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Florigrown v. DOH: Florida's Vertical Integration Requirement for Medical Marijuana Licensees Held Unconstitutional

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Yesterday, the Florida First District Court of Appeal held that the vertical integration requirement of Florida's medical marijuana licensing scheme contravenes the 2016 constitutional amendment passed by Florida voters to legalize medical marijuana in the state. *Fla. Dep't of Health v. Florigrown, LLC*, No. 1D18-4471 (Fla. 1st DCA July 9, 2019). The statutory scheme invalidated by the court required licensees to be "vertically integrated," meaning each licensee must perform all aspects related to the production and sale of medical marijuana, including cultivation, processing, transportation, and retail sales. Although the court recognized that there may be "sound policy reasons" for requiring Medical Marijuana Treatment Centers (MMTCs) to be vertically integrated, the text of the constitutional amendment plainly did not impose such a requirement, instead permitting MMTCs to perform any one (or more) of the activities authorized by the amendment. Although the decision requires the Florida Department of Health to register or license new MMTCs without imposing the unconstitutional statutory provisions, it explicitly states that the Department is **not** required to do so "immediately." The decision, however, is not clear on the amount of time the Department has to do so. The court simply states that it would not be in the public interest to require the Department to register MMTCs "without applying other regulations to uphold the safety of the public." To that end, the court upheld "that portion of the [trial court's] injunction that … allows the Department a reasonable period of time" to issue the constitutionally required health and safety regulations, and thereafter to begin registering new MMTCs subject to those requirements. The court does not grapple in any detail with the statutory caps on the number of licensees. Instead, the opinion states its ruling that the vertical integration system is unconstitutional which "renders the statutory cap on the number of facilities … unreasonable," and therefore unconstitutional (presumably).

As a result, the court deemed it "unnecessary" to "address the Department's authority to establish any caps." While the reasoning for this holding is not entirely clear, the court does not appear to rule out the possibility that the Department has the authority to establish caps on the number of licensees, so long as those caps are "reasonable" and "necessary for the implementation and enforcement" of the constitutional amendment. **What's Next?** The Department has a few options.

1. Rehearing – The Department has 15 days to file a motion for rehearing or request a rehearing en banc. If the rehearing en banc is granted, all active judges on the First DCA would be involved in deciding the appeal. This could potentially involve an additional oral argument before the full court, although it is unlikely. Either a motion for rehearing or rehearing en banc would need to be filed by July 24.

2. Appeal – The Department could also appeal the decision to the Florida Supreme Court. Opinions by district courts of appeal that declare statutes unconstitutional are within the Supreme Court's mandatory, not discretionary, jurisdiction. The Department would also be entitled to a stay during the pendency of the appeal. The Department has 30 days to file an appeal (August 8), unless that deadline is extended by the consideration of a motion for rehearing.

3. Rehearing and Appeal – The Department could file both a motion for rehearing and (depending on whether that motion is denied, or if the court grants rehearing but then issues another unsatisfactory opinion) file a subsequent appeal. This option would also delay the effectiveness of yesterday's ruling.

4. Accept the Decision – The Department could accept the ruling and attempt to implement the existing statute while disregarding all of the unconstitutional provisions. This option would result in further proceedings in the circuit court.

There are many possible moves left to make in this litigation saga between the Department and Florigrown. The Department's next filing will determine the trajectory of the dispute. **Other Considerations** If the unconstitutionality of vertical integration is ultimately accepted by the state, the Department will have to determine how to handle the existing licenses without triggering a regulatory taking. One option would be to issue each current licensee with separate licenses to engage in each phase of the new, horizontal licensing scheme (i.e., a cultivation license, a processing license, a transportation license, a dispensing license, etc.). If that were to happen, yesterday's ruling would actually create more opportunities for existing licensees. Whereas licensees under the current scheme are required to perform all aspects of an operation, a "horizontal" licensing scheme could allow these licensees to focus on specific aspects of the operation and provide other companies the opportunity to do other aspects. A horizontal structure may also provide opportunities for licensees to structure their operations so as to limit their total tax liability. For existing licensees, having separate licenses for each aspect of their operations may ultimately prove advantageous. With that said, it is not entirely clear that the Department would immediately have to start grappling with the question of how to handle existing licensees. As the current licensing

scheme stands, all existing licensees can engage in any activity for which a license is required (by virtue of the fact that they have a license issued under the current vertically integrated licensing scheme). The Department could simply permit these existing licensees to carry on their businesses until promulgation of a new licensing scheme by the Florida Legislature, which starts its session in January next year rather than March. Regardless of the direction the proceedings take from here, one thing seems certain: The process of legalizing medical marijuana in Florida will remain interesting and legally complicated. Watch this space for information on further developments.

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