NOTE
HE WHO COMES INTO COURT MUST NOT COME WITH GREEN HANDS: THE MARIJUANA INDUSTRY’S ONGOING STRUGGLE WITH THE ILLEGALITY AND UNCLEAN HANDS DOCTRINES

I. INTRODUCTION
Imagine a hardworking marijuana dispensary owner, Mary Jane.1 Mary operates her marijuana business legally under the laws of her state.2 Mary contracts with James Chong for ten pounds of marijuana and pays the amount due, $45,000, in full and up front.3 Upon the scheduled delivery time, Chong tells Mary it will take about six more months than expected to make the delivery, clearly breaching the contract.4 Mary is devastated, as she was counting on that delivery to fill several orders. The solution seems clear—Mary should bring a lawsuit against Chong for breach of contract and collect consequential damages or rescind the contract and seek restitution.5 As this Note explains, the court Mary turns to might recognize no remedy and

1. For illustration purposes, the fictitious Mary Jane’s contract issues will help to demonstrate the legal problem this Note addresses.


5. Consequential damages are damages foreseeable prior to breach and flow directly from the breach, such as Mary’s lost business sales, or expenses that were necessary to limit damages. See U.C.C. § 2-715(2) (AM. LAW INST. & UNIF. LAW COMM’N 2013). Restitution, on the other hand, requires the defendant to restore the benefit a plaintiff conferred upon the defendant. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (AM. LAW INST. 2011). In this case, restitution would result in Chong returning to Mary her $45,000.
“wash its hands” of the contract because it is in direct violation of federal law banning the sale and consumption of marijuana, regardless of her state’s laws legalizing marijuana. Further, should this breach be so egregious or cause such a great degree of harm that Mary has no choice but to seek relief from the bankruptcy courts, it is likely she will be turned away. This Note explores this problem facing the marijuana industry today and proposes solutions for the courts, as well as the parties, to avoid an unfair situation for plaintiffs or debtors like Mary.

Over the last few decades, public support for marijuana legalization has risen dramatically. According to a 2015 survey performed by Pew Research Center, fifty-three percent of Americans support the legalization of marijuana. This is a substantial increase from the twelve percent of Americans who supported marijuana legalization in 1969 and the twenty-five percent in 1981. In line with this increase in public support, many states have legalized marijuana for both medical and recreational use. To date, twenty-five states and the District of Columbia have legalized marijuana for medical purposes, and four states have legalized marijuana for recreational purposes.

---

6. A court can deem a promise or contract unenforceable in accordance with the unclean hands or illegality doctrine if the contract violates the law or if enforcement of the contract would directly conflict with public policy. See RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (AM. LAW INST. 1981). One scholar referred to the doctrine as “perhaps the most powerful and least containable defense that came from ancient courts of equity.” T. Leigh Anenson, Limiting Legal Remedies: An Analysis of Unclean Hands, 99 KY. L.J. 63, 63 (2011).

7. See infra Part III.A.

8. See infra Parts III–IV.


11. Swift, supra note 2.


As a result, the marijuana industry is booming. For example, in Colorado, a state that has legalized marijuana for both medical and recreational purposes, the sale of marijuana generated a total of $135,000,000 for the 2015 year in tax revenue.

Despite the positive financial impact the legalization of marijuana seems to have had, there is, however, one glaring obstacle to this surge in growth; state laws legalizing marijuana are in direct violation of the Federal Controlled Substance Act of 1970 (“CSA”), which tabs marijuana as a banned controlled substance. This has been and will continue to be a problem for the courts as the Supremacy Clause of the Constitution provides that federal laws shall be the supreme law of the land and shall supersede all state laws.

This Note focuses on the issues—specifically in contract disputes and bankruptcy proceedings—the courts, federal and state, have come across due to this conflict of laws in limited exposure to the problem. More precisely, this Note addresses how the conflict of laws relates to the “illegality” or “unclean hands” doctrines. Plaintiffs suing for breach of contract who are either marijuana distributors themselves or involved with a party who deals in marijuana could find themselves without any remedy as the courts might “wash their hands” of the illegal activity. This Note suggests two separate solutions, one for parties who contract in the marijuana business, and a suggested balancing test for courts dealing with this issue.

Part II explains the marijuana industry’s recent growth, as well as the direct conflict of state marijuana laws with federal laws banning the


15. Tom Huddleston, Jr., Colorado’s Legal Marijuana Industry Is Worth $1 Billion, FORTUNE (Feb. 11, 2016, 10:19 AM), http://fortune.com/2016/02/11/marijuana-billion-dollars-colorado. This tax revenue for the state of Colorado is a result of just over $996,000,000 in total marijuana sales in 2015. Id.


17. This Note, explaining the problems created in contract law, does not speak as to whether the CSA will be overturned by legislation in the near future. Instead, this Note discusses the current and ongoing problems that will continue while this disparity in the law exists.

18. See U.S. CONST. art. VI, cl. 2 (“[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.”).

19. See infra Part III.

20. See infra Part III.

21. See infra Part III.A–E.

22. See infra Part IV.
distribution and consumption of marijuana. It also briefly introduces and explains what are known as the illegality and unclean hands doctrines and discusses the most fundamental examples of the doctrines in action. These doctrines, being vital to this Note’s analysis, have recently collided with the marijuana industry due to the federal illegality of marijuana. Part III explains the legal issue of how some courts are invoking the illegality and unclean hands doctrines against those within the marijuana industry and explains how it is a detriment to the industry’s overall growth. Part IV proposes solutions, both for contract drafters and for the courts, in hopes of preventing the unclean hands defense from being a roadblock for the industry in the future.

II. A BRIEF HISTORY OF MARIJUANA’S GROWING POPULARITY, STATE MARIJUANA LAWS CONFLICTING WITH FEDERAL LAWS, AND THE UNELEAN HANDS DOCTRINE

Marijuana, a drug that was entirely illegal for both sale and consumption for any purpose across the entire United States just fifty years ago, is now legal in twenty-five states and the District of Columbia. In line with this upward trend of legalization in the states, the marijuana industry is booming, so much so that it is now said to hold a potential value of around $100,000,000,000. However, state laws legalizing marijuana are in direct violation of the CSA. Although the federal government has seemingly vowed to be lenient in allowing state legalized marijuana dispensaries to operate peacefully, per the Constitution’s Supremacy Clause, federal law is supreme over state law. Since the sale of marijuana is illegal under federal law, the application of the unclean hands or illegality doctrine might apply. The unclean hands and illegality doctrines are doctrines in which a court recognizes no claim for a plaintiff whose case relies on his own illegal conduct.

23. See infra Part II.A-C.
24. See infra Part II.D.
25. See infra Part III.
26. See infra Part III.
27. See infra Part IV.
28. See infra Part II.A.
29. See infra Part II.A.
30. See infra Part II.B.
31. See infra Part II.C.
32. See infra Part III.
33. See infra Part II.D.
A. “Legalize It”: The Popularity and Growth of Marijuana Legalization in the States

Despite the current trend of marijuana laws, the use of marijuana was, until very recently, illegal across the entire country. The first state to legalize marijuana was California in 1996 for medical purposes. Currently, twenty-five states and the District of Columbia have enacted laws legalizing the use of medical marijuana, the most recent being Ohio in June 2016. Four of these states have also enacted laws allowing the use of marijuana for recreational purposes. One other state, Florida, currently has pending legislation that would legalize marijuana for medical use.

Recognizing the opportunity, investors and entrepreneurs have flocked to the marijuana industry, and dispensaries have been popping up all over the country. It is easy to understand why so many are eager to dive into the business, as the marijuana industry has been said to hold a potential value of around $100,000,000,000. If you are not currently from a state that has legalized marijuana, it can be hard to imagine just how fast and strong the industry has grown. To put this in perspective, a few scholars have recently noted that in some cities marijuana dispensaries now outnumber Starbucks coffee houses. These dispensaries are generally small, largely a result of some of the legal issues this Note discusses. However, some are worth tens of millions of dollars.

34. See Scheuer, supra note 12, at 519.
35. Id. at 521.
36. See 25 Legal Medical Marijuana States and DC, supra note 13 (listing states that have legalized marijuana for medical use).
37. See Scheuer, supra note 12, at 522.
40. See Scheuer, supra note 12, at 529.
41. See infra note 42 and accompanying text.
42. See Scheuer, supra note 12, at 521-22; see also Benac & Caldwell, supra note 39 (noting that in Los Angeles as of August 2013 there were 135 marijuana dispensaries compared to 112 Starbucks).
43. See infra Part III.F.
44. See Scheuer, supra note 12, at 528-29.
B. State Marijuana Laws Are in Direct Violation of the Controlled Substances Act

State laws legalizing the use and sale of marijuana are in direct violation of the Federal CSA, which lists marijuana among a group of illegal substances.45 Marijuana is included in this list of substances that are said to have “no currently accepted medical use.”46 James M. Cole, Deputy Attorney General, in a memorandum to U.S. attorneys, acknowledged this direct conflict of laws, stating that “[p]ersons who are in the business of cultivating, selling, or distributing marijuana . . . are in violation of the [CSA], regardless of state law.”47 The CSA further makes it illegal to profit from the sale of marijuana.48 The words of Attorney General Cole were put into action in 2013, as the federal government raided marijuana dispensaries, seizing computers and plants and freezing bank accounts, causing a devastating loss to some dispensaries.49

The fact that the federal government has the right to the above actions raises a red flag for investors and creditors alike looking to take part in a flourishing business.50 Marijuana-related penalties range from a misdemeanor for possession to twenty years to life in prison and a $4,000,000 fine for distribution.51 The threat of government action, however, seemed to subside due to the effect of an August 2013 memorandum by Attorney General Cole making it clear that his administration was no longer seeking to use the valued resources of the U.S. Department of Justice (“DOJ”) to patrol state marijuana dealings.52

46. § 812(b)(1)(B).
50. Scheuer, supra note 12, at 528.
The memorandum stressed state regulation of the marijuana industry instead of federal government interference.\textsuperscript{53}

Nonetheless, Cole cautioned that the federal government and the DOJ do still have the right to interfere should they wish to, explaining that “[i]f state enforcement efforts are not sufficiently robust... the federal government may seek to... bring individual enforcement actions, including criminal prosecutions.”\textsuperscript{54} Cole’s words make it clear that although the federal government has taken a more lenient attitude towards those dealing in marijuana, dispensaries engaging in the sale of marijuana are nonetheless breaking the law.\textsuperscript{55} It is not entirely relevant to this Note’s analysis, however, whether or not the federal marijuana laws are actively enforced by the DOJ.\textsuperscript{56} Our friend, Mary Jane, might very well breathe a bit easier knowing the “feds” will not invade her dispensary, but she still might be denied recovery in a court of law.\textsuperscript{57} So long as the CSA remains in effect, the unclean hands doctrine may be invoked by a court of law because, as this Note explains, federal law is said to trump all state law.\textsuperscript{58}

C. The Supremacy Clause and the Preemption Doctrine

While the Supreme Court has decided that Congress can regulate the marijuana industry, states are not forced to align their policies with the federal government.\textsuperscript{59} This results in conflicting state and federal laws.\textsuperscript{60} Federal laws, however, are said to preempt all state laws per the preemption doctrine.\textsuperscript{61} The preemption doctrine is based on the

\begin{itemize}
  \item \textsuperscript{53} See David M. DiSegna & Bruce H. Tobey, Medical Marijuana Business Regulatory Landscape in Rhode Island and Other States, 36 R.I.B.J., May/June 2015, at 11, 14.
  \item \textsuperscript{54} See Memorandum from James M. Cole, supra note 52.
  \item \textsuperscript{55} See id.
  \item \textsuperscript{56} This Note is concerned with the court raising the illegality or unclean hands defense, not the federal government’s enforcement of the law. As one court that invoked the doctrine points out, “Colorado law does not create a right to use and possess medical marijuana. Instead [it] creates an exception from state criminal laws for any patient who lawfully possesses a [registration card] to use medical marijuana.” Haeberle v. Lowden, No. 2011CV709, 2012 WL 7149098, at *3 (Colo. Dist. Ct. Aug. 8, 2012).
  \item \textsuperscript{57} Whether it is by the bankruptcy courts or a court “at law,” Mary may not find sympathy in either. See infra Part III.
  \item \textsuperscript{58} See infra Part II.C.
  \item \textsuperscript{59} The highest Court in the land has held that Congress had the power to regulate marijuana pursuant to its Commerce Clause power, through the CSA, even for personal use. Gonzalez v. Raich, 545 U.S. 1, 27-33 (2005).
  \item \textsuperscript{60} See Erwin Chemerinsky et al., Cooperative Federalism and Marijuana Regulation, 62 UCLA L. REV. 74, 102 (2015).
  \item \textsuperscript{61} See id.
\end{itemize}
Constitution’s Supremacy Clause,\textsuperscript{62} which deems federal law the “supreme law of the land,” trumping all conflicting state laws.\textsuperscript{63} The constitutional question that arises is whether a state law in direct conflict with a federal law should be preempted or overruled by the federal law, specifically in the courts.\textsuperscript{64}

The Supreme Court has said that “[a] fundamental principle of the Constitution is that Congress has the power to preempt state law.”\textsuperscript{65} This is extremely pertinent to the marijuana industry because, as noted, state laws legalizing marijuana are in direct conflict with the federal CSA.\textsuperscript{66} Allowing these laws to coexist, however, is the Tenth Amendment’s anti-commandeering doctrine.\textsuperscript{67} Under this doctrine, the federal government cannot force a state to enforce, enact, or maintain any specific law.\textsuperscript{68} The result of these two doctrines is that “[a] state can constitutionally decide to not criminalize conduct under state law even if such conduct offends federal law.”\textsuperscript{69} The U.S. Supreme Court has made clear that no matter how powerful the federal interest, Congress can never require the states to regulate certain conduct.\textsuperscript{70}

Nonetheless, the U.S. Supreme Court has upheld the federal government’s ability to enforce the CSA against all who are not compliant with the law, which includes those in states that have legalized marijuana use and production.\textsuperscript{71} There is an exception to the preemption doctrine, however, for when a federal statute contains a clause that addresses the issues of preemption and conflict, specifically.\textsuperscript{72} In those instances, if the clause within the federal statute is ambiguous, some judges believe the reading must favor the state and cut against preemption.\textsuperscript{73} For this reason, some argue that the CSA does not

\textsuperscript{62} U.S. Const. art. VI, cl. 2.
\textsuperscript{63} See Chemerinsky et al., supra note 60, at 102 (citing U.S. Const. art. VI, cl. 2).
\textsuperscript{64} See id.
\textsuperscript{66} See supra Part II.B.
\textsuperscript{67} See Chemerinsky et al., supra note 60, at 102-03.
\textsuperscript{68} Id.; see also New York v. United States, 505 U.S. 144, 162 (1992) (“[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”).
\textsuperscript{69} See Chemerinsky et al., supra note 60, at 103.
\textsuperscript{70} See New York, 505 U.S. at 178.
\textsuperscript{71} See Chemerinsky et al., supra note 60, at 103; see also Gonzales v. Raich, 545 U.S. 1, 21-22 (2005) (holding that the CSA applies to intrastate activities as well as interstate).
\textsuperscript{72} See Elizabeth Rodd, Note, Light, Smoke, and Fire: How State Law Can Provide Medical Marijuana Users Protection from Workplace Discrimination, 55 B.C. L. Rev. 1759, 1771 (2014) (noting that courts are divided on the subject of preemption).
\textsuperscript{73} See Ter Beek v. City of Wyoming, 846 N.W.2d 531, 536-37 (Mich. 2014) (noting that the Supreme Court suggests the words of the statute be explored to decide Congress’s “preemptive
preempt state law because it contains a clause that allows states to create their own drug laws, as long as there is “no positive conflict between [the CSA] and the state law so that the two cannot consistently stand together.” Nonetheless, many scholars still firmly hold the position that the states cannot protect citizens from federal enforceability of the CSA, leaving all those who contract with and within the marijuana industry vulnerable to the federal law’s reach.

The fact remains that this ambiguity in the law leaves the door open for preemption and application of the unclean hands and illegality doctrines to those dealing in the marijuana business. Whether or not you favor preemption, it seems that until the Supreme Court rules directly on point with the preemption issue, the law in this area will remain uncertain, as more and more states pass laws that explicitly undermine the CSA. Subsequently, it is not enough for those like Mary Jane in the marijuana business to simply hope the judge presiding over her case disfavors preemption. Mary, and those like her, may very well encounter a judge who deems his or her responsibility is to uphold federal law.

D. The Unclean Hands or Illegality Doctrine

The unclean hands doctrine, also known as the illegality doctrine, is extremely powerful and precludes a party from any type of relief. In defining the doctrine, the Restatement (Second) of Contracts (“Restatement of Contracts”) states that a contract is unenforceable “if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public intent,” starting with the presumption that Congress did not intend to preempt state law).

74. 21 U.S.C. § 903 (2012); see also Ter Beek, 846 N.W.2d at 537 (“[W]e do not find it impossible to comply with both the CSA and [Michigan’s law legalizing marijuana].”).

75. See Chemerinsky et al., supra note 60, at 102-13 (giving an in-depth analysis of the law and arguments both against and in favor of preemption).

76. See id. at 103 (“[N]o state can erect a legal shield protecting its citizens from the reach of the CSA.”). The issue of preemption has been extremely pertinent to certain employment disputes in which employees, using marijuana legally under their states laws, were fired for marijuana use due to a failed drug test. See John Campbell, Coats v. Dish: A Chance to Clear the Legal Haze Surrounding Medical Marijuana, 91 DENV. U. L. REV. ONLINE 79, 85-89 (2014) (examining the history of medical marijuana in the State of Colorado and how it relates to employment termination disputes).

77. See Scheuer, supra note 12, at 519.

78. See infra Part III.A–E.

79. See infra Part III.A–E.

80. See infra notes 81-84 and accompanying text.
policy.\textsuperscript{81} In short, a contract that is in violation of the law will not be recognized as a binding contract by the courts, and neither party will be entitled to a legal remedy.\textsuperscript{82} For a while, the doctrine was believed to only apply to suits seeking equitable remedies.\textsuperscript{83} However, state and federal courts have since expanded the doctrine, applying and accepting it as a defense to suits seeking money damages.\textsuperscript{84}

Many judges will invoke the illegality or unclean hands doctrine without explicitly referring to it, deeming claims void or without a legal remedy because public policy is against its enforcement.\textsuperscript{85} Put simply, a court will not provide relief to parties of a contract who engaged in illegal activity, especially if both parties have knowledge that the contract is illegal.\textsuperscript{86} The main purpose of this doctrine is said to be deterrence.\textsuperscript{87} The hope is that if a contracting party is aware no relief will be available in the courts should the transaction go awry, then that party will choose not to engage in the illegal contract.\textsuperscript{88} The Supreme Court explained this theory of the doctrine’s deterrent effect over one hundred years ago: “To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it

\begin{footnotes}
\item[81] \textit{Restatement (Second) of Contracts} § 178(1) (Am. Law Inst. 1981).
\item[82] See id.
\item[83] See \textit{Dan B. Dobbs, Law of Remedies: Damages-Equity-Restitution} § 2.4(2), at 68 (2d ed. 1993) (“The most orthodox view of the unclean hands doctrine makes it an equitable defense, that is, one that can be raised to defeat an equitable remedy, but not one that defeats other remedies.”).
\item[84] See Anenson, \textit{supra} note 6, at 63-64. For a discussion of the evolution of the unclean hands defense applying to suits seeking legal damages in state courts, as opposed to suits seeking equitable relief, see \textit{id.} at 73-89. Federal courts have since applied both federal and state laws of unclean hands. See \textit{id.} at 89.
\item[86] See Juliet P. Kostritsky, \textit{Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory}, 74 \textit{Iowa L. Rev.} 115, 138-40 (1988). For example, a Minnesota court in \textit{McCauley v. Michael} denied relief to a plaintiff who illegally paid $500 to a broker dealer for the illegal purchase of stock. 256 N.W.2d 491, 494 (Minn. 1977). Both parties knew the exchange was in violation of Minnesota’s Blue Sky laws, which further influenced the court to invoke the unclean hands doctrine. \textit{Id.} at 495-98; see also Danebo Lumber Co. v. Koutsby-Brennan-Vana Co., 182 F.2d 489, 492-93 (9th Cir. 1950) (denying plaintiff rescission of a land contract since he had knowledge the sale and purchase were part of a sham to perpetuate a fraud); Hendrix v. McKee, 575 P.2d 134, 141 (Or. 1978) (invoking the unclean hands doctrine and denying relief under an employment contract because plaintiff had knowledge that the defendant was conducting an illegal gambling operation).
\item[87] See Kostritsky, \textit{supra} note 86, at 123-24.
\item[88] See \textit{id}. The first scholar to deeply explore the doctrine was Zechariah Chafee, Jr., in 1949, when he explored eighteen groups of cases that were affected by unclean hands. See Anenson, \textit{supra} note 6, at 64-65, 65 n.11.
\end{footnotes}
One classic example of the doctrine in action is addressed in *Sinnar v. Le Roy*.\(^\text{90}\) In *Sinnar*, plaintiff sought restitution for a contract of a promise of an illegal gun license, but instead was denied any remedy by the court.\(^\text{91}\) The plaintiff paid the defendant $450 in exchange for a promise to obtain an illegal gun license, a promise that was never fulfilled by the defendant.\(^\text{92}\) While no such defense of illegality or unclean hands was raised, the court found it appropriate to raise the defense sua sponte: “Illegality, if of a serious nature, need not be pleaded. If it appears in evidence the court of its own motion will deny relief to the plaintiff.”\(^\text{93}\) On its face, it may seem that the doctrine is only applicable to contracts involving illegal activities, but that is not the case.\(^\text{94}\) If the contract is not itself unlawful, the promise or contract may still be rejected by the unclean hands doctrine if it is “closely connected with an unlawful act.”\(^\text{95}\)

As stated, the doctrine is also closely related to, if not intertwined with, the doctrine of unenforceability on the grounds of public policy.\(^\text{96}\) The *Restatement of Contracts* notes this, including public policy within the doctrine of illegality, allowing a court to weigh enforcement of a contract against current public policy surrounding enforcement of that contract.\(^\text{97}\) For example, in *A.Z. v. B.Z.*\(^\text{98}\), the court refused to enforce a

---

90. 270 P.2d 800 (Wash. 1954).
91. Id. at 800-02. For another classic example of the unclean hands doctrine, see *Homani v. Iranzadi*, in which the court dismissed a plaintiff’s claim for interest payment on a note because the parties deliberately omitted interest from the terms of the note to evade tax on income generated from the agreement. 260 Cal. Rptr. 6, 11-12 (Ct. App. 1989). Plaintiff was denied relief because the only way he could obtain relief was to prove that he broke the law. See id. at 9.
92. *Sinnar*, 270 P.2d at 801. Defendant testified, “[A]fter I told him I thought I could get the license, I told him I’d see about it . . . and I told him that it would cost him $450.00.” Id.
93. Id. (quoting *RESTATEMENT (FIRST) OF CONTRACTS* § 600 cmt. a (AM. LAW INST. 1932)).
94. The *Restatement of Contracts* includes both illegal contracts and contracts void as against public policy in its definition of unclean hands. See *RESTATEMENT (SECOND) OF CONTRACTS* § 178(1) (AM. LAW INST. 1981).
96. See supra note 85 and accompanying text.
98. 725 N.E.2d 1051 (Mass. 2000). Also, note that some courts—in weighing a contract’s terms against public policy—have held that a court can reasonably alter a contract’s terms to render it enforceable. See, e.g., Data Mgmt. Inc., v. Greene, 757 P.2d 62, 64-65 (Alaska 1988) (holding that a lifelong non-compete clause signed by an employee was against public policy and therefore the case was remanded to see if the contract could be reasonably altered). Other jurisdictions will simply “delete” a single term in a contact if they find the specific term to be against public policy. See id. at 64.
seemingly legal contract that would have allowed the plaintiff to utilize frozen zygotes previously fertilized by her ex-husband because the public policy of the legislature in Massachusetts was against agreements binding parties into unwanted familial relationships.99

The use of the unclean hands defense as it applies to both illegality and policy restrictions creates an enormous gray area in the doctrine, providing ample discretion for judges to raise the defense, as it is not a rigid, bright-line rule.100 Additionally, it leaves a contracting party open to abuse by an adversary with superior legal counsel.101 As this Note discusses, the defense can also be invoked strategically when it is convenient for defendants who are in breach.102

III. PARTIES ENGAGED IN THE MARIJUANA BUSINESS OR ENGAGED IN BUSINESS WITH PARTIES WHO DEAL IN MARIJUANA MAY NOT BE AFFORDED A REMEDY IN THE COURTS

This Note takes aim at the problem of plaintiffs engaged in or with those who engage in marijuana dealings potentially being afforded no remedy in the courts.103 While some state courts have allowed for contractual remedies relating to the sale of marijuana,104 others have refused to provide a remedy for marijuana-related activities as they are in clear violation of the CSA.105 Part III.A explains how bankruptcy courts have, on numerous occasions, invoked the unclean hands doctrine against those who operate under state legalized marijuana laws, denying them the discharge of the debt they seek.106 Part III.B explains how some courts have extended the unclean hands doctrine to reach those who conduct business with marijuana dealers.107 Part III.C, however, explains 

99. See A.Z., 725 N.E.2d at 1057-58 (“As a matter of public policy, [the court] conclude[d] that forced procreation is not an area amenable to judicial enforcement. It is well-established that courts will not enforce contracts that violate public policy.”).

100. See Anenson, supra note 6, at 114. The U.S. Supreme Court has not ruled on the doctrine since 1944, adding to the lack of clarity in the federal courts. See id. at 112.

101. Kostritsky, supra note 86, at 161 (“[T]he party with inferior status . . . may lack access to legal counsel and may, therefore, lack knowledge that the transaction is illegal.”).

102. See infra note 156 and accompanying text.

103. See infra Part III.A–E.

104. COLO. REV. STAT. § 13-22-601 (2013). Colorado has made it the policy of the state to never invalidate a contract for state legalized marijuana distribution and consumption on grounds that it violates public policy. Id.


106. See infra Part III.A.

107. See infra Part III.B.
that at least one court has suggested a balancing test be employed before invoking the doctrine.\footnote{108} Further, Part III.D and Part III.E explain how the illegality doctrine can be and has been extended to both homeowners insurance and lending, thereby leaving dispensaries, insurers, and creditors with little to no protection should the courts turn their back on them.\footnote{109} Part III.F explains that these legal problems, if not remedied, will negatively affect the growth of the business as the application of the unclean hands doctrine deters polished investors, lenders, and insurers from partaking in the industry and growing it to maximum potential.\footnote{110}

\textbf{A. Bankruptcy Courts “Wash Their Hands Clean” of Marijuana Business}

Bankruptcy courts are considered to be courts of equity and are to, at all times, “invoke equitable principles.”\footnote{111} It is well-settled in the bankruptcy courts that the illegality or unclean hands doctrine “closes the doors of a court to one who is tainted relative to the matter in which he seeks relief.”\footnote{112} While in some instances state law may be applicable, bankruptcy courts are ultimately federal courts, and the protections of bankruptcy law exist through federal law.\footnote{113} In this way, a debtor involved in marijuana dealings is in essence asking for equitable relief from a federal court for a business that is in violation of federal law.\footnote{114} It has been said by one bankruptcy appellate court that marijuana dispensary owners who turn to the bankruptcy courts for relief “are unfortunately caught between pursuing a business that the people of [their state] have declared to be legal and beneficial, but which the laws of the United States—laws that every U.S. judge swears to uphold—proscribe and subject to criminal sanction.”\footnote{115} For these reasons, many marijuana businesses have been denied relief by the bankruptcy courts.\footnote{116}

\begin{thebibliography}{99}
\bibitem{108} See infra Part III.C.
\bibitem{109} See infra Part III.D–E.
\bibitem{110} See infra Part III.F.
\bibitem{111} \textit{In re Beaty}, 306 F.3d 914, 922 (9th Cir. 2002).
\bibitem{112} Northbay Wellness Grp., Inc. v. Beyries, No. C11-06255JSW, 2012 WL 4120409, at *3 (N.D. Cal. Sept. 18, 2012) (citation omitted), rev’d, 789 F.3d 956 (9th Cir. 2015), aff’d in part, rev’d in part, 607 F. App’x 693 (9th Cir. 2015).
\bibitem{113} Carlyon & Carlyon, supra note 51, at 42.
\bibitem{114} Id.
\bibitem{115} \textit{In re Arenas}, 535 B.R. 845, 854 (B.A.P. 10th Cir. 2015).
While the U.S. Bankruptcy Code does not explicitly prohibit a dispensary from seeking relief, in many instances, U.S. Trustees and other parties in interest, have successfully argued that dealing in marijuana is sufficient cause to dismiss a case due to its illegality.117 The bankruptcy court in In re Arenas granted a U.S. Trustee’s motion to dismiss a bankruptcy case filed by a marijuana grower because the business was operating in violation of federal law.118 The court explained that there was no way that the marijuana grower could devise a reorganization plan that did not depend upon income that was illegal under the CSA, and any form of bankruptcy relief was thus one that could not be provided to the debtor.119 The court in In re McGinnis similarly denied confirmation of a Chapter 13 reorganization plan, explaining that the plan was not legally feasible due to the debtor’s dealings in marijuana.120 Furthermore, the court stated that “[b]ecause the sale and cultivation of marijuana as envisioned in [the] Debtor’s Plan is illegal under federal law, [the court] cannot find that the predicated income stream from the marijuana operations is reasonably certain to produce sufficient income to fund the Plan.”121

Similarly in In re Johnson, a bankruptcy court in Michigan ruled that a medical marijuana business owner, regardless of state laws legalizing marijuana in Michigan, cannot avail himself of bankruptcy protection unless he were to stop all marijuana operation immediately.122 Chief U.S. Bankruptcy Judge Scott W. Dales, in a strongly worded opinion, ordered the Michigan debtor to destroy all property he used in connection with his marijuana business and to abandon and destroy all dispensaries find their efforts to regain solvency thwarted by the federal government’s battle with state legislators as both entities jockey for control over the permissibility of medical marijuana.”).117 See infra notes 118-24 and accompanying text. Provisions of the Bankruptcy Code permit a party in interest, such as a U.S. Trustee, or a court on its own motion to dismiss a bankruptcy claim for good cause, which includes one not filed in “good faith” or submitting a proposed plan that is not “legally and economically feasible.” Cheng, supra note 116, at 108-09. 118. Arenas, 514 B.R. at 851-54. 119. See id. at 853 (“In fact, the debtors have violated federal law and apparently intend to continue to do so.”). 120. 453 B.R. 770, 773 (Bankr. D. Or. 2011). 121. Id. Confirmation was denied because per § 1324(a)(3) of the Bankruptcy Code confirmation requires that a “plan has been proposed in good faith and not by any means forbidden by law” in order to be confirmed. Id. at 772 (quoting 11 U.S.C. § 1325(a)(3) (2012)). The court in In re Medpoint Mgmt. LLC agreed with the reasoning of the Arenas Court, finding that an appointed trustee’s inevitable violation of the CSA was grounds for dismissal. 528 B.R. 178, 186 (Bankr. D. Ariz. 2015). 122. 532 B.R. 53, 59 (Bankr. W.D. Mich. 2015) (“In the court’s view, the Debtor cannot conduct an enterprise that admittedly violates federal criminal law while enjoying the federal benefits the Bankruptcy Code affords him.”).
marijuana plants and by-products. If he did not do so, the court was to dismiss the case in its entirety. These cases are certainly alarming for dispensary owners like Mary Jane. Should the climate of the bankruptcy courts not change, dispensary owners will continue to have no recourse in bankruptcy. This will continue to place dispensary owners at a distinct disadvantage, as the right to seek relief in the bankruptcy courts is one that is generally afforded to all business owners.

B. Ancillary Effects: Conducting Business with Marijuana Dispensaries Might Equate to Unclean Hands

Not only have the bankruptcy courts denied relief to dispensary owners, but the effects can also be passed on to ancillary parties. For example, in Colorado, in In re Rent-Rite Super Kegs W. Ltd., despite the state’s legalization of marijuana for both medical and recreational purposes, the bankruptcy court denied relief to a debtor who leased his warehouse space to someone who sold marijuana legally under state law. The court urged that, until Congress passes a law deeming the sale of marijuana legal under federal law, “a federal court cannot be asked to enforce the protections of the Bankruptcy Code in aid of a debtor whose activities constitute a continuing federal crime.”

Thus, even leasing space to a tenant who grows or distributes marijuana could prevent a landlord from protection by the bankruptcy courts. One could imagine that a savvy landlord, or one that is well-informed and not willing to face the possibility of being denied her day in court, might refuse to rent to a tenant like Mary who owns a

---

123. Id.
124. Id.
125. It is even possible that, if she wished to be granted relief by the courts, she would have to destroy all of her business and by-products thereof, as was the case in Johnson. See supra notes 118-24 and accompanying text.
126. See supra notes 118-24 and accompanying text.
127. What if Mary Jane’s contract with James Chong leads her to turn to the Bankruptcy Code for reorganization of her debts? It seems she might have no such recourse. See supra notes 118-24 and accompanying text.
128. See infra notes 129-33 and accompanying text.
130. See id. at 803-04 (“Debtor freely admits that it leases Warehouse space to tenants who use the space for the cultivation of marijuana. The Court, therefore, finds that the Debtor is engaged in an ongoing criminal violation of the federal Controlled Substances Act.”).
131. Id. at 805.
132. See infra notes 129-31 and accompanying text.
marijuana dispensary. As this Note discusses, a major roadblock to a flourishing industry may be that landlords, vendors, and banks mere association with a marijuana dispensary could result in a lack of access to court remedies.

C. Appellate Court Reverses: Attorney’s Wrongdoing Deemed Much More Severe than Marijuana Seller

Although the bankruptcy courts have been notably harsh on marijuana-related business, a glimmer of hope was found in the reversal of Northbay Wellness Group, Inc. v. Beyries. At first, it seemed as though the bankruptcy courts would yet again deny relief to dispensary owners seeking recourse in bankruptcy on account of unclean hands, until the Ninth Circuit reversed the decision. Prior to the bankruptcy filing in 2008, Northbay, a medical marijuana dispensary in California, sued their attorney, Michael Kenneth Beyries, alleging conversion of a $25,000 legal defense fund the company had set up with Beyries as counsel. A jury found against Beyries for both conversion and breach of contract and awarded Northbay the $25,000, as well as breach of contract damages. However, when Beyries filed for Chapter 7 Bankruptcy and listed Northbay as a creditor for the damages awarded in the civil proceeding, Northbay filed an adversary proceeding claiming that the funds awarded to Northbay in the lawsuit were non-dischargeable. After holding a trial, the bankruptcy court refused to acknowledge the civil award. The court reasoned that although the conversion of the $25,000 would normally be non-dischargeable pursuant to the Bankruptcy Code—which does not allow a discharge of judgments based on frauds of this caliber—they would refuse to honor any judgment in Northbay’s favor because the trust fund was created using proceeds from the sale of marijuana, violating federal law.

133. Mary Jane’s landlord would then face the possibility of being deemed as engaging in a federal crime, like the landlord in In re Rent-Rite Super Kegs W. Ltd. See infra notes 129-31 and accompanying text.

134. See infra Part III.F.


136. See Northbay Wellness Grp., Inc., 789 F.3d 956.

137. Id. at 958.

138. Id.

139. Id.

140. Id. at 958-59.

141. Id. The Bankruptcy Code enumerates specific exceptions for which an individual debtor cannot obtain a discharge—such as debts obtained “for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny”—the very same wrongs for which Beyries was found
On appeal, the Ninth Circuit reversed the district court’s ruling with respect to the unclean hands doctrine because the district court failed to conduct the necessary balancing test in applying the doctrine.\textsuperscript{142} The balancing test, according to the Ninth Circuit, requires that the wrongdoing of the plaintiff be weighed against the wrongdoing of the defendant seeking to raise the unclean hands defense.\textsuperscript{143} Additionally, the court noted that the unclean hands doctrine should not be strictly enforced when doing so would be contrary to a public interest.\textsuperscript{144} The court found that the lawyer’s unlawful activity in stealing $25,000 from his client far outweighed any wrongdoing on the part of the marijuana dispensary.\textsuperscript{145} In explaining its reason for reversal, the court stated that “[i]f the bankruptcy court weighed the parties’ respective wrongdoings, it necessarily would have concluded that Beyries’ wrongdoing outweighed Northbay’s, both as to harm caused to each other and as to harm caused to the public.”\textsuperscript{146}

It remains to be seen whether or not any other court will follow the holding in \textit{Northbay Wellness Group, Inc.} and employ a balancing test before applying the unclean hands doctrine. This Note suggests a similar balancing test.\textsuperscript{147} One could argue, however, that the facts of the case were unique and distinguishable, and marijuana dispensary owners might still be out of luck.\textsuperscript{148} The judges on the Ninth Circuit seemed considerably upset with the attorney’s actions.\textsuperscript{149} Instead of focusing on the marijuana laws in question, the opinion seemed to set a precedent completely unrelated to that of marijuana laws in “holding that the guilty. See 11 U.S.C. § 523(a)(4) (2012) (listing the exceptions to discharge).
\textsuperscript{142} \textit{Northbay Wellness Grp., Inc.}, 789 F.3d at 960 (“The bankruptcy court failed to conduct the required balancing, instead concluding solely from the fact that Northbay had engaged in wrongful activity.”).
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Id.} (“In addition, ‘the [unc]lean hands doctrine should not be strictly enforced when to do so would frustrate a substantial public interest.’” (quoting EEOC v. Recruit U.S.A., Inc., 939 F.2d 746, 753 (9th Cir. 1991))).
\textsuperscript{145} \textit{Id.} The court saw the lawyer’s actions of theft from a client as “a gross violation of general morality likely to undermine public confidence in the legal profession,” deeming Beyries’s actions much worse than Northbay’s. \textit{Id.} at 961 (quoting Greenbaum v. State Bar, 544 P.2d 921, 928 (Cal. 1976)).
\textsuperscript{146} \textit{Id.} at 960.
\textsuperscript{147} \textit{See infra} Part IV.B.
\textsuperscript{148} \textit{See infra} notes 149-50 and accompanying text.
\textsuperscript{149} \textit{See Northbay Wellness Grp., Inc.}, 789 F.3d at 961 (“A lawyer’s ‘[m]isappropriation of a client’s property is a gross violation of general morality likely to undermine public confidence in the legal profession and therefore merits severe punishment.’” (alteration in original) (quoting \textit{Greenbaum}, 544 P.2d at 928)).
doctrine of unclean hands cannot prevent recovery of funds stolen from a client by his or her lawyer.\textsuperscript{150}

D. Homeowners Insurance Owner Not Covered for Stolen State-Authorized Marijuana Plants

Bankruptcy courts have not been the only ones washing their hands clean of parties who are involved with state legalized marijuana use.\textsuperscript{151} A federal district court in Hawaii entered judgment against a homeowners insurance policy holder suing for $45,600 in unpaid claims for stolen marijuana plants in Tracy v. USAA Casualty Insurance Co.\textsuperscript{152} According to plaintiff, Barbara Tracy, twelve marijuana plants were stolen off her property.\textsuperscript{153} Tracy believed she would be covered under her homeowners insurance policy, with defendant USAA as the provider, because it included a term covering stolen “trees, shrubs, and other plants.”\textsuperscript{154} When USAA offered to satisfy the claim, Tracy denied and sued for breach of contract in Hawaii state court claiming the offer was insufficient.\textsuperscript{155} USAA removed to federal court based on diversity jurisdiction, presumably a strategic move.\textsuperscript{156}

The federal district court seemed to disregard that these medical marijuana plants were grown legally under state law and granted USAA’s motion for summary judgment.\textsuperscript{157} Judge Kobayashi agreed that federal law precluded the court from forcing USAA to honor the claim and held that “[p]laintiff’s possession and cultivation of marijuana, even for State-authorized medical use, clearly violate[d] federal law.”\textsuperscript{158}

Other courts have agreed with the Tracy Court.\textsuperscript{159} For instance, in 2014, a California federal court stated that a possessor of marijuana does not have a property interest in the eyes of the law because under the CSA, marijuana is contraband and “no person can have a legally

\textsuperscript{150} See infra notes 152-63 and accompanying text; infra Part III.E.
\textsuperscript{152} Id. at *1.
\textsuperscript{153} Id.
\textsuperscript{154} See High and Dry: No Homeowners Coverage for Stolen Marijuana Plants, WESTLAW J. INS. BAD FAITH, Apr. 17, 2012, at 10, 10. Attorney Jeremy Heinickel of Reed Smith LLP, an insurance attorney not involved in the case, believed removal to federal court may very well have been the deciding factor. Id.
\textsuperscript{155} See Tracy, 2012 WL 928186 at *12-14.
\textsuperscript{156} Id. at *13.
\textsuperscript{157} See infra notes 160-61 and accompanying text.
protected interest in contraband per se.”

Even courts that tend to be more lenient on marijuana laws recognize that, because marijuana is illegal under federal law, a plaintiff cannot seek damages under a federally granted private right of action for deprivation of property because no federal right is being impaired.

The holding of the Tracy Court raises yet another alarming scenario for Mary Jane. What if her entire dispensary were to burn down or her marijuana plants stolen? It is very possible that, although Mary could have seemingly done all the right things in having her property insured, an insurance company may be free to deny her claim, leaving her empty handed.

E. Contracts for the Sale of Marijuana or for the Purpose of Funding the Sale of Marijuana Are Void and Unenforceable

While removing to federal court might be a strategic move to invoke the unclean hands doctrine, a state court in Arizona proved that removing to federal court might not always be necessary to succeed under the doctrine. In Hammer v. Today’s Health Care II, two Arizona citizens lent $250,000 each to a marijuana dispensary. When the dispensary defaulted on the loan, the two lenders sought to enforce the loan agreement in the courts. The court had no sympathy for the plaintiffs’ claim: “The explicitly stated purpose of these loan agreements was to finance the sale and distribution of marijuana. This was in clear violation of the laws of the United States. As such, this contract is void and unenforceable.” The plaintiffs were awarded no remedy, and the defendant was essentially allowed to keep the $500,000 free and clear.

162. See supra text accompanying notes 151-61.
163. See supra text accompanying notes 151-61.
166. See id.
167. Id. at 4.
168. See id.
This decision, and the possibility of similar outcomes, could very well be the reason why banks are shying away from the marijuana industry.\textsuperscript{169}

A federal Colorado district court delivered a similar opinion that shook the marijuana industry in \textit{Haeberle v. Lowden}.\textsuperscript{170} In \textit{Haeberle}, plaintiff sued after delivering $40,000 in marijuana plants to a marijuana dispensary and receiving no payment, alleging that defendant promised to pay for the delivery in cash or shares in a potential business partnership.\textsuperscript{171} The court ordered briefings from both parties to opine on the court raising the illegality and unclean hands doctrine sua sponte.\textsuperscript{172} In its opinion, the court found that a proper contract existed and that the defendant breached that contract.\textsuperscript{173} The existence of the contract proved to be a moot point, however.\textsuperscript{174} The court held that federal law preempts state law, and that the contract was void and unenforceable because it violated the public policy of the United States.\textsuperscript{175} Much like the lenders in \textit{Hammer}, the plaintiff in \textit{Haeberle} was out $40,000, with no remedy at all.\textsuperscript{176}

\textbf{F. Lack of Protection: Curtailing a Flourishing Business}

As this analysis continues, one thing seems to be clear: the odds in the courts are unfortunately stacked against our friend Mary Jane who, as you recall, is operating her business completely legally under state law.\textsuperscript{177} Although she might not face the imminent threat of a federal raid, Mary seems to have no remedy in the bankruptcy courts, no property rights under federal law, and those who contract with her might be under no obligation to pay her.\textsuperscript{178} This additionally begs the question: \textit{Who would want to conduct business with Mary Jane?} One business attorney who specializes in marijuana law, in response to the \textit{Hammer} decision, added: “Who wants to do business with somebody if you can’t enforce your contract?”\textsuperscript{179} If that is not enough to scare her, ancillary businesses

\begin{itemize}
\item \textsuperscript{169} See \textit{infra} Part III.F.
\item \textsuperscript{171} \textit{Id.} at *1.
\item \textsuperscript{172} \textit{Id.} at *2.
\item \textsuperscript{173} \textit{Id.} at *1.
\item \textsuperscript{174} \textit{See id.} at *5.
\item \textsuperscript{175} \textit{Id.}
\item \textsuperscript{176} \textit{See id.} (“Consequently contracts for the sale of marijuana are void as they are against public policy. Accordingly, the contract here is void and unenforceable.”).
\item \textsuperscript{177} \textit{See supra} Part III.A–E.
\item \textsuperscript{178} \textit{See supra} Part III.A–E.
\item \textsuperscript{179} James Purdy, \textit{$500,000$ Marijuana Case Goes up in Smoke}, \textit{LINKEDIN} (Apr. 16, 2015), https://www.linkedin.com/pulse/500000-medical-marijuana-case-goes-up-smoke-james-purdy (quoting Abby Ellin, \textit{$500,000$ Medical Marijuana Loan up in Smoke}, \textit{ABC NEWS} (May 12, 2012),
might shy away from Mary’s business, as a mere relationship with her might give rise to the unclean hands doctrine.\textsuperscript{180} This problem poses a threat to the marijuana industry that is almost painfully obvious.\textsuperscript{181} It is essential to any flourishing business that contracts formed will be honored by a court remedy if breached, and it is expected that a business owner can seek the aid of a bankruptcy court if necessary.\textsuperscript{182} Presumptions such as enforceability of contracts, availability of credit, and recourse in bankruptcy are all on the menu for most small business owners, but are often denied to those within the marijuana industry.\textsuperscript{183} Those in danger include, but are not limited to, landlords who lease to dispensaries, investors in dispensaries, lenders who loan to dispensaries, attorneys representing dispensaries, and any employees or independent contractors who do business for the marijuana industry.\textsuperscript{184}

Consider our friend Mary Jane.\textsuperscript{185} It is very possible that she will not be able to seek recourse in the bankruptcy courts.\textsuperscript{186} Mary might, in certain circumstances, be expected to burn all of her plants if she seeks a bankruptcy court’s protection.\textsuperscript{187} Mary might not even be able to enforce contracts in which she enters.\textsuperscript{188} Worse, the money she spends to insure her business in the event of a tragedy might be worthless in the eyes of a court.\textsuperscript{189} A prudent landlord might choose not to rent to Mary’s business for fear of developing “unclean hands.”\textsuperscript{190} This lack of certainty in the courts will only amplify the problems the marijuana industry is facing, scaring away potential investors and experienced businessmen who understand the limited protection the courts offer.\textsuperscript{191} Lack of consumer

\textsuperscript{http://abcnews.go.com/Business/500000-medical-marijuana-lawsuit-smoke/story?id=16322793).}\textsuperscript{180} See supra Part III.B. \textsuperscript{181} See infra notes 182-205 and accompanying text. \textsuperscript{182} In re Rent-Rite Super Kegs W. Ltd., 484 B.R. 799, 805 (Bankr. D. Colo. 2012). As the court in In re Rent-Rite Super Kegs W. Ltd. pointed out, this might not be an option because “a federal court cannot be asked to enforce the protections of the Bankruptcy Code in aid of a Debtor whose activities constitute a continuing federal crime.” Id. \textsuperscript{183} See supra Part III.A–E. \textsuperscript{184} See Richard Keyt, Maricopa County Superior Court Ruling May Be Last Nail in the Coffin of the Unborn Arizona Medical Marijuana Dispensary Industry, KEYT L. (May 7, 2012), http://www.keytlaw.com/arizonamedicalmarijuanalaw/2012/05/hammer-v-todays-health-care. \textsuperscript{185} See supra text accompanying notes 1-6. \textsuperscript{186} See supra Part III.A. \textsuperscript{187} See supra text accompanying notes 122-24. \textsuperscript{188} See supra Part III.E. \textsuperscript{189} See supra Part III.D. \textsuperscript{190} See supra Part III.B. \textsuperscript{191} Scheuer, supra note 12, at 516.

Banks have recognized the possible illegality of marijuana businesses, and have been refusing to take money from marijuana sales or offer any type of bank accounts or credit cards to marijuana dispensaries, in fear that they will be shut down by federal authorities.\footnote{193}{Jeffrey Stinson, \textit{States Find You Can’t Take Legal Marijuana Money to the Bank}, HUFFINGTON POST (Jan. 5, 2015, 10:02 AM), http://www.huffingtonpost.com/2015/01/05/marijuana-money_n_6416678.html.} Further, banks are reluctant to engage in lending with the industry, as they might have no legal recourse if attempting to collect a debt, as some courts view the contracts as void.\footnote{194}{See supra Part III.E.} Any prudent bank examining cases, such as \textit{In re Rent-Rite Super Kegs W. Ltd.}, will abstain from lending to the marijuana industry.\footnote{195}{See Carlyon & Carlyon, supra note 51, at 43; supra notes 128-31 and accompanying text.} The lack of incentive originates, in part, from the possibility that “notes collateralized by a property that is used in enterprises that are illegal under federal law run the risk of being subject to criminal forfeiture, which would serve to wipe out a bank’s interest in the property.”\footnote{196}{Carlyon & Carlyon, supra note 51, at 43.}

This lack of access to federally insured bank accounts has left many dispensary owners and employees vulnerable to crime, as the businesses currently operate entirely on a cash basis, resulting in employees walking out of their jobs on pay day with wads of cash instead of a paycheck.\footnote{197}{Id. This has left those in the business crying out to the federal government for help: “Apparently a century of failure isn’t enough . . . so they want to give marijuana prohibition a few more decades.” Id.} The all-cash business has led to another, much more expensive problem for dispensary owners.\footnote{198}{See Stableford, supra note 197.} Since they deal primarily in cash, these marijuana dispensaries have been spending hundreds of thousands of dollars storing their money in secure vaults and hiring armed security guards.\footnote{199}{See Matt Richtel, \textit{The First Bank of Bud}, N.Y. TIMES, Feb. 8, 2015, at BU4.} This results in an overall halt to the industry’s potential growth, and experts contend that the industry will not be sustainable in the future unless action is taken.\footnote{200}{See supra note 197.
Additionally, since it is clear that the marijuana dispensaries are considered by some courts to be federally illegal regardless of state law, the courts should be troubled by the lack of protection that any party contracting in the marijuana industry will be afforded.\footnote{201}{See infra Part III.F.} Sophisticated investors might shy away from a flourishing business due to this lack of protection.\footnote{202}{Scheuer, supra note 12, at 547-48.} Some scholars suggest that the investors who are attracted to the industry will likely be less experienced ones who do not understand the dangers of partaking in a federally illegal business.\footnote{203}{Id. at 547; see also Stephanie Simon, In Mile High City, Weed Sparks up a Counterculture Clash, WALL STREET J. (Mar. 19, 2010, 12:01 AM), http://www.wsj.com/articles/SB10001424052748704784904575111692045223482 (giving an example of an unemployed man who invested a couple thousand dollars and found himself bringing in $80,000 a month in marijuana sales).} One could also assume that the business will be attractive only to those who were involved in marijuana dealings prior to its state legality.\footnote{204}{Scheuer, supra note 12, at 548.} This lack of professionalism in the industry could further scare off experienced professionals seeking to take the plunge into the marijuana industry.\footnote{205}{Id. at 548-49. A group of private equity fund managers explained to the New York Times that they were stunned at the lack of professionalism when they took a trip to visit dispensaries in which they were considering to invest. See Bruce Barcott, Sell High, N.Y. TIMES MAG., June 25, 2013, at 37.}

IV. CLEANSING THE MARIJUANA INDUSTRY’S UNELEAN HANDS: PRUDENT DRAFTING AND A BALANCING TEST FOR THE COURTS

The quick and easy solution is obvious: if the legislature were to pass a law that removed marijuana from the list of controlled substances covered by the CSA, the problems described herein would seemingly disappear.\footnote{206}{See Removing Marijuana from the Controlled Substances Act, DRUG POL’Y ALLIANCE (May 2013), http://www.drugpolicy.org/sites/default/files/DPA_Fact%20sheet_Marijuana%20Reclassification_May%202013.pdf. Legislative action is a hot topic for debate. Id. However, to date, attempts at reclassifying marijuana and removing the substance from the CSA have been unsuccessful. Id.} However, until then, this problem must be adequately dealt with for the sake of protecting individual plaintiffs and the marijuana industry as a whole.\footnote{207}{See supra Part III.F.} Attorneys representing marijuana dispensaries and those otherwise closely situated with the marijuana industry have not overlooked this issue and frequently blog about possible solutions and how contract drafting might assist in remedying the issue.\footnote{208}{For an example of marijuana practitioners actively blogging about the issue of the
however, far from an exact science as different courts and forums will result in varying results and viewpoints. This Note suggests two different types of solutions. First, this Note suggests careful drafting by including a forum selection clause in contracts that requires disputes be arbitrated or litigated in state court. Finally, this Note suggests the courts employ a balancing test, devised to create an equitable solution in the interest of justice.

A. The Prudent Drafter: Bargaining for Forum Selection Clauses

As long as uncertainty remains in the marijuana industry as to whether or not state laws legalizing marijuana supersede the CSA, dispensary owners and their counsel must be ready for the illegality defense to be raised in litigation. At least one marijuana dispute litigator suggests that a prudent attorney drafting a contract should acknowledge the illegality and not hide the fact that one’s activities are contrary to the CSA. One might suggest that a clever drafter, as a possible solution, would provide adequate consideration for waiver of the illegality defense. Unfortunately, this is likely not an option. It is well settled in contract law that the defense of illegality, being based on public interest, cannot be waived.

An alternative plausible strategy in drafting, which this Subpart describes, is to include a forum selection clause in these marijuana-related contracts. For example, a state court illegality doctrine trumping marijuana contracts, see Rebecca Millican, Your Cannabis Contract: Is It Worth the Paper It’s Written on?, CANNAL. GRP. (Sept. 13, 2015), http://www.cannalawblog.com/your-cannabis-contract-is-it-worth-the-paper-its-written-on. Millican notes that one judge looked past the illegality of a lease for a marijuana dispensary because the contract explicitly called for a marijuana dispensary to be operating on the property at issue. In her blog post, Rebecca Millican explains how one court in Washington deemed federally illegal dispensary activities “too attenuated” to invoke the illegality doctrine. Id.

209. Id. In her blog post, Rebecca Millican explains how one court in Washington deemed federally illegal dispensary activities “too attenuated” to invoke the illegality doctrine. Id.

210. See infra Part IV.A–B.

211. See infra Part IV.A.

212. See infra Part IV.B.

213. See supra Part III.A–E.


215. See infra notes 216–17 and accompanying text.

216. See infra note 217 and accompanying text.


218. See infra Part IV.A.1–2.
forum selection clause, inclusive of a waiver of the right to remove to federal court, might provide a more favorable forum for plaintiffs in the marijuana industry.\footnote{219} An alternative forum selection clause solution would bind disputes to arbitration, with the expectation that arbitration experts will look past the federal illegality of marijuana dealings.\footnote{220} Note though, that while these solutions may be effective in dispute resolution between two parties, it will not be much help in the bankruptcy courts, as they are exclusively federal courts.\footnote{221} In situations where forum selection clauses are ineffective, or for disputes and cases similar to bankruptcy to which federal courts are bound, this Note suggests a balancing test.\footnote{222}

1. State Court Only Provision

As discussed, federal judges might feel more inclined to invoke the unclean hands or illegality doctrine if a dispute arises in their court because marijuana distribution and possession is in clear violation of the federal law, which they take an oath to uphold.\footnote{223} At least one commentator on insurance law believed the defense in Tracy removed to federal court for purely strategic reasons, recognizing that a federal court might be much more compelled than a state court to wash their hands of a claim involving marijuana plants.\footnote{224} However, a contract drafter might be able to avoid this dilemma altogether and ensure that any claim will be disputed in a state court by bargaining for a forum selection clause that waives both parties’ rights to remove.\footnote{225}

A defendant in a marijuana-related dispute might have the opportunity to use his or her right to remove to federal court as a defensive strategy.\footnote{226} Pursuant to 28 U.S.C. § 1441(a), a defendant may remove a case that was originally brought in state court to federal court, in the district where the suit is pending if the claim had a basis for original federal subject matter jurisdiction.\footnote{227} If a defendant hails from,

\begin{itemize}
\item \footnote{219}{See infra Part IV.A.1.}
\item \footnote{220}{See infra Part IV.A.2.}
\item \footnote{221}{See supra note 113 and accompanying text.}
\item \footnote{222}{See infra Part IV.B.}
\item \footnote{223}{See supra note 115 and accompanying text.}
\item \footnote{224}{High and Dry: No Homeowners Coverage for Stolen Marijuana Plants, \textit{Westlaw J. Ins. Bad Faith}, Apr. 17, 2012, at 10, 10.}
\item \footnote{225}{See infra notes 226-38 and accompanying text.}
\item \footnote{226}{See infra notes 227-31 and accompanying text.}
\item \footnote{227}{See Walter W. Heiser, \textit{Forum Selection Clauses in Federal Courts: Limitations on Enforcement After Stewart and Carnival Cruise}, 45 \textit{Fla. L. Rev.} 553, 595 (1993). Procedurally, if a defendant submits a motion to remove a case to federal court, it will be granted as a matter of statutory right. \textit{Id.}}
\end{itemize}
operates its principal place of business in, or is incorporated in a state other than that of the plaintiff, he could strategically invoke removal jurisdiction in hopes of a federal court dismissing the plaintiff’s claim on the basis of unclean hands. While by no means a sure way to avoid a court invoking the unclean hands doctrine, a party anticipating this problem may bargain for the waiver of removal jurisdiction, ensuring the matter will be litigated in a state forum. Parties are free to bind themselves to a forum selection clause that eliminates the right to remove as long as the clause is clear and unambiguous.

Bargaining for waiver of removal jurisdiction might be extremely effective in a state that holds a policy for upholding marijuana contracts. For instance, a dispute bound to the Colorado state courts is almost surely, by precedent, not going to be dismissed due to the unclean hands or illegality doctrine. Per state code, effective May 2013, “[i]t is the public policy of the state of Colorado that a contract is not void or voidable as against public policy if it pertains to lawful activities” related to the state laws legalizing marijuana distribution and consumption.

Oregon’s legislature adopted a similar act: “No contract shall be unenforceable on the basis that manufacturing, distributing, dispensing,
possessing, or using marijuana is prohibited by federal law." To ensure the protection of these codes, however, a party such as Mary Jane should make sure beforehand that her contracts include a state court only provision and waiver of removal because, as noted, many federal courts take the position that they are bound to uphold the federal CSA. Should Mary bring a claim against James Chong in Colorado or Oregon courts, following state guidelines would likely lead a judge to overlook the CSA and simply enforce the contract as a normal business contract? Although this drafting suggestion is not an absolute solution, it could prove extremely helpful in select forums.

2. Binding Arbitration Provision

An additional strategy a party can invoke to keep the federal courts from deeming them unworthy of a remedy is to bargain for a mandatory binding arbitration clause in their contract. Arbitration clauses must be bargained for because if a contract does not set out a forum for dispute resolution, the default method will be litigation. Arbitration is a way for parties to seek remedies and resolve disputes in a private forum. The Supreme Court has specifically addressed binding arbitration on several occasions and has deemed it to be constitutional and enforceable.

Arbitration is known as a speedy, more affordable alternative to litigation. Since arbitrators are almost always considered to be experts of the industry they are presiding over, arbitration is said to result in “better” outcomes. Therefore, almost intuitively, an “expert” of the

236. See supra notes 114-15 and accompanying text.
237. See supra text accompanying notes 233-35.
238. See supra text accompanying notes 233-35.
241. See Flynn, supra note 239, at 729.
243. See Drahozal & Wittrock, supra note 240, at 77-78. Arbitration is always said to be advantageous as a way to keep disputes private, avoid punitive damages, better preserve party relationships, and avoid aggregate litigation. Id.
244. Id. at 78; see also Christopher R. Drahozal & Keith N. Hylton, The Economics of Litigation and Arbitration: An Application to Franchise Contracts, 32 J. LEGAL STUD. 549, 558.
marijuana industry is far less likely to deem a contract unenforceable and far more likely to sympathize with Mary Jane and others like her operating their marijuana businesses legally under state law. Not surprisingly, marijuana and the illegality defense has not yet been arbitrated, so it remains to be seen if this technique will be effective. Arbitrations have taken place, however, in cases where employees were fired for marijuana consumption in states that legalized marijuana. From 2004 to 2014, five such cases were arbitrated, and in four of those cases, the discharge of the employee was either reduced to a lesser penalty or entirely overturned. Although not an overwhelming sample size, it seems arbitration might very well be a more favorable alternative for those within the marijuana industry.

Recognizing the inherent unfairness of a case being dismissed via the illegality doctrine and the uncertainty associated therewith, organizations such as the Cannabis Dispute Resolution Institute are setting out to be the premier venues for marijuana-related disputes. The Cannabis Dispute Resolution Institute, and others like it, set out to rid the marijuana industry of the issue of contracts being unenforceable, and become a profitable arbitration setting in the process. It is important to note, however, that while arbitration might be a beacon of hope on the horizon for those in the marijuana industry such as Mary Jane, the courts have been known to overturn arbitration decisions on public policy grounds. Nevertheless, Mary and her peers’ chances of receiving a favorable ruling are much greater in front of an “expert” arbitrator, well versed in the marijuana industry, than in front of a

(2003) (“Arbitration offers the parties the opportunity to enter into a specialized dispute resolution forum in which industry experts rather than uninformed jurors evaluate the litigants’ predispute conduct.”).

245. See supra note 244 and accompanying text.


247. Id.

248. See id. In only one instance was the termination upheld, suggesting quite possibly that arbitrators are more sympathetic to an employee using marijuana in a state that has legalized its use. See id.


250. Id.

judiciary with other interests in mind. An arbitration clause in her contract might free Mary of her contracting issues.

B. A Balancing Test

Should prudent drafting not be an adequate solution, or if a forum selection clause is not included in an agreement, this Note proposes a balancing test for the courts. In sum, this balancing test requires the courts to balance the policy interests behind the illegality and unclean hands doctrines with the conduct of the supposed illegal actor. Logically, this balancing test should only be afforded to those operating their business legally under state law. This Note also urges the bankruptcy courts to utilize their equitable principles to properly allow protection for marijuana dispensaries operating in accordance with state law. Additionally, the balancing of interests should weigh heavily in favor of affording restitution to plaintiffs, at the very least. Finally, the test proposed herein urges courts to look to the public policy of their states, and provides examples of situations in which an egregious breach by a defendant should render the illegality and unclean hands doctrines inapplicable.

1. A Brief Introduction to “Balancing”

While a forum selection clause might provide some protection and lessen the chance of the unclean hands doctrine being invoked, not all parties will be prudent enough in drafting to include them, and courts might still find themselves with a dilemma. Additionally, since bankruptcy courts are exclusively federal courts, forum selection will be ineffective. In bankruptcy, and other instances in which matters are bound to federal courts, this Note proposes a balancing test whereby the court balances the harm and severity of conduct of the breaching party against public policy and the supposed “illegal” conduct of plaintiff.

252. See supra note 244 and accompanying text.
253. See supra notes 239-50 and accompanying text.
254. See infra Part IV.B.1–5.
255. See infra Part IV.B.1–5.
256. See infra Part IV.B.2.
257. See infra Part IV.B.3.
258. See infra Part IV.B.4.
259. See infra Part IV.B.5.
260. See supra Part IV.A.
261. See Carlyon & Carlyon, supra note 51, at 42.
262. As discussed, the court in Northbay Wellness Grp., Inc. used a balancing test to overturn a district court’s application of the unclean hands doctrine because the court “failed to conduct the
This, of course, will need to be treated on a case-by-case basis. The Supreme Court has acknowledged in one of its few rulings on the illegality and unclean hands doctrine that a defendant’s behavior might be such that the doctrine should not apply. The Court explained that the existence of the doctrine “does not mean that courts must always permit a defendant wrongdoer to retain the profits of his wrongdoing merely because the plaintiff himself is possibly guilty of transgressing the law in the transactions involved.” The Court alluded to a balancing test in which the alleged wrongdoing of the plaintiff be weighed against the alleged wrongdoing of the defendant. A federal appellate court recently acknowledged this required balancing test as applicable to the marijuana industry, yet did not explicitly explain what that test might look like. The basic premise, however, is that if the breach or conduct by one party is so egregious, it may outweigh the necessity to apply the unclean hands or illegality doctrine in the interest of justice.

Buried in section 178 of the Restatement of Contracts, comment b explains that the doctrine should not preclude a court from enforcing a contract if illegality is so trivial, or if, after “careful balancing” of interests under all the circumstances, the interests of justice and public policy favor enforcement. While the Restatement of Contracts provides a “test” of sorts, scholars note that it is too vague and often leads to undesirable results. Critics note that the main issue with required balancing” of the wrongdoing of the plaintiff against that of the defendant. 789 F.3d 956, 960 (9th Cir. 2015); supra Part III.C.

263. For a discussion of how balancing tests can be applied to cohabitation agreements that have been voided for public policy concerns, see Harry G. Prince, Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony, 70 MINN. L. REV. 163, 187-208 (1985).


265. Id.

266. See id. (“The maxim that he who comes into equity must come with clean hands is not applied by way of punishment for an unclean litigant but ‘upon considerations that make for the advancement of rights and justice.’” (quoting Keystone Diller Co. v. Gen. Excavator Co., 290 U.S. 240, 245 (1933))).

267. See Northbay Wellness Grp., Inc., 789 F.3d at 960 (explaining that it is necessary to weigh the parties’ wrongdoing against the illegality of actions). The court found that a debtor-attorney’s wrongdoing in stealing $25,000 from his client far outweighed Northbay’s violation of the CSA in running a marijuana business. Id. at 961.

268. See id. at 960.

269. See RESTATEMENT (SECOND) OF CONTRACTS § 178 cmt. b (AM. LAW INST. 1981) (“Enforcement will be denied only if the factors that argue against enforcement clearly outweigh the law’s traditional interest in protecting the expectations of the parties, its abhorrence of any unjust enrichment, and any public interest in the enforcement of the particular term.”).

270. See Adam B. Badawi, Harm, Ambiguity, and the Regulation of Illegal Contracts, 17 GEO. MASON L. REV. 483, 484 (2010) (“This decoupling of the remedies for illegal contracts and their
employing a balancing test is that the most bright-line issues, where one party’s conduct is clearly egregious and illegal, will not likely end up in court.\textsuperscript{271} It is the tough issues, such as within the marijuana industry, where conduct is legal under state law but not under federal law, where the test will be most applicable.\textsuperscript{272} In this Part, this Note sets out how the balancing test should practically be applied in different scenarios and for different damage awards, and it explains the policy considerations of each.\textsuperscript{273}

2. Initial Considerations

First, plaintiff’s knowledge of the CSA tabbing marijuana as an illegal substance should not factor into the analysis at all.\textsuperscript{274} Additionally, this test should not be applicable or available for plaintiffs who hail from or operate a business in a state that has not legalized marijuana, as their behavior would have no legal basis.\textsuperscript{275} Instead, it should only be applicable in those states that have passed laws legalizing marijuana distribution or consumption, whether that be for medical or recreational use.\textsuperscript{276} This Note does suggest, however, that a contract involving a dealer or dispensary that functions solely as a distributor of medical marijuana should be given more positive weight in balancing because of the vast medical research finding substantial benefits for medical marijuana.\textsuperscript{277} In that way, the safety, health, and recovery of those the dispensary serves should assist in outweighing consequences creates the potential for undesirable outcomes because it allows for overdeterrence of beneficial contracts and underdeterrence of harmful contracts.”).

\textsuperscript{271} Id. at 487-88.

\textsuperscript{272} See infra Part IV.B.2–5.

\textsuperscript{273} See infra Part IV.B.2–5.

\textsuperscript{274} Another term for this requirement would be known as “scienter,” defined as “[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission.” \textit{Scienter}, BLACK’S LAW DICTIONARY 1547 (10th ed. 2014).

\textsuperscript{275} See supra note 13 and accompanying text (listing states that have legalized marijuana).

\textsuperscript{276} See supra note 13 and accompanying text.

\textsuperscript{277} One notable study by Dr. D.I. Abrams found that medicating through marijuana reduced pain in HIV victims by thirty-four percent. See D.I. Abrams et al., \textit{Cannabis in Painful HIV-Associated Sensory Neuropathy: A Randomized Placebo-Controlled Trial}, \textit{68 NEUROLOGY} 515, 519 (2007), http://www.neurology.org/content/68/7/515.full.pdf+html. His results were consistent with his peers conveying that marijuana is extremely effective in treating pain, inflammation, and nerve damage. \textit{Id.} at 520. Doctors like Abrams have time and time again, through placebo-controlled studies, showed that medical marijuana is a legitimate treatment for the control of pain, nausea, vomiting, and weight gain. See Matthew B. Hodroff, Note, \textit{The Controlled Substances Act: Time to Reevaluate Marijuana}, \textit{36 WHITTIER L. REV.} 117, 130-31 (2014).
the public policy concerns of deterring these allegedly illegal contracts from forming.\textsuperscript{278}

3. A Plea to the Bankruptcy Courts

Courts of equity, such as bankruptcy courts, are the birthplace of the unclean hands doctrine.\textsuperscript{279} Due to the doctrine’s original considerations, this Note would urge the bankruptcy courts to cease closing their doors to marijuana business owners, especially those seeking to reorganize in Chapter 11 Bankruptcy.\textsuperscript{280} Bankruptcy is distinguishable from all other cases discussed herein, where one party sued another for failure to fulfill an obligation because there is no breach of contract in the traditional sense. Rather, a party seeks relief on its own in bankruptcy by either reorganizing its equity and debt structure or liquidating its assets and seeking a discharge from debt.\textsuperscript{281} For marijuana dispensary owners in bankruptcy, the balancing of interests is quite clear.\textsuperscript{282} To turn these debtors away either by asserting there is proper basis to dismiss due to illegality or claiming no reorganization plan could be deemed legal under federal law would be to completely ignore the medical, communal, and tax benefits the industry provides.\textsuperscript{283}

As noted, the unclean hands doctrine was originally created by courts of equity, prior to the merger of law and equity, to prevent a party from seeking equitable relief when he took actions that were unconscionable, ill-willed, and rooted in “bad motive.”\textsuperscript{284} This policy consideration of refusing to award equitable remedies for inequitable

\begin{footnotesize}
\textsuperscript{278} See supra note 277 and accompanying text (explaining the positive medical uses for marijuana).
\textsuperscript{280} See Cheng, supra note 116, at 112-23 (explaining why, in the author’s opinion, running a marijuana dispensary should be no reason to be denied relief in Chapter 11 Bankruptcy).
\textsuperscript{281} See Ralph Brubaker, Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11 Reorganizations, 1997 U. ILL. L. REV. 959, 961 (1997) (“The reorganization provisions of Chapter 11 of the Bankruptcy Code enable a business debtor to achieve a complex and comprehensive financial restructuring through the workings of a plan of reorganization that provides for distribution on, and discharge of, all of the debtor’s prebankruptcy debts.”); id. at 1003 (“The Bankruptcy Code’s fresh start policy for the ‘honest but unfortunate debtor’ is embodied in the discharge provisions of Chapters 7 and 13, which extinguish the debts of an individual debtor to the extent they are not fully satisfied by bankruptcy distributions.”).
\textsuperscript{282} See infra text accompanying notes 283-88.
\textsuperscript{283} For a discussion of the tax revenue the industry has created, see Bennett, supra note 14. For a discussion of the research-backed medical benefits of marijuana, see supra note 277 and accompanying text.
\textsuperscript{284} See Anenson, supra note 279, at 460 (“Conduct that does not conform to ‘minimum ethical standards’ in business may also satisfy the doctrine.”).
\end{footnotesize}
plaintiffs is certainly valid. However, attempting to use that policy to justify closing the courthouse doors to marijuana dispensary owners who operate state legalized businesses would be a mischaracterization. Considering the Attorney General’s lax policy towards state legalized dispensaries, and the federal government’s apparent blessing of the industry when a state legislature legalizes distribution and consumption, it is clear that public policy now supports growth of the industry. The continued growth will not be possible without the cooperation of the bankruptcy courts.

4. A Lenient Test for Restitution

When the alleged illegality is a state legally operated marijuana business, the balance of justice should always weigh, at the very least, in favor of restitution. Restitution has often been called upon as an alternative to the non-enforcement of a contract. This remedy returns any payment made by a claimant as a result of a defendant’s breach. For example, Mary Jane would receive her $45,000 back from James Chong for his failed delivery. This Note proposes that in states where marijuana is legalized, courts at all times should award restitution in lieu of raising illegality and dismissing the case. The application of restitution should include all contracts with and within the marijuana industry whereby one party makes upfront payment and defendant fails to fulfill the required services due to breach. This will ensure that those in the marijuana industry can count on the courts to, at the very least, award them money they paid for services in the event of a breach. It would also ensure, for example, that a marijuana business

---

285. See Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 245 (1933) (“When a party who . . . has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him.”).
286. See infra text accompanying notes 287-88.
288. See discussion supra Part III.F.
289. See infra notes 290-99 and accompanying text.
290. Badawi, supra note 270, at 492.
291. Id.
292. Put simply, James Chong was unjustly enriched as he holds money for a service he failed to deliver in accordance with the terms of the contract. Therefore, he is liable in restitution. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. LAW INST. 2011) (“A person who is unjustly enriched at the expense of another is subject to liability in restitution.”).
293. See infra notes 294-99 and accompanying text.
294. See Badawi, supra note 270, at 492 (explaining that the most fundamental instance in which restitution is applicable is when a seller fails to deliver goods paid for up front).
295. See id. at 490 (“As long as there is a credible threat of enforcement, the second party should carry out the promise when the cost of doing so does not exceed the cost of expectation
could be paid back-rent if a landlord breaches his duties under a lease.296 Furthermore, this will signal to those in the marijuana industry that the law will not be used as a vehicle to essentially steal money under the guise of the illegality doctrine and will serve as a deterrent.297 The downside to restitution is that it neglects to consider the expectation or reliance damages a plaintiff like Mary suffers as a result of the breach.298 Nevertheless, plaintiffs are compensated, and any unjust enrichment is avoided.299

5. Further Investigation of Weighing Interests for Damages Beyond Restitution

For damages beyond restitution, this Note proposes a two-step balancing test that asks (1) whether plaintiff was justified in expectations of enforcement and (2) whether public policy in favor of enforcement exists.300 While restitution damages might assist the problem the illegality doctrine poses to the marijuana industry, it fails to account for the expectation and reliance damages someone like Mary Jane would suffer as a consequence of a defendant’s breach.301 For the court to award expectation or reliance damages, this Note proposes a stricter balancing of interests, as these types of damages could cause a much more severe loss to a defendant.302 For instance, if a court were to hold James Chong liable to Mary Jane for expectation and reliance damages, he could face a judgment against him that includes all expenditures made by Mary in anticipation of receiving shipment, as well as all sales damages—at least according to the conventional economic account.”).  

296. This Note proposes this solution in hopes that, by ensuring a remedy for tenants, some of the business problems discussed supra in Part III.F will subside.  
297. See Badawi, supra note 270, at 491.  
298. See id. at 492 (“This remedy does not compensate for the reliance or expectation interests. So, under the conventional account, restitution creates a risk of inefficient breach.”). Restitution is said to result in inefficient breach when it is the only remedy available in a situation “[w]here the producer’s cost exceeds the contract price but is less than the value of the goods to the buyer.” Andrew Kull, Restitution as a Remedy for Breach of Contract, 67 S. CAL. L. REV. 1465, 1497 n.83 (1994).  
299. See Badawi, supra note 270, at 490-92.  
300. The Restatement of Contracts emphasizes these two considerations when a contract term is unenforceable per public policy. RESTATEMENT (SECOND) OF CONTRACTS § 178(2) (AM. LAW INST. 1981).  
301. See discussion supra Part IV.B.4. The Restatement of Contracts defines reliance damages as expenses made in anticipation of or preparation for performance, and it defines expectation damages as any loss caused by defendant’s breach, whether it be consequential or incidental. See RESTATEMENT (SECOND) OF CONTRACTS §§ 347, 349.  
lost for Chong’s failure in delivery.\textsuperscript{303} One could see how a court might be more cautious in awarding such damages in a situation where the plaintiff is conducting a federally illegal business.\textsuperscript{304} However, this Note urges that in scenarios where there is a blatant breach of contract for delivery of product or fraud in representation, a court cannot simply turn its back on a plaintiff running a state legalized activity.\textsuperscript{305} To apply the illegality doctrine so rigidly would compare Mary Jane to an illegal gun distributor or heroin dealer, and would completely thwart the goals of fundamental justice and fairness.\textsuperscript{306}

In considering whether or not to award expectation or reliance damages, the court should first turn to whether or not the claimant is justified in her expectations.\textsuperscript{307} Was Mary justified in expecting timely delivery from James Chong?\textsuperscript{308} The answer to this type of question would be a clear yes in a case such as Tracy, described above, and would result in a much different outcome than the Tracy Court produced.\textsuperscript{309} When someone takes out a homeowners insurance policy, he or she expects to be covered for damage to his or her property, and the interests of justice would clearly be disturbed if the insurers could raise the illegality defense to those operating state legalized businesses.\textsuperscript{310} Similarly, if a bank or private party lends money to a business, they are certainly justified in expecting the right to foreclose on whatever has been collateralized in lending.\textsuperscript{311}

\textsuperscript{303} See \textsc{Restatement (Second) of Contracts} \textsection{} 347 (defining expectation damages).

\textsuperscript{304} This premise is the very idea behind the illegality and unclean hands doctrines under which the law does not want to protect illegal promises in hopes it will deter them from forming. \textit{See supra} notes 87-88 and accompanying text.

\textsuperscript{305} The court should instead conduct the “required balancing” of interests. \textsc{Northbay Wellness Grp., Inc. v. Beyries}, 789 F.3d 956, 960 (9th Cir. 2015).

\textsuperscript{306} \textit{See supra} notes 91-93 and accompanying text.

\textsuperscript{307} \textsc{The Restatement of Contracts} urges that in balancing interests in enforcement we must first look to “the parties’ justified expectations.” \textit{See Restatement (Second) of Contracts} \textsection{} 178(2)(a).

\textsuperscript{308} \textit{See supra} note 307 and accompanying text.

\textsuperscript{309} \textit{See supra} Part III.D.

\textsuperscript{310} Courts have repeatedly overlooked express terms of insurance policies in the interest of justice when an insured clearly held a reasonable expectation of being covered for the subject events. \textsc{Mark C. Rahdert, Reasonable Expectations Revisited, 5 Conn. Ins. L.J.} 107, 108 (1998) (“[T]he reasonable expectations doctrine enables courts to consider the ‘reasonable expectations of the insured’ as an aid to insurance policy interpretation, and occasionally as a platform for guaranteeing the insured rights—including coverage—that the policy language itself does not provide.”).

\textsuperscript{311} Most mortgages on houses or notes for any type of lending include an acceleration clause that gives the lender the right to declare the full loan obligation “immediately due and payable” upon borrower’s default. \textsc{Restatement (Third) of Property: Mortgages} \textsection{} 8.1(a) (Am. Law Inst. 1997).
Expectation of coverage goes hand in hand with a second consideration—whether or not there exists a special public interest in the enforcement of the contract at issue. For example, as in Tracy, is it not in the best interest of the public for those with homeowners insurance policies to be covered? Courts have historically been lenient in enforcing insurance policies in favor of the public policy of expected coverage. This Note asserts that if the marijuana industry can be certain of insurance coverage, the industry will benefit greatly as a whole.

In the event of attorney misconduct, the doctrine of illegality or unclean hands should not be available for an attorney, as defendant, to estop a client from recovering against him. As the court opined in Northbay Wellness Group, Inc., the public interest in “holding attorneys to high ethical standards” far outweighs whatever harm can be said to be done by a marijuana business operating legally under state law. Attorneys are in a much greater position to have knowledge of the intricacies of a business operating legally under state law yet illegally under federal law. The justice system would be undermined if, for example, Mary’s lawyer could strategically invoke the illegality defense when being sued for malpractice. In instances such as these, the parties are considered to not be in pari delicto (to not be in equal fault) because the attorney is assumed to have superior knowledge of the law. A dispensary owner might assume state legality is enough and

312. Restatement (Second) of Contracts § 178(2)(c) (“In weighing the interests in the enforcement of a term, account is taken of . . . any special public interest in the enforcement of the particular term.”).
313. See supra Part III.D.
314. See, e.g., Ferguson v. Phx. Assurance Co. of N.Y., 370 P.2d 379, 387 (Kan. 1962) (holding that it was unreasonable to bar insured recovery under the policy, even though the policy expressly denied recovery in the subject case, because there was no evidence of fraud, and because denying coverage would be at odds with public policy).
315. If the problem of uncertainty in insurance coverage discussed supra in Part III.D is remedied, the industry as a whole will be better off.
316. See infra notes 317-21 and accompanying text.
317. Northbay Wellness Grp., Inc. v. Beyries, 789 F.3d 956, 961 (9th Cir. 2015).
318. See Berman v. Coakley, 137 N.E. 667, 670 (Mass. 1923) (“The attorney and client do not deal with each other at arm’s length. The client often is in many respects powerless to resist the influence of his attorney.”).
319. See Feld & Sons, Inc. v. Pechner, Dorfman, Wolfe & Cabot, 458 A.2d 545, 554 (Pa. Super. Ct. 1983) (“When a lawyer has by immoral or illegal conduct violated his professional obligations to his client, an action by the client to recover the lawyer’s fee will not be barred on the lawyer’s plea that the client also engaged in immoral or illegal conduct.”).
320. See id. at 548 (“The common law doctrine of in pari delicto . . . is an application of the principle that ‘no court will lend its aid to a man who grounds his action upon an immoral or illegal act.’” (quoting Fowler v. Scully, 72 Pa. 456, 467 (1872))).
should not be held to a higher standard than an attorney in the eyes of the law.\textsuperscript{321}

Another instance in which public policy would far outweigh the illegality of marijuana would be in fraudulent misrepresentation within the industry.\textsuperscript{322} If, for example, a distributor was misled in purchasing from a wholesaler, the courts would be remiss to turn the plaintiff away.\textsuperscript{323} Courts have a long history of admonishing fraud, and thus, the public policy in deterring misrepresentations, particularly in contract law, should outweigh the illegality, and a court should be free to award reliance and expectation damages, as well as restitution.\textsuperscript{324}

Moreover, this proposed test, at its core, asks courts to balance public policy interests.\textsuperscript{325} Although the CSA still remains in effect, despite some judicial restraint, the government has made it clear that punishing those who deal in state legalized marijuana businesses is no longer a priority.\textsuperscript{326} The words of Attorney General Cole alone should make this clear.\textsuperscript{327} The most prevalent counterargument is that marijuana distribution is a federally illegal activity, and therefore a plaintiff cannot bring his unclean hands into court—the very same argument asserted by judges who have washed their hands clean of marijuana cases.\textsuperscript{328} This Note simply asks those individuals to look to the will of the people who seem to long for all the legitimate benefits marijuana has to offer.\textsuperscript{329} The very premise of illegality and the unclean hands doctrine is to deter harmful and unwanted contracts from forming.\textsuperscript{330} It seems by attempting to apply this principle to marijuana, the courts are doing more harm than good.\textsuperscript{331}

\textsuperscript{321} See supra notes 317-20 and accompanying text.
\textsuperscript{322} Courts originally did not recognize punitive damages in contract until its expansive application to willful, wanton, or fraudulent torts—reasoning that a defendant should not be shielded from a punitive damage award simply because the wrongdoing involved a contractual relationship. See Dold v. Outrigger Hotel, 501 P.2d 368, 372 (1972) (Haw. 1972) (“We have recognized the fact that certain situations are so disposed as to present a fusion of the doctrines of tort and contract.”); William S. Dodge, \textit{The Case for Punitive Damages in Contracts}, 48 DUKE L.J. 629, 637-44 (1999) (discussing the evolution of punitive damages in contract law).
\textsuperscript{323} As discussed, the Supreme Court explained that the existence of some form of illegality “does not mean that courts must always permit a defendant wrongdoer to retain the profits of his wrongdoing.” Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 387 (1944).
\textsuperscript{324} See supra notes 300-23 and accompanying text.
\textsuperscript{325} See supra notes 300-24 and accompanying text.
\textsuperscript{326} See supra notes 52-53 and accompanying text.
\textsuperscript{327} See supra notes 52-53 and accompanying text.
\textsuperscript{328} See supra Part III.A–E.
\textsuperscript{329} See supra Part II.A.
\textsuperscript{330} See supra Part II.D.
\textsuperscript{331} See supra Part III.F.
V. CONCLUSION

One thing is certain: times are changing. Long gone is the consensus that marijuana has no proper legal purpose and should be treated as a deadly, useless drug. Since 1996, the legalization of marijuana for both medical and recreational purposes has resulted in a booming business in need of protection. For these businesses operating legally under state law, the CSA remains the giant elephant in the room.

The ability of state laws legalizing marijuana to coexist with current federal laws remains an ongoing debate. Nevertheless, the uncertainty has resulted in undeniable risks for a flourishing business that has proven to serve both valid medical purposes and generate enormous revenue for states. Adding to the uncertainty are instances of courts closing their doors both in equity and at law to those in the marijuana industry and those who engage in business with the industry. This Note proposes solutions for contract drafters and courts alike in hopes of providing additional protection for the industry and increasing its appeal for investors. Forum selection clauses might provide a more inviting venue for the marijuana industry whether it be through arbitration or state court only provisions. If, for example, the fictitious Mary Jane had bargained for a forum selection clause in her contract with James Chong, the problem posed by this Note might disappear thanks to a more favorable and understanding venue for dispute resolution.

Should prudent drafting not remedy the issue, this Note urges the courts to acknowledge the marijuana industry’s vast benefits and afford those within the industry who turn to the courts, like Mary, restitution, at the very least. Further, every court should be inclined to balance competing contract interests with the supposed illegality and uncleanliness of the marijuana business in hopes of affording marijuana dispensary owners, like our friend Mary, all contractual remedies.

332. See supra Part II.A.
333. See supra Part II.A.
334. See supra Part II.A.
335. See supra Part II.B.
336. See supra Part II.C.
337. See supra Part III.F.
338. See supra Part III.A–E.
339. See supra Part IV.
340. See supra Part IV.A.
341. See supra Part IV.A.
342. See supra Part IV.B.4.
provided by the law. Absent court protection, Mary and her fellow marijuana entrepreneurs may fall short of realizing the industry’s full potential.

Steven Mare*

---

343. See supra Part IV.B.5.
344. See supra Part III.F.

* J.D. Candidate, 2017, Maurice A. Deane School of Law at Hofstra University; B.S., 2013, State University of New York at Old Westbury. Thank you to Professor Julian G. Ku and my Notes Editor, Katy Barrett, for their diligent guidance and suggestions throughout the writing process. The author would also like to thank the Volume 44 Managing Board, Peter Guinnane, Leron Solomon, and Michael Senders, as well as the incoming Volume 45 Managing Board, Joseph DeSantis, Michelle Malone, and Susan Loeb, for their hard work and dedication and for granting me the privilege of publishing in the Hofstra Law Review. Thank you to Richard De Maio, Denise Neuendorf, Matthew Koopersmith, and all of the Staff Members who helped prepare this Note, without whom this publication would not have been possible. I am forever indebted and grateful to my parents, Nancy and Thomas Mare, for their endless love, friendship, and unwavering support everyday of my life. I am also grateful to my sister, Elizabeth Mare, my best friend and confidant, for her confidence in me and for always keeping me grounded. I am thankful to Anna Noens, for her love, selfless support, and patience throughout the long weekends and nights of law school studies and for truly being my better half. Thank you to the rest of my family, for your never-ending love and support. Lastly, I would like to thank my brother and idol, Joseph Mare, whose perseverance in the face of unimaginable odds and tragedy has changed my life forever. Your courage and fortitude are awe-inspiring and drive me to succeed. For Grandma Rae and Pop, I miss you everyday.