

New York's Social Equity Program Under Fire Again – This Time From Its Own Medical Marijuana Licensees

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By Alex Malyshev. Published in the *New York Law Journal*.

As was previously covered in this column, New York's ambitious social equity focused recreational cannabis has faced its fair share of challenges.^[1] And, if the latest lawsuit by the "Coalition for Access to Regulated & Safe Cannabis" ("CARSC") is any indication, the hits will just keep on coming. According to reports, CARSC consists of at least four of the state's "Registered Organization" (its legacy medical marijuana operators) – Acreage Holdings, PharmaCann, Green Thumb Industries, and Curaleaf – who have a pathway towards vertically integrated recreational cannabis sales under the Marijuana Regulation and Taxation Act ("MRTA").

The CARSC plaintiffs are seeking to invalidate the Office of Cannabis Management's ("OCM") roll-out of the Conditional Adult-Use Retail Dispensary ("CAURD") program as inconsistent with certain provisions of the MRTA. At the same time, they also take issue with New York's generally slow implementation of the recreational cannabis provisions of the law, and the lack of enforcement that has allowed the "grey" market to proliferate in New York State (both of which have long been pain points for other hopeful participants in the licensing process).

Background

The MRTA was signed into law two years ago, on March 31, 2021. This was about three months after New Jersey amended its Constitution to allow recreational sales of cannabis by voter referendum, which was later implemented through legislation. Although both sets of laws have an emphasis of social equity, New York and New Jersey took two diametrically opposed approaches to implementing the program. New Jersey opted to allow its own existing medical cannabis operators (known as Alternative Treatment Centers, or "ATCs") to engage in recreational sales, while it works on implementing regulations allowing new entrants into the market. As a result, as of the third quarter of 2022, New Jersey had 20 operating recreational dispensaries (in addition to 10 medicinal ones).^[2]

By contrast, New York opted to implement the CAURD program, as part of its "Seeding Opportunity" initiative,^[3] which resulted in no dispensaries being opened in 2022, and only 5 dispensaries being opened as of the writing of this article. None of those licenses were available to the CARSC plaintiffs, and instead were only available to "justice involved" individuals (the definition of which has led to its own litigation on Dormant Commerce Clause grounds, and ultimately an injunction barring the issuance of license in five of the regions established by OCM).^[4] The gravamen of the CARSC complaint is that, in addition to damaging the financial interests of the plaintiffs, this process is inconsistent with the provisions of the MRTA regarding licensing. Indeed, as of the writing of this article, OCM has not even finalized its rules to allow for the issuance of licenses (with the exception of its special CAURD and provisional cultivation rules).

The Lawsuit

On March 16, 2023, CARSC commenced its lawsuit against the New York State Cannabis Control Board ("CCB"), the OCM, Tremaine Wright (the CCB's chairwoman), and Chris Alexander (the OCM's Executive Director).^[5] In the lawsuit, CARSC accuses OCM and CCB of disregarding their

mandate – of (i) launching New York’s adult-use cannabis program; (ii) creating a safe, licensed, and regulated cannabis industry; (iii) generating sufficient tax revenue through cannabis sales to re-invest in communities disproportionately harmed by federal and state drug policies; and (iv) “reduc[ing] the illegal drug market ... and reduc[ing] the participation of otherwise law-abiding citizens in the illicit market” – and instead implementing their own set of priorities through the CAURD program (which is not specifically authorized by the statute). CARSC pulls no punches in its pleading.

Focusing on the dual mandates of shrinking the “grey” or “illicit” market, and growing the legal market by opening the retail dispensary license application “for all participants at the same time”,^[6] plaintiffs allege that CCB and OCM impermissibly and “sua sponte,” created an “entirely new licensing category, called the [CAURD] license, and limited eligibility for this special, yet legally impermissible, early-access license to only ‘justice-involved individuals’ who own a profitable ‘qualifying business.’” This, in turn, had the knock-on effect of opening an application period only for those licenses and postponing “indefinitely” the licensing of “hundreds of additional dispensaries necessary to satisfy consumer demand.” See Petition, 3-6. The petitioners argue that this licensing scheme violates (1) the U.S. Constitution’s Dormant Commerce Clause (as alleged in the earlier *Variscite NY One* complaint), (2) the MRTA’s explicit provisions (specifically, MRTA § 10(19)), and (3) New York’s separation of powers doctrine. *Id.* 7. They also argue that this departure from the MRTA’s mandate “(1) harmed those individuals the MRTA was designed to benefit (e.g., veterans, women-owned businesses, distressed hemp farmers and those communities most affected by the War on Drugs to name just a few), and (ii) diverted Defendants-Respondents’ attention from the enforcement tasks with which the MRTA entrusts them” thereby allowing the illicit market to proliferate for two years. *Id.* 8. With respect to the latter, petitioners argue that OCM and CCB have failed to use the injunction authority available to them (and the New York Attorney General) under the MRTA to stamp out illegal sales.

The CARSC petitioners allege a panoply of harms they, and the other actual and hopeful participants in the regulated market have suffered, including cultivators growing 350,000 pounds of cannabis flower in 2022, without the ability to sell it. See Petition 14. They also specifically point to the perceived hostility of the regulator to Registered Organizations like themselves. *Id.* In their supporting brief, they lay out the relief they seek, order: (i) declaring OCM’s CAURD license exceeds their rule making authority under the MRTA and violates New York’s separation of powers doctrine; (ii) declaring the qualifying criteria for the CAURD license category arbitrary and capricious; (iii) compelling OCM and/or CCB to (a) pursue civil injunctions against all illicit cannabis stores, (b) refer to the Attorney General’s Office the names of all illicit cannabis stores advertising THC for further legal action, and (c) opening the adult-use retail dispensary licensing window for all applicants immediately, including for all the social and economic equity applicants specified in the MRTA and for Registered Organization (e.g. members of the coalition).

Reading The Tea Leaves

Although, at the time of writing, OCM and CCB have not yet responded to the petition, they are likely to argue that the CAURD program is generally consistent with New York’s emphasis on social equity. This will not be OCM’s first attempt to defend the program – it is currently appealing an injunction granted in the *Variscite* case with respect to the CAURD program’s residency requirement. Based on the language of the MRTA to which the CARSC petitioners have pointed, this may be an uphill battle for OCM.

OCM and CCB are also likely to argue that, even if the CAURD program was not contemplated by the statute, they are currently in the process of finalizing rules for the retail program under Article 4 of the MRTA (Adult-Use Cannabis) that will be open to all eligible applicants, and that as a result the relief sought is something they are actively working towards. The real fight on that front will likely be whether this encompasses the Registered Organizations – which have their own, separate, pathway towards vertically integrated operations that are not possible for new entrants – under Article 3 of the MRTA (Medical Cannabis). See MRTA § 39 (“Registered organizations and adult-use cannabis.”). This will be an interesting fight to watch.

Finally, OCM and CCB are likely to point to efforts to stamp out the illegal market by requiring landlords to evict unlicensed sellers, which kicked off in earnest earlier this year, in arguing that the Court should not micromanage how they go about policing the market. The relief sought by the petitioners – directing OCM to refer specific illicit operators to the Attorney General – is likely the type of “War on Drugs 2.0” that OCM is trying to avoid.

[1] The column previously covered some of those challenges. See [New York’s Rollout of Its Adult-Use Cannabis Program Hits Another Snag | New York Law Journal](#) (December 5, 2022).

[2] [Recreational cannabis sales jump to more than \\$100 million in 2022 third quarter \(nj.gov\)](#)

[3] See [State of Play: New York’s Recreational Cannabis Market in 2022 | New York Law Journal](#) (October 3, 2022).

[4] Subsequent to submission of the article the injunction was narrowed by the 2nd Circuit to one region.

[5] See *Coalition for Access to Regulated & Safe Cannabis v. New York State Cannabis Control Board, et al.*, Index No. 902390-23 (Sup. Ct. Albany Co., 2023).

[6] See MRTA §§ 2, 10(19).

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