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Recording Date - April 10, 2018

Recording Availability – August 24, 2018

Meeting Location	Date	Time	Topic
King County Bar Association 1200 Fifth Avenue - Suite 700 Seattle, WA	Tuesday, April 10, 2018	12:00 PM to 1:15 PM	The Highs and Lows of Marijuana in Bankruptcy

AGENDA

12:00 PM Introduction

12:10 PM Presentation: ‘The Highs and Lows of Marijuana in Bankruptcy’, by Aditi Paranjpye, Bush Kornfeld LLP and Thomas Buford, Bush Kornfeld LLP

- Scenarios in which marijuana issues may arise in commercial and consumer situations;
- Review of Cook Investments, which is currently pending before the 9th Circuit;
- Review of consumer cases where marijuana issues have arisen;
- Practical pointers for practitioners facing marijuana issues.

1:15 PM Adjourn

SPEAKER BIOGRAPHY

Aditi Paranjpye, Bush Kornfeld LLP – Aditi Paranjpye is an attorney at Bush Kornfeld, which she joined in 2017. Aditi's previous experience includes four years as an associate at the New York office of White & Case LLP working on commercial bankruptcy issues and two years as the Assistant United States Attorney in Seattle responsible for representing the United States in bankruptcy matters in the Western District of Washington. Aditi earned her B.A. at the University of Washington in 2005 and her J.D. from the University of Chicago in 2009. She is a member of the State Bars of Washington, New York, and California.

Thomas Buford, Bush Kornfeld LLP – Thomas Buford is an attorney at Bush Kornfeld LLP, which he joined in 2017. Thomas’s practice focuses on commercial insolvency issues and representing court

appointed trustees and receivers. Prior to joining Bush Kornfeld, Thomas served for 11 years in the Seattle Office of the United States Trustee, where he worked on a wide variety of consumer and commercial bankruptcy issues. Thomas attended Washington University School of Law in St. Louis and began his career by clerking for Chief Judge Catharine Aron in the Bankruptcy Court for the Middle District of North Carolina.

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THE HIGHS AND LOWS OF MARIJUANA IN BANKRUPTCY

Aditi Paranjpye and Thomas Buford
Attorneys at Bush Kornfeld LLP



Marijuana Basics

- Recreational marijuana is currently legal in 8 states and the District of Columbia, including Washington State and Oregon
 - *Washington State: I-502* passed in November 2012 by a 56 to 44 percent margin.
 - *Oregon: Oregon Ballot Measure 91* passed in November 2014 by a 56 to 44 percent margin.
- Medical marijuana legal in 28 states plus District of Columbia
- Projected Revenues:
 - *Washington State: \$730 million for 2017-19 budget cycle*
 - 60% to public health programs
 - \$211 million to general fund
- State Laws Regulate Producers, Processors, and Retailers
 - *Generally: RCW 69.50.360-380; WAC 314-55*

Federal Legal Issues

- Controlled Substances Act (21 U.S.C. § 812)
 - *Marijuana classified as a Schedule I Drug*
 - high potential for abuse
 - no currently accepted medical use in treatment in the United States
 - a lack of accepted safety for use of the drug or other substance under medical supervision.
- United States Trustee Directive of April 26, 2017:
 - *Memorandum Directing Chapter 7 and Chapter 13 Trustees to move to dismiss or object in all cases involving marijuana assets on grounds that such assets may not be administered under the Bankruptcy Code*

In Re Cook Investments, Case 16-44782 (W.D. WA)

- Five jointly administered cases, four commercial real estate lessors, filed November 2016
- One debtor, Cook Darrington, leases property to I-502 producer (Green Haven)
- UST moves to dismiss for “cause” pursuant to Section 1112(b)(4)(B) on the basis that per se violation of CSA constitutes “Gross mismanagement of the estate”
- Motion Denied. Court holds that Debtors “may be able to propose a plan that does not rely on the income from the marijuana operation lease.”

In re Cook Investments, Case 16-44782 (W.D. WA)

- Debtors file Plan
 - Eliminates all references to Green Haven, lease or lease income
 - Provides for rejection of Green Haven lease
- Debtors Reject Green Haven lease
- UST objects to Plan
 - **11 U.S.C. §1129(a)(3)**: “The court shall confirm a plan only if...[t]he plan has been proposed in good faith and not by any means forbidden by law.”

In re Cook Investments, Case 16-44782

(W.D. WA)

- Sole issue is 1129(a)(3)'s requirement that: “[t]he plan has been proposed in good faith and not by any means forbidden by law.”
 - *Debtors*: 1129(a)(3)'s intent is to evaluate manner by which the plan was proposed
 - *UST*: Debtor cannot satisfy 1129(a)(3) where any involvement of any marijuana asset in a bankruptcy case, even where plan implementation doesn't rely on marijuana-related income
- Court Confirms Plan,
 - finds that 1129(a)(3) requires that a Plan not be proposed by any “means” forbidden by law
 - Plan is neither based upon violations of CSA, nor dependent on Green Haven lease income (lease rejected)

Relevant Case Law

- *In re Rent-Rite Super Kegs West Ltd.*, 484 BR 799 (Bankr. D. Colo. 2012) (where “[b]ecause a significant portion of the Debtor’s income is derived from an illegal activity, §1129(a)(3) forecloses any possibility of this Debtor obtaining confirmation of a plan that relies in any part on income derived from a criminal activity)
- *In re Arenas*, 514 BR 887 (Bankr. D. Colo 2014) (dismissing case where debtors could not “under the present circumstances, feasibly propose a chapter 13 plan that does not depend on income from sources that are illegal under the CSA for the plan’s execution.”)
- *In re McGinnis*, 453 B.R. 770, 772 (Bankr. D. Or. 2011) (denying confirmation of chapter 13 plan where plan depended on cultivation and sale of medical marijuana)

In re Cook Investments, Current Status

- UST appeals both denial of MTD and Confirmation Order to District Court
- Bankruptcy Court and District Court deny UST's Motion for Stay Pending Appeal
- District Court Affirms, denies UST's Motion for Stay Pending Appeal
- Appeal Pending at the 9th Circuit

Common scenarios where marijuana and bankruptcy meet

- Commercial
- Consumer

So, I own a...

- Dispensary
- Grow operation
- Processing business
- Commercial property
- Fertilizer business
- Bong maker
- Advertising company

So, I work for...

- Ownership does not matter
- Control does not matter
- Unclear that a trustee would be doing anything illegal by accepting proceeds
- *In re Stickles*, W.D. Wa. 17-11424

I need a little help here...

- *In re Skrzysinski*, W.D. Wa. 17-11437

Tribal Issues

- Some tribes have embraced recreational marijuana
 - *What if your client works for one of these tribes?*
- It remains illegal on some tribal lands

Let's get absurd...

- The Debtor uses marijuana to control anxiety
- The Debtor has an automobile that does not meet federal emission standards
- The Debtor is in the country illegally

These seem like a lot of lows – where are the highs?

- Receivership
- Pre-bankruptcy planning
- Judicial intervention
 - *In re Olson* (9th Cir. BAP, February 5, 2018) (Burden on party seeking dismissal to establish that Debtor is actually violating the Controlled Substances Act)
- Congressional actions
 - *U.S. v. McIntosh*, 833 F. 3d 1163 (9th Cir. 2016)(where Consolidated Appropriations Act prohibited DOJ from spending money on prosecutions of state-legal medical marijuana, burden on prosecutors to establish non-compliance with state law)