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Cannabis and the Dormant Commerce Clause

This practice note provides practical insight regarding the Dormant Commerce Clause as it applies to the cannabis industry.

The Commerce Clause is among the Constitution's most sweeping grants of authority to the federal government. Pursuant to the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, Congress may "regulate commerce . . . among the several states." Accordingly, the Constitution provides an express grant of authority to Congress to regulate interstate commerce. In turn, courts have interpreted the Commerce Clause's grant of such authority to act as a limitation on the states' ability to regulate in any way that might interfere with interstate commerce. This limitation upon the states' authority is known as the Dormant Commerce Clause (DCC).

The DCC is poised to rise in prominence as policy discussions heat up in the nation's cannabis industry and as Congress contemplates national legalization (otherwise known as descheduling). In 2021 alone, Congress saw three credible proposals to legalize and regulate cannabis at the federal level. Meanwhile, cannabis is legal in two-thirds of the states, whether for medical or recreational use. These three dozen states have each constructed individualized legal and regulatory regimes dedicated to governing the growth, sale, and distribution of cannabis within their jurisdictions. That is, the current cannabis marketplace consists of more than 36 individual jurisdictions, each with their own distinctions. Licensed cannabis businesses have invested heavily in reliance on and to comply with existing state regulatory structures. If—or when, if advocates are to be believed—interstate cannabis is legalized, the question of the interplay between proposed federal regulatory oversight of cannabis and existing state regulatory regimes is yet unanswered.

As of January 2021, there is no single national cannabis market as there is no interstate commerce in cannabis. In other words, the growth, sale, and distribution of cannabis is legal within jurisdictions that have legalized such activities, but not between these jurisdictions. By necessity then, each jurisdiction that has legalized the growth, sale, and distribution of cannabis prohibits out-of-state activity with regard to state-legal cannabis. Many states also impose residency requirements for licenses to conduct cannabis activities. Ordinarily, the prohibition on out-of-state activities or residency requirements would likely represent a violation of the DCC as these mandates would hinder interstate commerce. The introduction of interstate commerce means that existing paradigms in the regulatory oversight of cannabis will face substantial challenges, especially with regard to the DCC.

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