

Looking Ahead to New York Cannabis in 2024: Is 'Fiore' Truly in the Rearview Mirror?

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By Alex Malyshev. Published in the [*New York Law Journal*](#).

As readers of this column know, New York's journey to bring its regulated adult-use cannabis market has been a tortured one. Nearly three years ago, on March 31, 2021, New York legalized revamped its medical program, and legalized adult-use cannabis to much fanfare with the passage of the Marijuana Taxation and Regulation Act (MRTA).

The MRTA was reflective of the broad coalition that was needed to pass it and contained both revenue generating and social equity components. Although, as we saw in litigation that marked most of 2023, that coalition began to fracture, in part due to policy choices made by the regulator.

Now, with the most recent challenge—an injunction in *Fiore v. New York*, Index. No. 907282-2023 (Sup. Ct. Albany Co., 2023)—resolved, New York finally looks to get the legal market going in 2024. As discussed below, however, challenges remain.

Policy Choices

New York's legalization of adult-use cannabis was influenced by "social equity" advocates in major ways, and the MRTA provided social equity applicants (defined to include those impacted by the war on drugs, veterans, women, and certain farmers) with preference in obtaining certain licenses (specifically, retail dispensary licenses).

New York made a deliberate policy choice not to follow the example of New Jersey—which legalized adult-use cannabis at roughly the same time through a constitutional amendment—and allowed already established medical cannabis operators to be the first to enter the market (thereby subsidizing future applicants through the additional licensing fees and cannabis sales revenue collected by New Jersey). This was seen by many advocates as an unfair first mover advantage for well moneyed interests.

Instead, New York tasked a new governing body, the Cannabis Control Board (CCB), and the regulator that answered to it, the Office of Cannabis Management (OCM), with designing a system from the ground up that prioritized social equity applicant. As it turns out, it made some fateful choices.

A year after passing MRTA, in March of 2022, with no adult-use regulations in sight, Governor Kathy Hochul announced the "[Seeding Opportunity Initiative](#)," which prioritized those impacted by the war on drugs (e.g. those with a prior conviction for cannabis related offenses) over other social equity applicants—by creating a special Conditional Adult-Use Retail Dispensary (CAURD) license, and an infrastructure to support it (through the award of conditional cultivation licenses for existing hemp farmers).

Crucially, this was done without the involvement of the legislature (although it ultimately did “codify” the conditional cultivation licenses but, again crucially, not the CAURD program). Among other things, the CAURD program limited available licenses to those with New York convictions.

At the same time, trying to avoid the appearance of a “War on Drugs 2.0,” New York allowed an illicit (more euphemistically known as “grey”) market to proliferate unchecked.

OCM also made clear that it intended to delay granting adult-use licenses to the existing medical providers (known as Registered Organizations or [ROs]) until other participants had a chance to get their footing. Those being excluded from the market did not sit idly by.

Litigation

On Sept. 26, 2022, Variscite NY One Inc. filed an action in federal court for the U.S. District Court for the Northern District of New York challenging CAURD’s constitutionality. (See *Variscite NY One v. New York*, No. 1:22-cv-01013 (N.D.N.Y. filed Sept. 26, 2022)).

Variscite claimed it was deemed ineligible for a CAURD license because the company is 51% owned by an individual who has no significant connection to New York and who has a cannabis conviction in Michigan, while CAURD rules require applicants to have been convicted of a cannabis crime in New York and have a “significant presence” here. Variscite alleged that this licensing regime violates the Dormant Commerce Clause (DCC) of the U.S. Constitution because it discriminates against out-of-state commerce. Variscite sought an injunction barring OCM from issuing any licenses under CAURD.

In granting the injunction but limiting it to the geographic areas in which the plaintiff applied for a license, the district court found that the program likely violated the DCC. The injunction remained in place until June 2023 when the matter was resolved by a settlement that resulted in a license being granted to the plaintiff.

While the *Variscite* case was pending, the Coalition for Access to Regulated & Safe Cannabis (CARSC) (e.g., the ROs) filed an action in Albany state court accusing regulators of bungling the rollout of the state’s market by hindering the entrance of licensed businesses and allowing unlicensed sellers to flourish (see *Coalition for Access to Regulated & Safe Cannabis v. New York*, Index No. 902390-2023 (N.Y. Sup. Ct. Albany Co. filed Mar. 16, 2023)).

In particular, CARSC alleged that OCM’s design and implementation of the CAURD program (which CARSC alleged is not specifically authorized by statute) went well beyond the scope of its authority under MRTA and, thus, violated the separation of powers article of the New York Constitution. CARSC further argued that the regulators’ decisions, opening the application window for one set of applicants, but not others, were arbitrary and capricious.

Five months later, the *Fiore* case was filed by a group of service-disabled veterans, alleging that OCM had no authority to open up the application window for one group of social equity applicants (those with criminal convictions) but not others. The *Fiore* and *CARSC* cases were consolidated before the same justice.

On Aug. 7, 2023, the court granted the *Fiore* plaintiffs’ request for a temporary restraining order, temporarily barring OCM from awarding CAURD licenses throughout the state. Less than two weeks later, on Aug. 18, the court issued a preliminary injunction, finding regulators likely exceeded their authority when they established the CAURD program.

The court appeared to be particularly bothered by OCM’s decision to potentially issue hundreds of CAURD licenses, after the *Variscite* injunction was lifted but while the *CARSC* action was pending. The order bared OCM from “further processing, approving, or investigating” pending applications for CAURD licenses (with some exceptions).

In opposing the injunction, OCM asserted that it was ready to implement the wider adult-use program and intended to start processing applications in late 2023.

Looking Ahead

Ultimately, like the *Variscite* litigation, the *CARSC* and *Fiore* cases were resolved through settlements that (among other things) granted licenses to the plaintiffs and paused new CAURD applications until April 2024 (though OCM was able to begin processing the existing applications). While this caused much consternation to the CAURD applicants, who remained in limbo for nearly 18 months, it nevertheless allowed OCM to start processing applications again, with the hope that 2024 is finally the year for adult-use cannabis in New York.

But lingering issues remain.

First, OCM has apparently allowed CAURD applicants to choose whether they want to proceed with their current CAURD application or to convert it to a regular adult-use dispensary application. While the CAURD application is streamlined, OCM's authority to issue those licenses remains unresolved. It is certainly foreseeable that an applicant at a later stage of the process—perhaps one that was not a social equity applicant—may challenge the award of a license to the extent their own application is denied due to oversaturation of a particular geographic location. In other words, they would have an incentive to argue that the market could certainly accommodate their dispensary if an improperly licensed dispensary is shut down.

Second, New York is going to spend years trying to put the genie back in the bottle vis-à-vis the illicit dispensaries that were allowed to flourish in the three years since legalization. In addition to leaning on landlords to evict illicit operators, seizures of cannabis are on the rise. It is foreseeable that pressure will mount to start exercising police and arrest powers, though the optics of this are not appealing to the State.

Third, there is likely going to be litigation with respect to the regulations promulgated by OCM. One example is the True-Party In Interest definition, which discourages investment by out of state operators in its current form because it looks to their foreign state operations to determine whether there is ownership across multiple tiers of the industry (retail and cultivation), which is prohibited under New York's approach. Coupled with poor access to capital, and the apparent failure of the public-private partnership envisioned by the Seeding Opportunity Initiative, this may come to a head in fairly short order.

Finally, New York's conditional cannabis cultivators invested significant capital based on the Seeding Opportunity Initiative, and have been sitting on hundreds of thousands pounds of cannabis they have been unable to sell (due to the various injunctions). They may well be looking to the government to make them whole.

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