

Mass. Gov. Sued For Closing Cannabis Shops Due To Virus

By **Chris Villani**

Law360 (April 8, 2020, 11:51 AM EDT) -- Massachusetts Gov. Charlie Baker was hit with a suit Wednesday by several recreational cannabis dispensaries and a medicinal marijuana patient who claim his executive orders shutting down the stores during the COVID-19 pandemic are crushing their businesses and hurting public health.

The suit, filed in state court, comes after an extensive lobbying campaign to get Baker to change his mind about classifying recreational cannabis as nonessential during the public health crisis. As Massachusetts is the only state in the region to legalize adult-use marijuana, the governor has said keeping recreational dispensaries open could lead to an influx of out-of-state consumers during a time when Massachusetts is enforcing a stay-at-home advisory and social distancing.

Baker has said opening the adult-use shops before May 4, the earliest possible date for reopening nonessential businesses, is a “nonstarter.” Meanwhile, the state has allowed medicinal marijuana dispensaries to remain open.

“By classifying adult-use marijuana establishments as non-essential, while classifying similar regulated businesses — such as liquor stores and medical marijuana dispensaries — as essential, the executive orders violate the constitutional rights of the plaintiffs and exceed the governor’s executive authority,” the complaint argues.

In other states, including California, Colorado, Illinois, Nevada and Washington, recreational marijuana has been deemed an essential business. Michigan and Oregon have also set up guidelines to keep the shops open.

Recreational stores in Massachusetts have said they are willing to adhere to social distancing guidelines, use curbside pickup and appointment-only sales, and sell only to Massachusetts residents.

Baker has said the residents-only restriction may not be legal, but Wednesday's suit claims the executive order runs afoul of both the state and federal constitutions. The dispensaries and the medicinal marijuana patient, an Iraq War veteran, have asked for an emergency injunction to reopen the shops and called for a hearing “by any means necessary.”

“The executive orders violate the equal protection clause because, for purposes of combating the outbreak of COVID-19, there is no legitimate or rational basis to distinguish between adult-use and

medical marijuana establishments; between adult-use marijuana establishments and liquor stores; between those who frequent such stores; or, between medical marijuana users who frequent adult-use marijuana establishments, and medical marijuana users who only frequent medical marijuana dispensaries,” the complaint argues.

The governor’s office said it does not comment on pending litigation.

Attorneys have argued that Baker’s concerns about the legality of prohibiting sales to out-of-state residents are unfounded, because the commerce clause would not apply to a substance that is illegal at the federal level anyway.

That argument was articulated in an April 1 letter to Baker’s chief legal counsel by attorneys from Foley Hoag LLP.

“No legal challenge under the commerce clause would lie, and a court would summarily dismiss any such action under longstanding commerce clause jurisprudence,” wrote Kevin Conroy and Jesse Alderman, who are not involved in Wednesday’s suit.

Even if such a challenge were possible, the U.S. Supreme Court has held that temporary measures, such as those taken during a public health emergency, do not violate the commerce clause, Conroy and Alderman wrote.

Shaleen Title of the Cannabis Control Commission, the regulatory body for marijuana in the state, has also suggested a restriction on out-of-state sales could help the recreational stores reopen safely during the emergency.

Industry lawyers have said the shutdown of out-of-state sales could be a “disaster” for businesses, as many are in debt due to high startup costs and, due to marijuana’s status at the federal level, federal aid is not an option.

Baker’s executive order closed 43 licensed adult-use establishments, and at least 21 more provisionally licensed adult-use retail marijuana stores cannot open due to the order, Wednesday’s suit claims.

On Tuesday, an updated order from the CCC allowed adult-use growers to continue to supply medicinal shops, citing a sharp uptick in medicinal license applications and Baker’s executive order allowing businesses that supply essential services to remain open.

But even with the CCC’s updated order, Stephen Mandile, a plaintiff in the suit, says he would have to travel more than an hour to obtain medicinal cannabis.

And stores may struggle to survive on medicinal-only sales if the pandemic persists beyond the penciled-in May 4 date to reopen nonessential business, attorneys said.

“We are seeing massive layoffs, the costs to sustain the operations just for medical is a big burden in and of itself,” said Frank Segall, who co-chairs the Cannabis Business & Law Advisory Group at Burns & Levinson LLP and is not involved in the suit.

“They may be in a better position to shut down entirely and ride this out,” Segall told Law360 last week. “If that happens, now you’re exacerbating the health and safety issues by decreasing the availability of

medical products, even to those who have licenses.”

The plaintiffs are represented by Michael T. Sullivan and Michael P. Ross of Prince Lobel Tye LLP and by Adam D. Fine and Brandon R. Kurtzman of Vicente Sederberg LLP.

--Editing by Marygrace Murphy.

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