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Michigan Court of Claims Denies Request for Injunction Against State Over Local Licensing Decisions: Dykema Gossett

On November 11, 2020, Attitude Wellness D/B/A Lume Cannabis Company (Lume), filed suit in the Michigan Court of Claims against the Michigan Marijuana Regulatory Agency (MRA), the Village of Edwardsburg, and two private parties, after the Village denied Lume's application for village marijuana establishment licenses. Lume sought an injunction to prevent the MRA from issuing state licenses to the two businesses that won licenses from the Village. Last week, the Court of Claims denied that request, finding Lume's claims against MRA to be "speculative and inexact."

Under the state's adult-use law, the Michigan Regulation and Taxation of Marihuana Act (MRTMA), if the MRA is faced with more applications from a municipality than the number of establishments that the municipality allows, then the municipality is to select from among competing applications by a competitive process. That process must be intended to select the applicants who are best suited to operate in compliance with MRTMA. As permitted under MRTMA, the Village limited the number of licenses for retail establishments, in this case to two, and chose from among the applicants.

In the Michigan Court of Claims, Lume alleged that the Village inappropriately selected Alvarez Cultivation (Alvarez) and NOBO Michigan (NOBO), in violation of MRTMA. Michigan's Court of Claims is a court of limited jurisdiction, which can only entertain claims against the State and its agencies. Lume argued that the MRA was the proper defendant and that MRA should be enjoined from awarding state licenses to Alvarez and NOBO because the Village failed to follow MRTMA's requirements with respect to competitive selections.

Lume's case illustrates the difficulty of succeeding in such challenges. Although MRTMA requires a municipality to select applicants by virtue of a competitive process aimed at ascertaining which are best suited to comply with the law, by its plain language MRTMA's requirement applies only in cases where MRA receives too many applications. But an MRA application is not complete without a municipal attestation that the applicant is in compliance with local ordinances. And municipalities generally will not provide such an attestation until applicants have been selected at the local level. As such, MRA does not face more applications than a municipality allows, because the municipality has already whittled the number down before the applicants come to MRA.

While the practicalities of the MRA licensing process and specific language of MRTMA has led to substantial debate as to whether and how a competitive process is truly required, Court of Claims Judge Michael J. Kelly issued an opinion in Lume's case last week that did not address this issue. Rather, Judge Kelly simply assumed that the MRTMA requirement was implicated here.

Nevertheless, Judge Kelly denied Lume's motion for an injunction. In doing so, he found that "the crux of plaintiff's allegations is against Edwardsburg and its decision to approve applications by Alvarez and NOBO." The Court further found that the few allegations levied against the MRA were "speculative and inexact" because they assumed that "Alvarez and/or NOBO will receive licensure—first local licensure and then state licensure." And Alvarez and NOBO apparently had not

yet even applied for licensure from MRA.

Even though the MRA was the only state-actor named in the complaint, none of the defendants were dismissed. While the Court of Claims has no jurisdiction over non-state actors, Judge Kelly stated in a footnote that “the Court has jurisdiction over the only defendant against whom it has been asked to grant relief—the MRA—at least for purposes of the instant motions.” Given that, “while the court questions whether it has jurisdiction over the non-state actors, it will not sua sponte dismiss them at this time, as doing so is unnecessary for resolving the currently pending motions.” But this is a fundamental problem for aggrieved applicants who wish to sue the MRA and municipalities over a licensing fight—the Court of Claims lacks jurisdiction over non-state actors, yet the Circuit Court that has jurisdiction over the municipalities lacks jurisdiction over the MRA.

As this case moves forward, there may be further insight to gain.

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