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Florida Supreme Court Declares Medical Marijuana Statute's Vertical Integration Requirement Constitutional and Confirms Caps on Licensees

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On May 27, 2021, the Florida Supreme Court held that the "vertical integration" requirement in §381.986(8)(e), Fla. Statutes, does not conflict with Article X, Section 29 of the Florida Constitution, an amendment passed by referendum in 2016 (the "Amendment").

In *Florida Dept. of Health v. Florigrown* (opinion here), the Florida Supreme Court held that the "seed-to-sale" requirements that medical marijuana treatment centers (MMTCs) cultivate, process, and distribute medical marijuana, as first enacted by the Florida legislature in 2014 (regarding "dispensing organizations," renamed MMTCs in 2017 to conform to the Amendment), do not conflict with the Amendment, and that no competent, substantial evidence supported the trial court's finding (affirmed by the First District Court of Appeal (First DCA)) that the cap on the number of licensees was unreasonable.

The *Florigrown* case was originally filed in the Leon County circuit court, which granted injunctive relief and held that §381.986(8)(e) unconstitutionally required MMTCs to participate in all aspects of the industry by using the word "and" in the list of activities – so-called "vertical integration" – while the Amendment used the word "or," allowing for "horizontal integration." The First DCA affirmed, agreeing that the "and-or" distinction was conclusive. The First DCA also held that its ruling "renders the statutory cap on the number of facilities...unreasonable."

The Florida Supreme Court quashed the First DCA's affirmance of the circuit court's decision, finding the statute's use of "and" does not conflict with the Amendment's use of "or":

The trial court and the First District concluded that section 381.986(8)(e) modifies or restricts a right granted under the Amendment by requiring an MMTC to perform several specified functions in order to be licensed as an MMTC, whereas the constitution defines "MMTC" using a disjunctive list of those and other functions. We disagree. In reaching their conclusions, the trial court and the First District misconstrued the constitution by overlooking the context of the definition of "MMTC" provided

in the Amendment and by failing to give due consideration to the authority that the Amendment, by its plain language and when considered together with article III, section 1 of the Florida Constitution, leaves to the Legislature in the establishment of policy related to MMTCs.

Florigrown at 19. The Supreme Court went on to hold, “In fact, section 381.986 does not undertake to define ‘MMTC’ at all. What it does is set forth requirements that an MMTC must meet in order to be licensed.” *Id*. at 20. In other words, the Amendment defines “MMTC,” and the statute merely identifies the type of MMTC that can become licensed. Quashing the injunction entered by the circuit court and affirmed by the First DCA, the Supreme Court concluded, “Because there is no conflict between the MMTC definition and the statute’s vertical-integration requirement, and the Amendment expressly left the Legislature its authority to ‘enact[] laws consistent with this section[]’…Florigrown’s challenge to section 381.986(8)(e) does not have a substantial likelihood of success on the merits.” *Id*. at 21.

Finally, the Supreme Court closed the door on claimants seeking to “register,” the term used in the Amendment, rather than become “licensed,” as the statute requires. The Court concluded this was “not a conflict between the statute and the constitution but a difference in the chosen labels.” *Id*. Because registration is “by” and not “with” the Florida Department of Health (the “Department”), and “the Amendment contemplates substantive standards to be imposed on entities seeking registration,” “the registration the Amendment speaks of operates as a license.” *Id*. at 22. “In sum,” the Court wrote, “the Amendment defines ‘MMTC’ by reference to its ‘regist[ration] by the Department,’” and requires such registration to conform to substantive statutes and regulations that the legislature and the Department are authorized to enact, which further authorizes vertical integration: “Because the Amendment does not entitle an entity to either registration or licensure simply because it intends to perform one of the listed functions, and the Amendment contemplates licensure according to substantive standards, the Legislature’s enactment of standards that include vertical integration is not inconsistent with the Amendment.” *Id*. at 22-23.

Upon the Supreme Court’s decision becoming final, the case will be remanded to the trial court, which can then move forward with the case and enter further rulings consistent with the Florida Supreme Court’s opinion.

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