MEDICAL MARIJUANA AND THE EFFECT OF STATE LAWS ON FEDERALLY SUBSIDIZED HOUSING

I. INTRODUCTION

On November 4, 2008, the Michigan Medical Marihuana Act ("MMMA") was passed by Michigan voters via referendum[1] and went into effect December 4, 2008.[2] Still in its infancy, the MMMA is quite controversial in nature and presents a great deal of conflict for citizens and courts alike. Interestingly, the controversy does not arise in the morality of the use of marijuana[3] itself, but rather, in the problems of interpretation of the statute. Michigan courts have only begun to clarify the muddy provisions of this statute, and it seems the heart of the problem is that, as Judge O'Connell stated in a concurring opinion in the 2010 case of *People v. Redden*, the legislation is "inartfully drafted," and is not just a problem for courts but for those citizens who truly wish to abide by the law.[4]

The MMMA itself identifies that its purpose is to shelter users of marijuana for medicinal purposes from prosecution by the State,[5] and *not* to legalize marijuana in Michigan per se. The MMMA did not create a 'right' to smoke marijuana in Michigan; rather, it affords an affirmative defense to be protected from prosecution for using marijuana, still an illegal substance, provided they can satisfy specific criteria.[6] But, while the MMMA offers this protection against state criminal prosecution arising from marijuana use, it was not designed to protect a Michigan medical marijuana user from prosecution by an agent of the federal government.[7] This conflict between the state law and the federal law[8] appears to be irreconcilable in the context of federally subsidized

---

1. For language of Proposition 1 as it appeared on the Michigan November 2008 general election ballot, see http://www.electionmagic.com/archives/mi/2008/novgen/B11results/proptext.htm#prop0 (last visited July 30, 2012).

2. Michigan Medical Marihuana Act, MICH. COMP. LAWS ANN. §§ 333.26421-.26430 (West 2008).

3. While both spellings are interchangeable, the Michigan statute employs a spelling of "marihuana." For purposes of consistency, however, this Note will utilize the other spelling, "marijuana," unless quoting directly from the MMMA.

4. People v Redden, 799 N.W.2d 184, 200 (Mich. Ct. App. 2011).

5. MICH. COMP. LAWS ANN. § 333.26422.

6. MICH. COMP. LAWS ANN. § 333.26428.

7. MICH. COMP. LAWS ANN. § 333.26422. (*See* Gonzales v. Raich, 545 U.S. 1, 29 (citing the Supremacy Clause, U.S. CONST. art. VI, cl. 2)).

8. Controlled Substances Act, 21 U.S.C. §§ 801-971 (West 1970).

housing,[9] as such housing is subject to federal laws[10] and regulations of the Department of Housing and Urban Development ("HUD").[11]

The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.[12] Therefore, in such conflicts, federal law must prevail over state law, preserving the common thread between the two theories, which is to protect each tenant's right to quiet enjoyment and habitability of the premises.[13] This Note will discuss in more detail the specific federal and state laws at issue as well as its effect on these common law basic rights to quiet enjoyment and habitability for both those who use medical marijuana and those who do not.

II. BACKGROUND

The MMMA went into effect in December of 2008, and now, several years later, Michigan courts are dealing with interpretation and enforcement of provisions of this law, based on the legislative intent. The MMMA was promulgated to protect those Michigan citizens who qualify under this Act as medical marijuana users from arrest and prosecution by state authorities.[14] The declaration section of this Act recognizes that the MMMA conflicts with federal law, which prohibits the drug; however, this section of the MMMA also suggests that the State does not have to

---

9. *See* Chris Killian, *Debate Over Medical Marijuana Could Affect Housing*, KALAMAZOO GAZETTE, Apr. 11, 2010, *available at* http://www.mlive.com/news/kalamazoo/index.ssf/2010/04/debate_over_medical_marijuana.html (providing examples of tenants in the area who are currently being threatened with eviction for use of medical marijuana on federally subsidized property).

10. *See e.g.*, Controlled Substances Act, 21 U.S.C.A. §§ 801-971 (West 1970).

11. Department of Housing and Urban Development Act of 1965 established HUD as a Cabinet-level agency, designed to assist the Executive Branch in administration of development and maintenance of affordable housing projects. 42 U.S.C.A. § 3531 (West 1965).

12. Gonzales v. Raich, 545 U.S. 1, 29 (2005).

13. While common law does not traditionally accept an implied covenant of habitability, most states have enacted statutes to provide that the landlord's warranty to provide safe and decent housing and the tenant's duty to pay rent are mutually dependent upon each other. *See* 5 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 48.11 (4th ed. 1993 & Supp. 1999). "Under Michigan law the duty to pay rent by the tenant and the landlord's obligation to provide 'safe, habitable, and fit premises' in compliance with state health and safety codes are mutually dependent covenants." Bayview Estates, Inc. v. Bayview Estates Mobile Homeowners Ass'n, 508 F.2d 405, 407 (Mich. Ct. App. 1974) (citing MICH. COMP. LAWS ANN. § 554.139) (West 2008).

14. MICH. COMP. LAWS ANN. § 333.26422.

enforce federal law.[15] What is misleading is that agents of the federal government may still enforce federal law and prosecute those who use or possess any illegal controlled substance, including marijuana, pursuant to the Controlled Substances Act ("CSA").[16] The following criminal cases were some of the first decided in Michigan and discuss in some detail various provisions of the MMMA. In discussing these provisions, federal and state courts in Michigan have attempted to interpret the general intent of the statute and by doing so, lay a framework for how the Michigan affordable housing market might be expected to react to the MMMA's provisions as it relates to landlord and tenant law.

Two criminal cases in Michigan were recently decided interpreting the MMMA, one in federal court and the other in state court, reaching similar outcomes. Essentially, these cases interpreted the MMMA as not creating the right to ingest, but rather, creating a narrow window of affirmative defenses to individuals charged with possession and use of illegal drugs.[17]

A. Federal District Court Interpretation of the MMMA: United States v. Hicks

Decided in July 2010, *United States v. Hicks*[18] arose out of a violation of the conditions of defendant's supervised release from prison when he allegedly engaged in criminal activity. Specifically, defendant was not to "commit another federal, state or local crime and shall not

---

15. *Id.* The MMMA is based on a model medical marijuana act, as drafted by the Medical Marijuana Policy Project. *See* Marijuana Policy Project, *infra* note 36. Part of this model act is a declaration that federal law which makes marijuana illegal will not preempt this law, and Michigan adopts the same declaration. MICH. COMP. LAWS ANN. § 333.26422. To justify this determination, the Medical Marijuana Policy Project looks to *Pennsylvania v. Nelson*, a 1956 Supreme Court decision which lays out a three-prong test to determine whether Congress is the only legislative body that may regulate a particular area, or if it is a state issue. 350 U.S. 497 (1956). *See* Bonnie L. Warnken, *Memo to Delegate Joseph F. Vallario, Jr., Chair, Maryland House Judiciary Committee, Re: House Bill 308 (Marijuana—Exception for Compassionate Use), available at* http://docs.mpp.org/pdfs/general/MODEL_BILL_ANALYSIS_2006.PDF [hereinafter *Warnken Memo*]. The Supreme Court sets forth a three-prong test to determine "whether federal law preempts state law, examining (1) whether the federal regulatory scheme is pervasive, (2) whether federal occupation of the field is necessitated by the need for national uniformity, and (3) whether there is danger of conflict between state laws and the administration of federal programs. It is rare that the courts interpret federal legislation as preempting state law." *Warnken Memo* (citing Pennsylvania v. Nelson, 350 U.S. 497 (1956)).

16. *See* 21 U.S.C. § 812(c)(c)(10) (indicating that marihuana is a Schedule I drug).

17. MICH. COMP. LAWS ANN. § 333.26422.

18. U.S. v. Hicks, 722 F. Supp. 2d 829, 837 (E.D. Mich 2010).

illegally possess a controlled substance."[19] However, police found defendant in possession of marijuana during a traffic stop and he was therefore arrested.[20] Upon his arrest, defendant raised the affirmative defense that he was a registered medical marijuana user under the MMMA, and subsequently presented proof of his application for a Registry Identification Card.[21] With these facts, the federal district court discussed the MMMA in the light of federal and state law conflict. The court in *Hicks* held that the MMMA cannot supersede the CSA, per the Supremacy Clause[22] of the U.S. Constitution, illustrative case law,[23] and the MMMA itself.[24] The court concluded that, because the defendant violated the federal law, he violated the terms of his supervised release.[25]

This case arose in federal district court, as the defendant was previously convicted in 2007 for various federal offenses related to the manufacture and distribution of marijuana.[26] Therefore, it is logical that the terms of his probation would require that he not possess or sell marijuana. The court found that although he possessed a valid medical marijuana card from the State of Michigan, it would not preclude him from conviction of possession of illegal narcotics under the federal statute.[27]

B. Michigan State Appellate Court Interpretation of the MMMA: People v. Redden

In *People v. Redden,*[28] the Michigan Court of Appeals came to a similar conclusion.[29] The defendant in *Redden* also had prior convictions for possession with intent to distribute marijuana.[30] The local police department executed a search warrant and found marijuana in the

---

19. *Id.* at 831.

20. *Id.*

21. *Id.* at 832. The registry program (the Michigan Medical Marihuana Program) is administered through the Michigan Department of Community Health. MICH. ADMIN. CODE R. 333.101 (2009). The MMMA provides for issuance of a registry identification card by the department to qualified patients. MICH. COMP. LAWS ANN. § 333.26426.

22. *Hicks,* 722 F. Supp. 2d at 833 (citing Gonzales v Raich, 545 U.S. 1, 29 (2005)).

23. *See* Gonzales v. Raich, 545 U.S. 1, 29 (2005); United States v. $186,416.00 in U.S. Currency, 590 F.3d 942, 945 (9th Cir. 2010); United States v. Scarmazzo, 554 F. Supp. 2d 1102, 1109 (E.D. Cal. 2008).

24. *Hicks*, 722 F. Supp. 2d at 833 (citing MICH. COMP. LAWS ANN. § 333.26422(c)).

25. *Id.* at 830.

26. *Id.* at 835.

27. *Id.* at 834.

28. 799 N.W.2d 184 (Mich. Ct. App. 2010).

29. *Id.*

30. *Id.* at 188.

defendant's home.[31] Defendant raised the medical-purpose defense under Section 8 of the MMMA, which presumes that the defense is valid only if: a bona fide patient-physician relationship is shown, the quantity of marijuana was "not more than was reasonably necessary" to treat the patient's condition, and the marijuana found was for medicinal purposes.[32] The court discusses Section 8 of the MMMA and attempts to reconcile it with Section 4, which requires possession of a valid registration card in order to possess the required amount of marijuana.[33] The court held that even though defendant did not satisfy Section 4, which requires possession of a registration card, the trial court below did not err in allowing the assertion of the Section 8 medical-purpose affirmative defense.[34]

In a concurring opinion, Judge O'Connell wrote to clear up confusion caused by the MMMA, and cautioned citizens to refrain from use and possession of marijuana in order to protect one's individual liberty until the Supreme Court rules one way or another.[35] Further, Judge O'Connell noted that the MMMA was written based on the Model Medical Marijuana Bill,[36] drafted by Washington, D.C. lobbyist group, the Marijuana Policy Project,[37] a group that seeks to legalize marijuana outright.[38] Adding to the confusion is the "interplay" of Sections 4, 7, and 8 of the MMMA and its "unusual structure."[39] Footnote 11 of

---

31. *Id.* at 187.

32. *Id.* at 187-88. *See also* MICH. COMP. LAWS ANN. § 333.26428(a)(1), (2).

33. *Redden,* 799 N.W.2d at 191-94.

34. *Id.* at 194.

35. *Id.* at 201 (O'Connell, J., concurring).

36. MARIJUANA POLICY PROJECT, *Model Medical Marijuana Bill,* http://www.mpp.org/legislation/model-medical-marijuana-bill.html (last visited July 30, 2012).

37. MARIJUANA POLICY PROJECT, *Our Work,* http://www.mpp.org/our-work/ (last visited July 30, 2012). *See also Redden*, 799 N.W.2d at 202 (O'Connell, J., concurring).

38. *Redden*, 799 N.W.2d at 202 (O'Connell, J., concurring).

39. *Id.* at 206. The concurrence goes on to discuss these three sections of the MMMA. Section 4 applies to those patients who possess a registry card. Such patients "shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action," as long as such patient possesses no more than 2.5 ounces of "usable marihuana" and no more than 12 marihuana plants if they do not have a caregiver license. *Id.* at 189 (citing MICH. COMP. LAWS ANN. § 333.26424). Judge O'Connell in a footnote, indicates that "instead of granting a right or implementing a prohibition, the statute leaves the underlying prohibition . . . of marijuana intact," but simply states certain circumstances in which a qualified patient would not be subject to arrest. *Id.* at 206 n.11 (O'Connell, J., concurring). "As a result, this state finds itself in the unusual position of having a statute that precludes enforcement, in certain circumstances, of another statute that makes certain activity illegal." *Id.* Section 7 specifies exactly who may "legally use medical marijuana," which is only a patient with a "serious or debilitating medical condition" as diagnosed by

Redden explained that, rather than affirmatively stating one may or may not engage in certain behavior, or amending an existing statute that accomplished the same goal, the MMMA merely "precludes enforcement . . . of another statute that makes certain activity illegal."[40] Thus, Judge O'Connell illustrated the drafting defects of the MMMA, which is precisely what makes it difficult to interpret.

C. The Establishment of Federally Subsidized Housing and Necessary Compliance with Federal Controlled Substances Act and the Fair Housing Act

The CSA[41] was implemented by Congress in 1970 and established five Schedules in which to classify all drugs listed as controlled substances under the Act.[42] Marijuana[43] is listed as a Schedule I drug, meaning that it has "a high potential for abuse[,] . . . no currently accepted medical use in treatment[,] . . . [and a] lack of accepted safety for use of the drug . . . under medical supervision."[44] Clearly, this is in direct conflict with the MMMA's findings.[45] This conflict makes it difficult for landlords of federally subsidized housing in Michigan to reconcile the federal and state expectations, and determine which law applies.

---

a physician with whom they have a bona fide relationship. *Id.* at 212-13 (O'Connell, J., concurring). And finally, Section 8 lists the affirmative defenses available for those who qualify under the MMMA. *Id.* at 213-14 (O'Connell, J., concurring). In order to assert the affirmative defenses of Section 8, a defendant must show that the two part test as laid out in Section 7 was satisfied. *Id.* at 197. The conflict between these sections of MMMA is that Section 4 provides no civil liability or medical malpractice liability for physicians who recommend medical marijuana, while Section 7 requires that a "physician must have a bona fide physician-patient relationship in order to implement the affirmative medical marijuana defense [of Section 8]." *Id.* at 216 (O'Connell, J., concurring).

40. *Redden*, 799 N.W.2d at 206 n.11.

41. 21 U.S.C.A. §§ 801-904 (West 1970).

42. 21 U.S.C.A. § 812.

43. 21 U.S.C.A § 812(c)(10). Marijuana is defined earlier in the Act as "all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin." 21 U.S.C.A. § 802(16).

44. 21 U.S.C.A. §812(c)(10).

45. *See generally* MICH. COMP. LAWS ANN. § 333.26422. The MMMA's findings in Section 2 indicate that research shows that marijuana is beneficial for treatment of various debilitating medical conditions and that states are "not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law," meaning that states do not have to uphold these federal laws in the context of a state marijuana arrest. *Id.*

Federally subsidized housing is established by the United States Housing Act of 1937[46] and is administered by HUD.[47] HUD, abiding by federal law, requires that landlords maintain a drug-free housing policy on the premises of public housing,[48] and defines "drug-related criminal activity" as illegal use or possession with intent to use a controlled substance as defined in the CSA.[49] This policy is furthered by the Anti-Drug Abuse Act of 1988, which provides in part that a landlord has cause to terminate the lease of a tenant who engages in any use of illegal drugs or if any member of a tenant's household or guest under their control uses illegal drugs.[50]

Additionally, federal regulations, as enforced by HUD, require that leases executed by a landlord of any federally subsidized property provide for termination of tenancy for residents engaging in criminal activity,[51] including illegal drug activity,[52] in order to ensure habitable and decent housing for residents residing on the premises.[53] Furthermore, Michigan law also grants a landlord possession of the premises when there is illegal drug activity caused by a tenant or by a member of his household or guest under his control.[54] A landlord may evict on a twenty-four-hour Notice to Quit if there is an accompanying police report.[55]

HUD also requires that landlords providing affordable housing strictly comply with the provisions of the Fair Housing Act ("FHA"), which was promulgated in 1968 to ensure that there was no discrimination in the housing market for protected classes.[56] One such protected class are persons with a handicap.[57] The FHA is explicit in its definition of "handicap" in that it excludes use of illegal controlled

---

46. 42 U.S.C.A. §§ 1437-1440 (West 1937).

47. *See* Department of Housing and Urban Development Act, *supra* note 11.

48. 42 U.S.C.A. § 1437(f)(d)(1)(B)(iii).

49. 42 U.S.C.A. § 1437(a)(9).

50. 42 U.S.C.A. § 1437d(l)(6).

51. 24 C.F.R. § 5.858 (2010). *See* HUD Handbook 4350.3 REV-1, Appendix 4-A for sample lease to be used in federally subsidized projects, *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=DOC_35639.pdf (last visited July 30, 2012).

52. 24 C.F.R. § 5.858 (2010).

53. *See* WILLISTON & LORD, *supra* note 13.

54. MICH. COMP. LAWS.ANN. § 600.5714(1)(b) (West 2011).

55. *Id.*

56. 42 U.S.C.A. §§ 3601-3631 (West 1968).

57. 42 U.S.C.A. § 3602(h)(1) defines "handicap" as a "a physical or mental impairment which substantially limits one or more of such person's major life activities."

substances.[58] Therefore, while disabled tenants are entitled to make a reasonable accommodation request pursuant to the FHA, landlords are not required to provide such an accommodation for those who are enabled by the MMMA or other such state law to use and possess marijuana for medical purposes.[59]

To date, Michigan does not have case law interpreting the MMMA in light of these federal housing regulations and laws, and therefore it is helpful to look to case law of other states which have already interpreted similar state medical marijuana statutes specifically in terms of the federally subsidized housing conflict. Washington is one such state where illustrative case law may provide a clue as to how similar cases might be decided in Michigan.

D. Washington's Medical Marijuana Law and Interpretive Case Law Pertaining to Federally Subsidized Housing

1. The Washington State Medical Use of Marijuana Statute

Michigan was not the first state to pass a medical marijuana law and it certainly will not be the last.[60] To date, seventeen states including the District of Columbia now have such legislation in place.[61] Washington passed the Washington State Medical Use of Marijuana Act,[62] which is similar to the Michigan statute, in 2007 and allows a similar affirmative

58. Specifically, the provision states that "handicap" does not include the "current, illegal use of or addiction to a controlled substance (as defined in section 802 of Title 21)." 21 U.S.C.A. § 802 (West 2009).

59. *See* Americans with Disabilities Act of 1990, 42 U.S.C.A. 12101-12300 (West 1990)) *amended* in 2008. *See also* Rehabilitation Act of 1973, 29 U.S.C.A. 794 (West 1973); 24 C.F.R. § 8.4 (2010); and 24 C.F.R. § 100.202 (2010). In general, most reasonable accommodations are found in the form of providing barrier-free units for handicapped residents. *See* Karen E. Field, *The Americans with Disabilities Act "Readily Achievable" Requirement for Barrier Removal: A Proposal for the Allocation of Responsibility between Landlord and Tenant*, 15 CARDOZO L. REV. 569, 583 (1993) (suggesting that the landlord is responsible for providing a barrier-free unit if the modification isn't "readily achievable" by the tenant).

60. *See* MARIJUANA POLICY PROJECT, *State Policy*, http://www.mpp.org/states/ (last visited July 30, 2012) for a list of current lobbying efforts in states that do not currently have medical marijuana statutes.

61. *Active State Medical Marijuana Programs*, NAT'L ORG. FOR THE REFORM OF MARIJUANA LAWS, http://norml.org/index.cfm?Group_ID=3391 (last visited July 30, 2012).

62. WASH. REV. CODE ANN. § 69.51A.900 (West 2007).

defense to possession of the illegal substance.[63] A major difference between the language of the Michigan and Washington laws is that Washington more clearly does not purport to shelter those covered by its Act from arrest for possession of marijuana, but rather only provides an affirmative defense for those patients that qualify.[64] In this sense, the Washington statute does not directly mirror the MMMA or the Marijuana Policy Project's model bill;[65] however, the two pieces of legislation are not all that different for the purpose of looking at the problem of federal and state law conflicts in light of subsidized housing issues.

2. Washington Medical Marijuana Statute as Applied to Federally Subsidized Housing Issues: Assenberg v. Anacortes Housing Authority

In *Assenberg v. Anacortes Housing Authority*, a federal district court in Washington granted summary judgment to a landlord in an action initiated by a tenant.[66] The tenant claimed that the landlord violated the Fair Housing Act by not granting a reasonable accommodation for medical marijuana to be used on the premises.[67] The court found that the landlord did not have a duty to accommodate the tenant's marijuana use, even though he was within the parameters of the state medical marijuana

---

63. *See* WASH. REV. CODE ANN. § 69.51A.005-.902 (West 2007). *See also* State v. Fry, 228 P.3d 1 (Wash. 2010) (holding that the Washington statute does not legalize marijuana, but instead provides an affirmative defense for authorized users).

64. "The medical use of cannabis in accordance with the terms and conditions of this chapter does not constitute a crime and a qualifying patient or designated provider in compliance with the terms and conditions of this chapter may not be arrested, prosecuted, or subject to other criminal sanctions or civil consequences." WASH. REV. CODE ANN. § 69.51A.040(2). Additionally, it is important to note that there is no registration procedure set up in Washington. *Wash. Medical Marijuana*, NAT'L ORG. FOR THE REFORM OF MARIJUANA LAWS, http://norml.org/legal/item/washington-medical-marijuana?category_id=835 (last visited July 30, 2012).

65. There are other differences between the Washington and Michigan statutes, but they are immaterial to the issues raised in this Note. For example, Washington requires that patients qualified under the Act be allowed no more than a "sixty day supply" of marijuana, which is presumed by the Act to be "a total of no more than twenty-four ounces of useable marijuana, and no more than fifteen plants." WASH. ADMIN. CODE § 246-75-010(3)(A) (2008). Conversely, the Michigan Act allows only up to 2.5 ounces of usable marijuana and may keep up to 12 marijuana plants at a time. MICH. COMP. LAWS ANN. § 333.26424(a) (West 2008).

66. Assenberg v. Anacortes Housing Auth., No. C05-1836RSL, 2006 WL 1515603 (W.D. Wash. May 25, 2006), *aff'd*, 268 Fed. App'x 643 (9th Cir. 2008).

67. *Id.* at *1-2.

statute.[68] Furthermore, *Assenberg* cites the 2002 Supreme Court decision of *Department of Housing & Urban Development v. Rucker* in which the Court held that a landlord has discretion to terminate tenancy for any sort of illegal drug use.[69]

E. Michigan's Medical Marihuana Act and Other Relevant Statutes

While courts have yet to issue interpretive case law in Michigan regarding medical marijuana and multi-unit housing as of the date of this Note, *Assenberg* could prove to be illustrative of what a Michigan court might hold. In looking at both Michigan and Washington's marijuana statutes, there are similarities that would lead to this presumption. Additionally, there are other Michigan statutes that apply to such matters, which are discussed herein.

First, Michigan common law provides that two parties may agree to contract to anything, provided it does not violate the law or public policy.[70] Extending this notion into the negotiation of a lease agreement, a tenant receiving public assistance is free to contract with a landlord and agree to not use illegal drugs on the premises. Generally, this is accomplished via the Lease Agreement itself or through a separate addendum or Drug-Free Housing Addendum.[71]

Second, Michigan has enacted legislation similar to the ADA on the state level, which prohibits discrimination against persons with disabilities.[72] Similar to the ADA, accommodations must be afforded to those persons with disabilities, as long as the request is reasonable.[73]

---

68. *Id.* at *4. *See also* 42 U.S.C.A § 1437(d)(l)(6) (giving landlords discretion to evict tenants engaging in any drug activity); 24 C.F.R. § 5.854 (requiring landlords of public housing to establish a drug free housing policy on the premises).

69. *Id.* at *5 (citing Dep't of Housing & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (holding that landlord has discretion to terminate tenancy for any sort of illegal drug use based on 42 U.S.C. § 1437(d)(l)(6))).

70. Cudnik v. William Beaumont Hosp, 525 N.W.2d 891, 894 (Mich. Ct. App. 1994) (citing Feldman v. Stein Bldg. & Lumber Co., 148 N.W.2d 544, 546 (Mich. Ct. App. 1967); Michigan Ass'n of Psychotherapy Clinics v. Blue Cross & Blue Shield of Michigan, 301 N.W.2d 33, 40 (Mich. Ct. App. 1980)).

71. *See* HUD Handbook 4350.3 REV-1, Chapt. 6, § 6-5(B)(4), *available at* http://www.hud.gov/offices/adm/hudclips/handbooks/hsgh/4350.3/43503c6HSGH.pdf (last visited Dec. 21, 2011) (providing federally subsidized lease requirements, including provision for termination of the lease by the landlord when there is illegal drug activity within the premises).

72. Michigan Persons with Disabilities Civil Rights Act, MICH. COMP. LAWS ANN. § 37.1101 (West 1998).

73. MICH. COMP. LAWS ANN. § 37.1102 (West 1998).

However, like the ADA, the definition of disability does not allow for the illegal use of drugs,[74] including marijuana.

It is an unfortunate reality that it is only a matter of time before Michigan courts are flooded with the issue of the Michigan Medical Marijuana Act (MMMA) as it pertains to federally subsidized housing, and it will be at the expense of the citizen who falls under the prevue of the statute. Eviction proceedings on the basis of illegal drug use are being brought by landlords who are abiding by federal law, against tenants who mistakenly believe they are free from prosecution because they qualify as patients under the MMMA.[75] While illustrative criminal cases such as *Hicks* and *Redden* in Michigan offer interpretations of the meaning of various aspects of the MMMA, it appears that landlord and tenant law is unaffected by the MMMA, as the MMMA is silent as to the issue.[76] The MMMA's silence as to the problem of qualifying medical marijuana patients who also reside in federally subsidized housing leaves the matter open to judicial review. Therefore, it is necessary to look to the provisions of the MMMA and other states' marijuana laws, as well as to illustrative case law in Michigan and other states, in order to determine how Michigan might reconcile a tenant's right to affordable housing and their desire to use marijuana in accordance to the MMMA, if they qualify.

---

74. MICH. COMP. LAWS ANN. § 37.1103(f) (West 2000).

75. *See* Ron French, *Michigan Marijuana Law Causes Confusion,* DETROIT NEWS, Nov. 26, 2010, *available at* http://detnews.com/article/20101126/METRO/11260375/Michigan-marijuana-law-creates-confusion. *See also* Holly Klaft, *Woman Evicted from Federally Subsidized Apartment for Using Medical Marijuana*, JACKSON CITIZEN PATRIOT, Jan. 13, 2011, *available at* http://www.mlive.com/news/jackson/index.ssf/2011/01/woman_evicted_from_federally_s.html. In response to the ensuing eviction of Shannon Sterner as discussed in the Jackson Citizen Patriot article, HUD's legal department issued a letter to the landlord (named plaintiff in the eviction proceeding) which took no stance for or against definite termination of a resident using marijuana for medical purposes. Citing statutes and HUD regulations already discussed herein, legal counsel for HUD indicated that a landlord "may" terminate tenancy of a resident using illegal drugs but is not required to do so. Letter from Sharon M. Pitts, Acting Assistant General Counsel, HUD's Office of General Counsel to James R. Gromer, General Counsel for Continental Management (Jan. 21, 2011) (on file with Continental Management). This seems contrary to the HUD regulations cited and it appears the federal government, either via legislation or judicial interpretation, will need to clarify this exact issue. Until a definite position is taken, landlords and tenants alike will be in the dark as to procedures they are required or not required to follow in relation to this issue.

76. Clifford E. Douglas, *Restricting the Use of Medical Marijuana in Multi-Unit Residential Settings: Legal and Practical Considerations*, June 1, 2010, *available at* http://www.mismokefreeapartment.org/MManalysis.pdf.

III. ANALYSIS

Because the MMMA is silent as to the impact on landlord and tenant law, analogous case law in other states helps to predict how Michigan landlord and tenant law will develop. The problem Michigan and other states have with regard to interpretation of their respective medical marijuana laws stems from the conflict of state and federal law. On the one hand, states have passed medical marijuana laws and also have jurisdiction over landlord and tenant matters. On the other hand, the federal government has implemented regulations and laws pertaining to affordable housing in these states and requires that landlords of such housing developments abide by these regulations. Generally, these laws can coexist without a problem, but where the medical marijuana statutes clearly conflict with the federal position that marijuana is always illegal, it is clear that federal law must supersede the state law. Justice O'Connell's description of the MMMA as being an "inartfully drafted" piece of legislation[77] seems to permeate any discussion of the MMMA as it relates to criminal and civil contexts alike.

A. Problems Caused by the MMMA

1. The MMMA Does Not Create an Affirmative Right to Possess or Use Marijuana for Medical Purposes

Contrary to what many Michigan citizens believe about the MMMA, including those citizens who fall within the qualifications of the Act, the MMMA most definitely does not create the "right" to ingest marijuana, as O'Connell's concurring opinion affirms.[78] Rather, the Act provides an affirmative defense to those prosecuted under the Michigan Public Health Code,[79] provided that persons qualify for and satisfy all aspects of the MMMA.[80] Because the Act merely provides an affirmative defense to criminal prosecutions, it logically follows that there is no affirmative right to smoke marijuana for medicinal purposes under the Act.

77. People v. Redden, 799 N.W.2d 184, 200 (Mich. Ct. App. 2010).

78. *Id.* at 199.

79. *Id.* at 187 (Defendant charged with possession of a schedule 1 drug under MICH. COMP. LAWS ANN. § 333.7401). The Michigan Public Health Code defines marijuana as a Schedule 1 drug. MICH. COMP. LAWS ANN. § 333.7212.

80. *Redden*, 799 N.W.2d at 200.

2. The MMMA's Silence as to Landlords' and Tenants' Responsibilities under the Act

Section 7 of the MMMA expressly prohibits the use of medical marijuana in specific settings.[81] Presumably, this may suggest that landlords are free to disallow possession and use of medical marijuana on the premises.[82] HUD's stance on the matter seems to be in favor of smoke-free housing in general, as per a Memo issued in September 2010,[83] although marijuana is not specifically addressed. Prior to the issuance of this Memo, HUD's chief counsel, Shelia Walker, issued a statement concerning smoke-free policies in multi-family housing, and essentially stated that smokers are not a protected class under federal or Michigan state civil rights statutes.[84] However, in a letter written to an owner of a federally subsidized property in Michigan, the legal department for HUD stated to this landlord that HUD will not take an affirmative stance on the medical marijuana issue either way, but instead takes the position that a landlord always *reserves the right* to terminate

---

81. MICH. COMP. LAWS ANN. § 333.26427(b) does not permit a patient under the Act to engage in acts while under the influence of marijuana in situations where it would constitute negligence and also prohibits use and possession of medical marijuana in a school bus, on the grounds of a school or in a correctional facility. *Id.* This section further provides that one may not smoke medical marijuana in any "public place." *Id.* Case law has further held that employers are also not required to accommodate employees who smoke marijuana or who are under the influence of marijuana, even if they are within the confines of the statute. *See* Casias v. Wal-Mart Stores, Inc., 764 F. Supp. 2d 914, 921 (W.D. Mich. 2011).

82. Clifford E. Douglas, *Restricting the Use of Medical Marijuana in Multi-Unit Residential Settings: Legal and Practical Considerations*, June 1, 2010, at 8, *available at* http://www.mismokefreeapartment.org/MManalysis.pdf.).

83. *See* HUD Notice: H 2010-21, Sept. 15, 2010, *available at* http://www.tcsg.org/sfelp/HUD-SFHsgImplemt091510.pdf. This memorandum from HUD indicates to owners of federally subsidized properties that they may encourage a completely smoke-free policy on the premises, as long as such policies are "in accordance with state and local laws" and indicate to tenants specifically where they may or may not smoke (i.e., address the policy regarding smoking in the tenant's unit, common areas, designated smoking areas). *Id.* § V(A)(1)-(3). In addition, the memorandum reiterates that discrimination between smokers and nonsmokers upon admission is not acceptable, nor may owners require that existing tenants move out simply because they smoke. *Id.* § V(B). The process for implementing such a policy includes providing existing tenants with reasonable notice of the policy change, as provided by the lease agreement, and that noncompliance may result in termination of tenancy. *Id.* § VI(B).

84. Letter from Sheila Walker, Chief Counsel, U.S. Department of Housing and Urban Development, Detroit Field Office, to James A. Bergman, Co-Director, Center for Social Gerontology, Inc. (July 18, 2003), *available at* http://www.mismokefreeapartment.org/hudletter.pdf.

tenancy for good cause, including drug use, but that it isn't required to do so.[85]

3. Federal Law Supersedes State Medical Marijuana Laws

As previously stated, the Supremacy Clause of the U.S. Constitution expressly provides that federal law shall supersede state law in any conflict of the two.[86] In the often cited Supreme Court case *Gonzales v. Raich*, federal Drug Enforcement Administration agents came to the defendant's home, and although the defendant acted within the scope of the California Compassionate Use Act,[87] the federal agents nonetheless seized and destroyed her marijuana plants.[88] The Court upheld the validity of the action of this federal department and said that "the [Controlled Substances Act] is a valid exercise of federal power."[89] Therefore, the controlling law per the Supreme Court's analysis of the California matter is, in terms of medical marijuana statutes of the states, the federal Controlled Substances Act, which supersedes the state medical marijuana laws where there is a conflict.[90]

An additional federal statute that permeates every aspect of housing, especially federally subsidized housing, the Fair Housing Act provides a means for disabled or other protected classes to request reasonable accommodation within their unit.[91] However, as the federal district court in *Assenberg* stated, medical marijuana patients are not within the scope of the Fair Housing Act[92] and therefore landlords are not required to

85. *See* Memorandum from Sharon M. Pitts, *supra* note 75. Letter from Sharon M. Pitts, Acting Assistant General Counsel, HUD's Office of General Counsel to James R. Gromer, General Counsel for Continental Management (Jan. 21, 2011) (on file with Continental Management).

86. *See* Gonzales v. Raich, 545 U.S. 1, 29 (2005).

87. CAL. HEALTH & SAFETY CODE ANN. § 11362.5 (West 2005).

88. *Gonzales*, 545 U.S. at 7.

89. *Id.* at 9.

90. *Id.* at 29.

91. The Fair Housing Act provides that it is discrimination on part of a landlord who refuses a reasonable request for a modification to his rental unit, or for a reasonable accommodation in "rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C.A. § 3604(f)(3)(B). An example of such modification might be accommodating the parking needs of a handicapped resident who is considered disabled per the FHA. *See* Shapiro v. Cadman Towers, Inc., 51 F.3d 328 (2d Cir. 1995).

92. 42 U.S.C.A. § 3602(h).

honor reasonable accommodation requests made by tenants who fit the exception provided by the MMMA.[93]

So far, one could determine that medical marijuana is considered illegal per the CSA, and that it is not an eligible disability for purposes of a reasonable accommodation request under the Fair Housing Act. How then does this relate to specific federal statutes and regulations pertaining to low income, federally subsidized housing? With the passage of the Anti-Drug Abuse Act of 1988 by the United States Congress, the federal government has declared it "has a duty to provide . . . federally assisted low-income housing that is decent, safe, and free from illegal drugs."[94] Additionally, the U.S. Housing Act of 1937 requires that federally subsidized housing leases contain provisions that call for the termination of tenancy of a resident who has engaged in "drug-related criminal activity" which "threatens the health, safety, or right to peaceful enjoyment of the premises."[95]

Clearly, the CSA, the FHA, and the Anti-Drug Abuse Act all contain provisions that mandate a drug-free housing standard, especially as it pertains to a federally subsidized property.[96] These federal laws go against the general substance of the MMMA, leaving landlords wondering what they should do in order to abide by the laws of the federal and state governments. In a memorandum to federal prosecutors, the U.S. Department of Justice ("DOJ") has taken the stance that it will not use tax dollars to actively seek out medical marijuana users and prosecute them under the CSA; however, this cannot be construed to mean that the DOJ is refusing to apply the CSA.[97] The problem becomes

---

93. *Assenberg*, 2006 WL 1515603, at *4. *See also* Fair Housing Act, 21 U.S.C.A. § 3602(h)(3), which expressly excludes "current, illegal use of or addiction to a controlled substance (as defined in section 802 of Title 21)."

94. Anti-Drug Abuse Act of 1988, 42 U.S.C. § 11901(1).

95. 42 U.S.C.S. § 1437d(l)(6). The Act further states that the lease shall provide for termination of tenancy of a tenant even if it was a member of the tenant's household, or guest under the tenant's control, that engaged in drug-related criminal activity, regardless of if the tenant knew about such activity. *Id.* The constitutionality of this section of the Anti-Drug Abuse Act was upheld by the Supreme Court in *Dep't of Hous. v. Rucker*, 535 U.S. 125 (2002).

96. *See supra* notes 49, 50, 56, and 95.

97. David W. Ogden, *Memorandum for Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana* (Oct. 19, 2009), *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf. This Memorandum explicitly reiterates the federal stance that marijuana is an illegal substance and that "no state can authorize violations of federal law." *Id.* at 2. The Memorandum was initiated out of a need to restate the DOJ's commitment "to making efficient and rational use of its limited investigative and prosecutorial resources," and empower federal prosecutors to use discretion in prosecutions of illegal controlled

more difficult for owners of federally subsidized properties who risk forfeiture of the premises due to illegal drug activity.[98]

B. Applying a Systematic Solution

Given the overwhelming evidence and case law that indicates federal drug laws and HUD regulations will continue to be superior to the MMMA, what can landlords do to ensure their own interests, as well as those of their tenants interests, are protected? Until the state legislature can amend the MMMA or rewrite it (or until Congress makes marijuana legal outright) the solution seems to be to continue enforcing systematic anti-drug policies for all tenants on the premises.

1. Landlords Should Continue to Implement and Enforce Drug-Free Housing Policies as per HUD Regulations.

Landlords have two potential problems with the issue of medical marijuana on their property. The first is the risk of forfeiture of property by state authorities[99] and the risk of loss of federal subsidy for noncompliance with federal law.[100] The second involves the duty of a landlord to ensure all tenants' rights of quiet enjoyment are upheld.[101]

---

substances. *Id.* at 1. It does *not* "'legalize' marijuana or provide a legal defense to a violation of federal law." *Id.* at 2.

98. MICH. COMP. LAWS ANN. § 333.7522 (West 1991). When a state or local police department issues a search warrant for a unit within a multi-unit development for purposes of search and seizure of illegal drugs, it notifies the owner of the premises pursuant to MICH. COMP. LAWS ANN. §§ 333.7502-7545 that the property will be seized if the illegal activity continues. Therefore, the owner or landlord's recourse is to notify the tenant of the immediate termination of his tenancy for engaging in such activity, by way of a twenty-four hour demand for possession, pursuant to Michigan law and HUD regulations. *See* MICH. COMP. LAWS ANN. § 600.5714(1)(b) and MICH. COMP. LAWS ANN. § 333.7522, *infra* note 102.

99. MICH. COMP. LAWS ANN. § 333.7522.

100. HUD expressly stated in a 1999 Memorandum that where "State laws purporting to legalize medical marijuana directly conflict with the admission and occupancy requirements" of the applicable federal housing laws, the federal laws will preempt the state law. Memorandum from Gail W. Laster, U.S. Dep't of Hous. & Urban Dev., to William C. Apgar, Assistant Sec., Office of Hous./Fed. Housing Comm'r and Harold Lucas, Assistant Sec., Office of Pub. and Indian Hous. *Medical Use of Marijuana in Public Housing*, (Sept. 24, 1999). HUD applies a more stringent standard to owners of federally assisted projects in terms of *admission* standards, however it seems to allow more discretion to these owners as to the *termination of current residents* for use of illegal substances, as indicated in a more recent Memorandum. *See* Memorandum from Helen R. Kanovsky, U.S. Dep't of Hous. & Urban Dev. to John Trasvina. Assistant Sec. for Fair Hous. and Equal Opportunity, et al., *Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing* (Jan. 20, 2011). The Kanovsky

Pursuant to Michigan law, when police execute a search warrant and find illegal drugs or drug paraphernalia, the owner of the premises must take action against that tenant who is responsible.[102] Federal law does not recognize marijuana as a legal substance, even in terms of a medical marijuana use.[103] Therefore, the landlord's only recourse is to demand the resident cease use of the illegal substance or vacate the premises.[104] The authority that gives the landlord the right to evict for illegal drugs is pursuant to the lease provisions approved and *required* by HUD.[105] The tenant presumably signs this lease as a competent adult who may enter into a contractual agreement, whereby he has agreed not to engage in drug-related criminal activity.[106] Therefore, the tenant is put on notice that such activity will not be tolerated and will result in termination of his tenancy. But again, the problem with the MMMA is that it mistakenly leads the average citizen to believe that they are exempt from such provisions of the lease that pertain to drug-free housing. This is simply not true, as we have seen from the foregoing case law, and most notably,

---

Memo reaffirms the Laster Memo, and states that owners have the "discretion to evict, or refrain from evicting, a current tenant who the . . . owner determines is illegally using a controlled substance." *Id.*

101. 42 U.S.C.A. § 13662. For the proposition that every Michigan lease includes an implied covenant of quiet enjoyment, see Royal Oak Wholesale Co. v. Ford, 136 N.W.2d 765 (1965).

102. MICH. COMP. LAWS ANN. § 333.7522. This statute provides for forfeiture of property if it is incident to a lawful arrest or search warrant, or if the property is "directly or indirectly dangerous to health or safety." *Id. See supra* note 98 and accompanying text.

103. *See supra* note 16.

104. This requirement is illustrated by the mandatory Regulatory Agreement as between owner and the governing state housing authority (in Michigan, such authoritative body is the Michigan State Housing Development Authority ("MSHDA") which is promulgated and overseen by HUD.) (Sample agreement may be found at the MSHDA website, http://www.michigan.gov/documents/mshda/Regulatory_Agreement_S8_w-TCAP_290470_7.pdf (last visited July 30, 2012) [hereinafter *Sample Agreement*]. Such Regulatory Agreements are required to be executed by owners of federally subsidized properties, and provide for specific covenants to be followed by the owner in order to receive the benefits of the federal subsidies. Expressly provided in such Agreement is the agreement by the owner to "evict any tenant . . . as is determined necessary by an Authorized Officer of the Authority [MSHDA] necessary to comply with the covenants contained in this Agreement" *See id.* at paragraph 5(e). Such covenants include the execution of a MSHDA-approved lease as per paragraph 21. *See also supra* note 51. Another covenant by the owner is to maintain the property as to provide "decent, safe and sanitary housing." *Sample Agreement*, at paragraph 13. If the owner doesn't comply, it is considered a material default of the Agreement and paragraph 26 provides that the Authority may do whatever is necessary to remedy the default, including taking possession of the property.

105. *See supra* notes 48, 49 and accompanying text.

106. *See supra* note 50.

recent Michigan case law.[107] Therefore, landlords should perhaps issue a notice to all tenants on the premises to clarify these anti-drug lease provisions and that possession of a medical marijuana card will not necessarily exempt him from eviction for possession and use of illegal drugs.

The second issue is a perhaps more difficult. Landlords have a duty to maintain *all* residents' right to quiet enjoyment.[108] The standard HUD lease contains provisions that maintain the landlord's ability to terminate the tenancy of a resident who is violating others' rights to peaceful enjoyment of the premises.[109]

2. Michigan State Legislature Should Amend or Replace the MMMA with a Better Defined Statute

In an October 5, 2010 White Paper, consultant for the Michigan Townships Association Gerald Fisher suggests that the only way to clear up ambiguities and confusion caused by the MMMA is to completely redraft it.[110] His suggestion is based on the fact that the cost of ensuing litigation on all fronts—criminal and civil alike—will be too great.[111] While Mr. Fisher specifically addresses the concerns of municipalities, an entirely distinct issue from the realm of this Note, the premise is the same. Redrafting this statute in a more narrow fashion can only result in better outcomes in court, more uniform practices in criminal and civil contexts, and less confusion for the average citizen.

IV. CONCLUSION

It is clear upon a simple reading of the MMMA that the statute is difficult to interpret. If Michigan federal and state courts alike take issue with the draftsmanship of the Act, how could one expect an average citizen to understand its meaning? Many believe the statute legalizes marijuana in a medical context, when in fact it does not.[112] Part of the problem is that the Act, enacted by the referendum process, was drafted poorly, using a model statute promulgated by a lobbyist group in

---

107. *See supra* Section II(A) of this Note; *Hicks*, 722 F. Supp. 2d at 829; *Redden*, 799 N.W.2d at 184.

108. *See supra* note 101.

109. *See supra* note 104.

110. Gerald A. Fisher, *White Paper: A Local Government View of the Michigan Medical Marihuana Act*, MICHIGAN TOWNSHIPS ASS'N 48-49 (Oct. 5, 2010), *available at* http://www.michigantownships.org/downloads/final_white_paper_8510.pdf.

111. *Id.*

112. MICH. COMP. LAWS ANN. § 333.26428.

Washington,[113] and was not drafted by our State Legislature with the precision that it could have perhaps had. Despite these problems, the owners of federally subsidized property struggle to appease all tenants on the premises as well as maintain their good standing with local law enforcement all the way up to HUD. This essentially becomes a balancing act for these owners, who are required to abide by federal law and must exercise discretion in dealings with residents who qualify under the MMMA. The bottom line is that owners first have a duty to provide quiet enjoyment to all tenants, not just to medical marijuana patients.[114] Therefore, the solution seems to closely mirror the general federal government's stance, which is to not look for problems and sniff out users of medical marijuana, but rather to exercise discretion in terminating the tenancies of those residents who are blatantly abusing the MMMA and/or disrupting the quiet enjoyment of their neighbors. HUD clearly gives owners this discretion, as it requires such a provision for drug-free housing to be included in the lease.[115] Until the state legislature can amend this law to make it clearer, Michigan federal and state courts will eventually have to interpret its meaning in the context of landlord and tenant law.

KELLY BLUMLINE

113. *See supra* note 36.
114. *See supra* note 101.
115. *See supra* note 52.