers to continue farming”⁶³ and includes “farming, tillage of the soil . . . production or raising of crops”⁶⁴

There are two approaches used by the courts to determine if a business is a farming operation. The first approach asks whether the operation is subject to “traditional risks of farming.”⁶⁵ The second approach, which has been used by Oregon bankruptcy courts, is the totality of circumstances test.⁶⁶ The totality of the circumstances test considers:

- (1) [w]hether the location of the operation would be considered a traditional farm;
- (2) the nature of the enterprise at the location;
- (3) the type of produce and its eventual market . . . ;
- (4) the physical presence or absence of family members on the farm;
- (5) ownership of traditional farm assets;
- (6) whether the debtor is involved in the process of growing or developing crops or livestock; and
- (7) . . . whether or not the practice or operation is subject to the inherent risks of farming.⁶⁷

⁶¹ 11 U.S.C.A. § 109(f) (West 2012). A family farmer with regular annual income “means [a] family farmer whose annual income is sufficiently stable and regular to enable such family farmer to make payments under a plan under chapter 12 of this title.” 11 U.S.C.A. § 101(19) (West 2016). “Chapter 12 is [also] available to corporate or partnership entities in addition to individuals if the corporation or partnership is controlled by a single family and otherwise meets the chapter 12 eligibility requirements.” 8 Collier on Bankruptcy ¶ 1200.01(3)(a) (Richard Levin & Henry J. Sommer eds., 16th ed. 2018).

⁶² 11 U.S.C.A. § 101(18) (West 2016).

⁶³ *In re Sharp*, 361 B.R. 559, 564 (B.A.P. 10th Cir. 2007) (quoting *In re Watford*, 898 F.2d 1525, 1527 (11th Cir. 1990)).

⁶⁴ 11 U.S.C.A. § 101(21) (West 2016).

⁶⁵ *In re Armstrong*, 812 F.2d 1024, 1028 (7th Cir. 1987) (This approach has been criticized for being too narrow in its focus). See also *In re Watford*, 898 F.2d 1525, 1528–29 (11th Cir. 1990); *In re Hettinger*, 95 B.R. 110, 111–12 (Bankr. E.D. Mo. 1989).

⁶⁶ *In re Watford*, 898 F.2d at 1528–29; *In re Hettinger*, 95 B.R. at 111–12; *In re Jones*, No. 10-65478-FRA12, 2011 WL 3320504, at *2–3 (Bankr. D. Or. Aug. 2, 2011) (quoting *In re Sugar Pine Ranch*, 100 B.R. 28, 31 (Bankr. D. Or. 1989)).

⁶⁷ See, e.g., *In re Jones*, 2011 WL 3320504, at *2–3.

Marijuana growers likely satisfy both the first and second approaches. Marijuana growers are subject to the traditional risks of farming. Marijuana growers, like farmers, deal with insects and pests that threaten their crop.⁶⁸ Pesticide use by marijuana growers is regulated by the Oregon Department of Agriculture.⁶⁹ Marijuana growers are located in places considered to be traditional farms.⁷⁰ The nature of such enterprise is to grow a crop, and the operations involve the ownership of traditional farm assets, such as fertilizer,⁷¹ greenhouses, and land.⁷² Therefore, marijuana growers satisfy the farming operation requirement for chapter 12. If a marijuana grower meets the additional debt limits, income limits, and asset requirements, a marijuana grower should meet the requirements to file chapter 12.

Upon filing, a marijuana grower in chapter 12 will be required to file a plan within ninety days after commencement of the case, and the plan must be confirmed or denied by the court within forty-five days of filing.⁷³ The marijuana grower will have an unqualified right to dismiss the case at any time.⁷⁴ Moreover, in filing a plan, a marijuana grower will not have to prepare a disclosure statement as creditors are not entitled to vote on the plan.⁷⁵

B. In the Weeds: A Marijuana Grower in Chapter 12

Having qualified for chapter 12, a marijuana grower will operate as a debtor in possession (DIP).⁷⁶ A DIP in chapter 12 is granted “all of the rights, powers and duties of a trustee in a chapter 11 case,” with the exceptions being the right to compensation and the trustee’s

⁶⁸ See Nebula Haze, *Pests, Bugs & Viruses*, GROW WEED EASY, <http://www.growweedeasy.com/bugs-pests-symptoms-marijuana-grow> (last visited March 9, 2019).

⁶⁹ See OR. ADMIN. R. 845-025-2070(1) (2018).

⁷⁰ See Laura M. Holson, *Pot Farmers to Neighbors: Chill Out. Neighbors: No*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/style/oregon-weed-farmers.html>.

⁷¹ See OR. ADMIN. R. 845-025-2070(2) (2018).

⁷² See OR. ADMIN. R. 845-025-2040(1) (2018); OR. ADMIN. R. 845-025-2000(2)–(3) (2018).

⁷³ 8 Collier on Bankruptcy, *supra* note 62, ¶ 1200.01(3)(c).

⁷⁴ 11 U.S.C.A. § 1208(b) (West 2012).

⁷⁵ 8 Collier on Bankruptcy, *supra* note 62, ¶ 1200.01(4).

⁷⁶ 11 U.S.C.A. § 1207(b) (West 2012) (filing a chapter 12 automatically establishes the debtor as a DIP).

investigative duties under 11 U.S.C. § 1106(a)(3)–(4).⁷⁷ While the DIP may exercise broad powers, it is still subject to the restrictions under chapter 3 and chapter 5 of the Bankruptcy Code.⁷⁸ Under § 363, the DIP may use, sell, or lease property of the estate.⁷⁹ The court is not required to approve such actions if they are done in the ordinary course of business.⁸⁰ Actions in the ordinary course of a marijuana grower's business may include the planting, cultivating, and harvesting of a marijuana crop or any other activities necessary to the marijuana grow operation. However, any sale outside the ordinary course of business, such as the sale of marijuana grow equipment or farmland, must be approved by the court after a notice and a hearing.⁸¹ After court approval, only the trustee can sell such equipment or land "free and clear" of any interest in the property.⁸²

Beyond the right to operate in the ordinary course of business, the marijuana grower as a DIP is able to obtain unsecured credit to continue operating the grow operation without approval of the court.⁸³ The marijuana grower will be able to purchase basic farm supplies and services on credit, such as fertilizer, pesticides, water, and equipment repair. However, any secured financing that may be required must be approved by the court.⁸⁴ The DIP also has authority to abandon, after notice and a hearing, any estate property that is burdensome or inconsequential to the value of the estate.⁸⁵

⁷⁷ 8 Collier on Bankruptcy, *supra* note 62, ¶ 1200.02(2).

⁷⁸ *Id.* ¶ 1203.02(1).

⁷⁹ See 11 U.S.C.A. § 363(c)(1) (West 2012).

⁸⁰ *Id.*

⁸¹ 8 Collier on Bankruptcy, *supra* note 61.

⁸² 11 U.S.C.A. § 1206 (West 2012). "It is possible that Congress granted this authority to the trustee instead of the debtor in order to prevent the debtor from engaging in collusive or ill-advised sales. . . . Perhaps an additional reason stems from the debtor's unqualified right to dismiss the chapter 12 case [pursuant to 11 U.S.C.A. § 1208(b)]. It would be unfair to a creditor to allow the debtor to sell encumbered property for less than the amount of the outstanding liens and then to dismiss the case prior to obtaining confirmation of a plan." 8 Collier on Bankruptcy, *supra* note 61, ¶ 1206.01(2).

⁸³ 11 U.S.C.A. § 364(a) (West 2012).

⁸⁴ 11 U.S.C.A. § 364(c), (d)(i).

⁸⁵ *Id.* § 554(a).

C. The Trustee's Limited Role in Chapter 12 Bankruptcy

With the marijuana grower operating as a DIP, “the trustee will not generally become involved” with the marijuana grower’s business.⁸⁶ “The trustee’s duties will normally be limited to performing various administrative tasks, appearing at major hearings in the case, and receiving and distributing payments under the plan.”⁸⁷ Overall, the trustee’s involvement in a chapter 12 bankruptcy is less than that of a trustee in a chapter 7, 11, or 13, even though there are similarities between chapter 12 and chapters 11⁸⁸ and 13.⁸⁹ While the trustee is still involved in the marijuana grower’s operation, the scope of criminal liability is less than that of a chapter 7, 11, or 13 trustee.

In contrast to chapter 7, chapter 12 dictates that a chapter 12 trustee perform only a limited number of the chapter 7 trustee’s duties as specified in 11 U.S.C.A. § 704 (West 2012).⁹⁰ As for the duties of a

⁸⁶ 8 Collier on Bankruptcy, *supra* note 61, ¶ 1200.01(4); *see also* 11 U.S.C.A. § 1202 (West 2012).

⁸⁷ 8 Collier on Bankruptcy, *supra* note 61, ¶ 1200.01(4); *see also* 11 U.S.C. § 1202(b)(1), (3)–(5) (West 2016).

⁸⁸ 8 Collier on Bankruptcy, *supra* note 61, ¶ 1200.01(4). “There are many similarities between farm cases under chapter 11 and cases under chapter 12. As in chapter 11, the farmer debtor will typically stay in possession and control of the farm and continue to operate the farming business. The chapter 12 debtor may plant, cultivate, harvest, and sell crops, assume or reject executory contracts or unexpired leases, and utilize the avoidance provisions of the Bankruptcy Code just as would a chapter 11 debtor.” *Id.*

⁸⁹ *Id.* ¶ 1200.01(5). “Because chapter 12 was modeled on chapter 13, and because so many of the provisions are identical, chapter 13 cases construing provisions corresponding to chapter 12 provisions may be relied on as authority in chapter 12 cases. Nevertheless, there are often differences in language between the two chapters and each particular provision should be looked at carefully before chapter 13 precedent is relied on or cited. In addition, the overall differences between the two chapters must be kept in mind in analyzing any particular provision. The different purposes of the chapters will sometimes warrant differences in interpretation.” *Id.* *See also* Justice v. Valley Nat’l Bank, 849 F.2d 1078, 1083 (8th Cir. 1988); *In re Holloway*, 261 B.R. 490, 492 (M.D. Ala. 2001).

⁹⁰ The trustee in a chapter 12 must be accountable for all property received. 11 U.S.C.A. § 704(a)(2) (West 2012). The trustee must ensure that the debtor performs his intention as specified in 11 U.S.C.A. § 521(a)(2)(B) (West 2012). 11 U.S.C.A. § 704(a)(3). “If a purpose would be served, [the trustee should] examine proofs of claims and object to the allowance of any claim that is improper.” 11 U.S.C.A. § 704(a)(5). “If advisable, [the trustee should] oppose the discharge of the debtor.” 11 U.S.C.A. § 704(a)(6). “[U]nless the court orders otherwise, [the trustee should] furnish such information concerning the estate and the estate’s administration as is requested by a party in interest.” 11 U.S.C.A. § 704(a)(7). The trustee should “make a final report and file a final account of the administration of the estate with the court and with the United States trustee.” 11 U.S.C.A. § 704(a)(9).

trustee in chapter 11, a “chapter 12 trustee will perform the duties of a chapter 11 trustee only if the debtor is removed as a debtor in possession by order of the court.”⁹¹ Moreover, the chapter 12 trustee is required to perform the investigative and reporting duties under 11 U.S.C.A. §§ 1106(a)(3), (4) only if instructed to do so by the court.⁹²

In comparison to chapter 13, the trustee in a chapter 12 does not supervise the debtor for compliance with the bankruptcy rules.⁹³ The chapter 12 trustee also does not investigate the debtor’s financial affairs nor advise the debtor on performing under the plan.⁹⁴ The lack of supervision and investigation “reflects a congressional decision to allow the family farmer . . . to continue operat[i]ons . . . without assistance or interference from the trustee.”⁹⁵

The trustee’s role in chapter 12 increases if the marijuana grower is removed as DIP by the court. The trustee will correct mismanagement of the estate, preventing the debtor from dissipating estate assets.⁹⁶ However, the trustee is not authorized to file a plan and is limited to the role of caretaker.⁹⁷ As the trustee can provide limited benefit only while in possession, a court should not remove the DIP lightly and “do so only when a trustee is needed immediately to preserve assets of the estate or to curb improper conduct of the debtor.”⁹⁸

While the trustee’s involvement in a chapter 12 bankruptcy is less than that of a trustee in a chapter 7, 11, or 13, a chapter 12 plan is subject to similar confirmation requirements as a chapter 11.⁹⁹ Under 11 U.S.C.A. § 1225(a)(3) (West 2012), the plan must be proposed in good faith and not by any means forbidden by law. Moreover, the court may reject the plan and dismiss the case for factors listed under 11 U.S.C.A. § 1208 (West 2012). Factors other than those listed may be

⁹¹ 8 Collier on Bankruptcy, *supra* note 61, ¶ 1200.01(4).

⁹² *Id.* ¶ 1200.02(2).

⁹³ *Id.* ¶ 1200.01(5).

⁹⁴ *See id.* ¶ 1200.01(3)(c).

⁹⁵ *Id.* ¶ 1202.03(3).

⁹⁶ *See* 11 U.S.C.A. § 1221 (West 2012).

⁹⁷ *Id.*

⁹⁸ 8 Collier on Bankruptcy, *supra* note 61, ¶ 1204.01.

⁹⁹ *Id.* ¶ 1200.01(4). “As in chapter 11 cases, a plan will be confirmed if it is proposed in good faith, is in compliance with the terms of the Bankruptcy Code, meets the Code requirements for payment of administrative fees and charges, is feasible and workable, and provides each holder of a claim with property having a present value not less than the value of what the holder would receive if the debtor’s estate were liquidated under chapter 7.” 8 Collier on Bankruptcy, *supra* note 61, ¶ 1200.01(4).

considered cause for dismissal.¹⁰⁰ Such factors include whether there was unreasonable delay or gross mismanagement by the debtor that was prejudicial to creditors.¹⁰¹

D. Successful Confirmation of a Marijuana Grower's Chapter 12 Plan

If a marijuana grower successfully confirms a plan, all property of the estate will vest in the debtor, except as otherwise provided in the plan.¹⁰² The marijuana grower will still be subject to the provisions of the Bankruptcy Code in disposing of property (i.e., sales outside the ordinary course of business).¹⁰³ However, if sales that are out of the ordinary course of business are foreseen, they can be provided for or authorized by the plan.

Ultimately, chapter 12 provides the furthest distance between the trustee and the debtor compared to chapters 7, 11, and 13. As such, chapter 12 narrows the scope of potential criminal liability under the CSA in comparison to chapters 7, 11, and 13. The limited involvement of the trustee should assuage bankruptcy courts' concerns regarding the scope of the trustee's criminal liability. The trustee's most consequential interaction with the debtor will be handling the money generated by the marijuana grow operation in making payments to creditors of the estate.¹⁰⁴ However, many of the other red flags that bankruptcy courts have raised with marijuana-related debtors filing under chapters 7 and 13 are a nonissue in chapter 12. The issues surrounding abandonment of the property by the trustee and forfeiture of estate assets are substantially limited in chapter 12.¹⁰⁵ As the marijuana grower is operating as DIP, the risk of forfeiture of the estate's assets does not run to the trustee and the trustee does not have

¹⁰⁰ *In re Euerle Farms, Inc.*, 861 F.2d 1089, 1091 (8th Cir. 1988).

¹⁰¹ 11 U.S.C.A. § 1208(c)(1) (West 2012).

¹⁰² 11 U.S.C.A. § 1227(b) (West 2012).

¹⁰³ 11 U.S.C.A. § 1206 (West 2012).

¹⁰⁴ Currently in Oregon, Maps Credit Union and Wauna Credit Union offer bank accounts to marijuana businesses. Kristian Foden-Vencil, *Small Oregon Credit Union Offers Banking to Marijuana Businesses*, OPB (Feb. 17, 2017), <https://www.opb.org/news/article/marijuana-businesses-oregon-credit-unions>; *Oregon Credit Union, Tech Firm, to Offer Marijuana Banking Services*, MARIJUANA BUS. DAILY (Jan. 19, 2018), <https://mjbizdaily.com/oregon-credit-union-tech-firm-offer-marijuana-banking-services>.

¹⁰⁵ *In re Medpoint Mgmt., L.L.C.*, 528 B.R. 178, 186 (Bankr. D. Ariz. 2015).

to worry about being forced to abandon the property. Moreover, the chapter 12 trustee is not bound by the investigative and reporting duties of a chapter 11 trustee, a further limitation on the chapter 12 trustee's involvement with the marijuana grower's business.¹⁰⁶

The status of the marijuana grower as DIP is critical in keeping the trustee removed from the operation of the marijuana grower's business. If the trustee is required to take over for the debtor, the benefits of chapter 12 in limiting the trustee's criminal liability may be lost, even if chapter 12 restricts the trustee to more of a caretaker role upon the debtor's removal as DIP.¹⁰⁷ Additionally, if the marijuana grower has to sell assets outside the ordinary course of business, the trustee will be involved with the sale and exposed to greater criminal liability.¹⁰⁸ Therefore, a marijuana grower who is contemplating filing chapter 12 should file in a position that does not require the sale of major equipment or farmland, and the marijuana grower should not engage in behavior that could result in removal as DIP. If the marijuana grower is in a position where such sales are needed to maintain the viability of the business, an appointment of a receiver under Oregon's receivership law may be more appropriate.

Chapter 12 does not address all the potential criminal liability a trustee may face under the CSA. However, it is more promising in its limited scope in comparison to chapters 7, 11, and 13. While a bankruptcy court may be inclined to view even the limited criminal liability of the chapter 12 trustee as enough to dismiss the case, the Rohrabacher-Farr amendment shields the debtor and the trustee from any criminal prosecution that may be brought by the DOJ per the CSA's marijuana prohibition. The nature of the trustee's limited role in chapter 12, combined with the protections afforded by the Rohrabacher-Farr amendment in the areas where chapter 12 still exposes the trustee to criminal liability, should act to overcome bankruptcy courts' concerns regarding the criminal liability of the trustee. When the broader policy interests that support marijuana growers' access to chapter 12 bankruptcy are also taken into consideration with the reality of chapter 12 and the Rohrabacher-Farr amendment, concerns raised by bankruptcy courts and the USTP, such as the public policy interest and congressional intent expressed in the CSA, should be overcome.

¹⁰⁶ See 8 Collier on Bankruptcy, *supra* note 61, ¶ 1200.01(4).

¹⁰⁷ *Id.*

¹⁰⁸ 8 Collier on Bankruptcy, *supra* note 61, ¶ 1203.02(1).

**IV
HONORING SUBSTANCE OVER FORM AND PUBLIC
POLICY INTERESTS**

If a bankruptcy court dismisses an Oregon marijuana grower filing chapter 12 with an active OLCC license and operating in strict compliance with state law, the court will be honoring form over substance.¹⁰⁹ To dismiss a marijuana grower based on an unenforceable violation of federal law ignores the fact that the unenforceability is a result of a congressional decision to thwart the enforcement of the CSA for the purpose of allowing states to give effect to their medical marijuana laws. In allowing states to give effect to their medical marijuana laws, Congress—whether intentionally or not—has protected (1) the public health interest that is served in allowing medical patients access to marijuana, (2) the economic interest served by a thriving legal marijuana industry that employs thousands of individuals and produces valuable tax revenue for local and state governments, (3) the environmental interest served by regulating marijuana grow operations, and (4) the criminal enforcement interest that is served by depriving malicious criminal enterprises of a valuable source of income. Congress, in thwarting the enforcement of the CSA, seems to have indicated that those policy interests may far outweigh any interests expressed by the CSA when the CSA is enforced in such a manner as to prevent states from giving effect to their medical marijuana laws.

More than 50,000 Oregon residents rely on medical marijuana to treat numerous, serious medical conditions.¹¹⁰ Although the science on medical marijuana may not be conclusive, many patients benefit from using the drug, and arguments have been made that the public policy behind scheduling marijuana as a Class I drug under the CSA was politically motivated.¹¹¹ As discussed in Part I, marijuana growers

¹⁰⁹ If a bankruptcy court is so incredulous about using the strict compliance standard of the amendment, the debtor should request an OLCC investigator to audit the debtor's operation. In light of the 90-day window for chapter 12, the debtor should seek the investigation prior to filing, and throughout the implementation of the plan, actively maintain its license and ensure strict compliance by working closely with the OLCC.

¹¹⁰ See STATISTICAL SNAPSHOT, *supra* note 25, at 6.

¹¹¹ See Alan Feuer, *Lawsuit Takes Aim at Trump Administration Marijuana Policy*, N.Y. TIMES (Feb. 13, 2018), <https://www.nytimes.com/2018/02/13/nyregion/marijuana-lawsuit-trump-sessions.html>.

licensed with OLCC provide a substantial amount of marijuana to Oregon medical marijuana cardholders.¹¹² In doing so, they serve the broader public health interest by providing medical patients access to marijuana.

As discussed in Part I, Oregon's medical marijuana laws are designed to prevent marijuana growers and medical marijuana cardholders from turning to the black market to buy and sell marijuana.¹¹³ By keeping marijuana growers within the legal market, Oregon receives valuable tax dollars.¹¹⁴ Moreover, thousands of Oregon residents have gainful employment through the industry.¹¹⁵

Oregon's medical marijuana laws cut down on the profit streams of malicious criminal enterprises¹¹⁶ and the environmental damage wrought by illegal marijuana operations.¹¹⁷ Oregon marijuana growers licensed with the OLCC are subject to fertilizer, pesticide, and other agricultural regulations.¹¹⁸ Through such regulations, not only are medical marijuana cardholders guaranteed a certain quality of marijuana but the state can also manage the environmental impact of marijuana growers. The state can thereby prevent the disastrous use of pesticides and fertilizers seen with illegal operations and move forward with environmental best practices for growing marijuana.¹¹⁹

With the looming insolvency of marijuana growers in Oregon as a result of falling prices and a glut in supply, denying marijuana growers an avenue for relief in chapter 12 would threaten the public health interest, economic and tax interest, environmental interest, and criminal enforcement benefits that are effectuated by Oregon's medical

¹¹² See STATISTICAL SNAPSHOT, *supra* note 25, at 6.

¹¹³ See Ingraham, *supra* note 60.

¹¹⁴ STATISTICAL SNAPSHOT, *supra* note 25, at 4 ("The Oregon Department of Revenue (DOR) collected \$65.4 million in marijuana taxes from February 2016 through January 2017.").

¹¹⁵ See *Marijuana License Applications*, OR. LIQUOR CONTROL COMM'N http://www.oregon.gov/olcc/marijuana/documents/mj_app_stats_by_county.pdf (last updated Jan. 25, 2019) (indicating, as of February 26, 2019, 40,824 active worker permits with the OLCC, with 2530 currently under review).

¹¹⁶ Ingraham, *supra* note 60.

¹¹⁷ Cf. Sharon Bernstein, *Toxic Waste from U.S. Pot Farms Alarms Experts*, REUTERS (Aug. 6, 2017), <https://www.reuters.com/article/us-usa-marijuana-environment/toxic-waste-from-u-s-pot-farms-alarms-experts-idUSKBN1AM0C3>.

¹¹⁸ OR. ADMIN. R. 845-025-2070(1) (2018).

¹¹⁹ See Vince Sliwoski, *Oregon Takes a Hard Look at the Environmental Impacts of Cannabis Production*, CANNA L. BLOG (Aug. 23, 2016), <https://www.cannalawblog.com/oregon-moves-to-set-water-usage-limits-on-cannabis>.

marijuana laws. To lock marijuana growers out of chapter 12 bankruptcy on the grounds of illegality and potential criminal liability of the trustees foolishly ignores the fact that any DOJ actions against the trustee and the marijuana grower in chapter 12 would likely be enjoined. Therefore, in honoring form over substance, to not look beyond the criminal violation of the CSA to the reality of the enforcement is to do great harm to medical marijuana patients, small-time marijuana growers, the environment, and the individuals dependent on the state and local programs funded by marijuana tax revenue.

The USTP argues that it merely seeks to enforce the will of Congress, as expressed in the CSA, by pushing marijuana-related debtors out of bankruptcy.¹²⁰ However, such a statement ignores the congressional intent that may be read into Congress' protection of state's medical marijuana laws. Moreover, courts that would cite to the public policy interests expressed in the CSA as grounds for dismissing a marijuana grower out of chapter 12 should consider the state policy interests that are effectuated by its medical marijuana laws, which Congress has chosen to protect through the Rohrabacher-Farr amendment.

While there are temporal concerns regarding the longevity of the Rohrabacher-Farr amendment and the CSA's five-year statute of limitations, such concerns did not dissuade the Ninth Circuit from adopting the strict compliance standard and opening the door to enjoinder of DOJ actions, in light of the need to balance the temporal concerns surrounding the amendment with a defendant's right to a speedy trial.¹²¹ As the Rohrabacher-Farr amendment has consistently received strong congressional support, even following the change in administration in the White House, it seems likely Congress will continue to support the amendment. Therefore, the temporal concerns surrounding the amendment should not derail the chapter 12 bankruptcy of a marijuana grower.

¹²⁰ Letter from Clifford J. White III, Dir., U.S. Dep't of Justice, Exec. Office for U.S. Trs., to Chapter 7 and Chapter 13 Trustees, *supra* note 15.

¹²¹ *In re Medpoint Mgmt.*, L.L.C., 528 B.R. 178, 186 (Bankr. D. Ariz. 2015).

A. Lingerin Questions

If the illegality of a marijuana grower's operation and the limited criminal liability of a trustee is enough to derail a marijuana grower's bankruptcy in chapter 12, courts should consider how far those concerns of illegality should dominate in the face of the enforcement reality of the CSA and the policy interests behind medical marijuana. If concerns over illegality are paramount and courts are willing to defer to DOJ's arguments on the CSA, then it seems to become a slippery slope in other areas of the law, such as immigration.

If a bankruptcy court becomes aware that a debtor or a debtor's family is in the United States illegally, should a bankruptcy court dismiss the case because a trustee may be placed in a criminal position by overseeing a case that is financially empowering a debtor or his or her family to remain in the United States illegally? Such an outcome seems at first a nonissue, as the bankruptcy code does not require citizenship to file; while a debtor is required to have an Individual Taxpayer Identification Number (ITIN) or a social security number,¹²² ITINs are issued without regard to citizenship status.¹²³ However, the current administration's immigration crackdown makes it more likely that individuals who harbor or attempt to protect illegal immigrants may face the wrath of immigration authorities.¹²⁴ Should courts be worried that a rabid DOJ may go after a trustee who is overseeing a case where the trustee knows or has reason to know that the debtor or his or her family are in the United States illegally? If one thinks such an outcome seems unlikely, it seems equally preposterous to say that the public interest behind a marijuana grower's success in chapter 12 does not outweigh potential criminal liability, especially when enforcement is enjoined by Congress.

¹²² Chrystin Ondersma, *Undocumented Debtors*, 45 U. MICH. J. L. REFORM 517, 532–35 (2012); Baran Bulkat, *Can an Undocumented Immigrant File for Bankruptcy?*, NOLO, <https://www.nolo.com/legal-encyclopedia/can-undocumented-immigrant-file-bankruptcy.html> (last visited Mar. 16, 2019).

¹²³ *Facts About the Individual Tax Identification Number*, AM. IMMIGR. COUNCIL (Jan. 2, 2018), <https://www.americanimmigrationcouncil.org/research/facts-about-individual-tax-identification-number-itin>.

¹²⁴ See *The Law Against Hiring or Harboring Illegal Aliens*, FED'N OF AM. IMMIGR. REFORM (Dec. 1999), <https://fairus.org/issue/illegal-immigration/law-against-hiring-or-harboring-illegal-aliens>; Patrick McGreevy & Jazmine Ulloa, *California Pushes Back Amid Fears of Trump Immigration Crackdown*, L.A. TIMES (Jan. 18, 2018), <http://www.latimes.com/local/lanow/la-me-pol-ca-immigration-crackdown-california-20180118-story.html>.

If bankruptcy courts deny relief to marijuana growers under chapter 12, it is also a slap in the face to Main Street,¹²⁵ especially when bankruptcy courts have been accommodating to those that have profited from criminal Wall Street enterprises.¹²⁶ The question at the heart of this concern is whether courts should differentiate between prepetition criminal enterprises in bankruptcy, such as the Bernie Madoff scandal,¹²⁷ and an ongoing criminal enterprise, such as a marijuana grow operation, based on the timeline of the operations? The individuals who lost money to Bernie Madoff are still reeling while others continue to hold onto the spoils; in the name of avoiding significant market disruption, the courts have effectively laundered the money.¹²⁸ One should be askance that an investor storing Ponzi scheme profits offshore is granted greater protection in the bankruptcy process than a family farmer helping medical marijuana patients by operating a marijuana farm in strict compliance with state law.

Why should Wall Street be able to finagle its way with the bankruptcy courts to keep criminally tainted profits while marijuana growers, with explicit enforcement protection from Congress, are left at the mercy of their creditors?

CONCLUSION

The Oregon marijuana industry is on the edge of a massive market correction, and marijuana growers will need access to chapter 12 bankruptcy as they adjust to falling prices and flattening demand. While bankruptcy courts have turned away marijuana-related debtors

¹²⁵ Cf. Eleanor Clift, *Sen. Warren's Main Street Crusade to Pressure Clinton*, THE DAILY BEAST (Jan. 8, 2015), <https://www.thedailybeast.com/sen-warrens-main-street-crusade-to-pressure-clinton>.

¹²⁶ Christopher Edmonds, *Enron Files for Chapter 11 Bankruptcy Protection*, THE STREET (Dec. 2, 2001), <https://www.thestreet.com/story/10004757/1/enron-files-for-chapter-11-bankruptcy-protection.html>.

¹²⁷ *Money Stolen by Bernie Madoff Is Still Being Found*, THE ECONOMIST (Feb. 26, 2018), <https://www.economist.com/finance-and-economics/2018/02/26/money-stolen-by-bernie-madoff-is-still-being-found>.

¹²⁸ See Erik Larson, *The Fallout from Madoff's Fraud Includes an Ironic Twist for Investors*, BLOOMBERG (Jan. 3, 2017), <https://www.bloomberg.com/news/articles/2017-01-03/another-madoff-legacy-ways-for-investors-to-keep-ponzi-profits>; Jonathan Stempel, *Madoff Trustee Loses Appeal on Clawbacks*, REUTERS (Dec. 8, 2014), <https://www.reuters.com/article/us-madoff-appeal-payoffs/madoff-trustee-loses-appeal-on-clawbacks-idUSKBN0JM1QM20141208>.

on the grounds of plan feasibility, lack of good faith and illegal means, and general cause for dismissal based on concerns of asset forfeiture, public health, and the criminal liability of the trustee, the nature of chapter 12 bankruptcy and the Rohrabacher-Farr amendment go a long way in addressing those concerns. With broader public policy interests served by medical marijuana provided by Oregon marijuana growers, bankruptcy courts should feel confident in allowing Oregon marijuana growers access to chapter 12 bankruptcy.