

NY Cannabis Licensing Row Compounds State Industry Woes

By **Meaghan Feenan and William Wolfe** (September 20, 2023)

While adult-use cannabis has been legal in New York state for more than two years, legal retailers are in short supply, primarily due to the many obstacles the Office of Cannabis Management encountered while drafting and attempting to implement the proposed regulations.

The latest obstacle in the rollout of New York's legal cannabis market started Aug. 2, when a group of four service-disabled military veterans[1] sued the OCM and the Cannabis Control Board in the Albany County Supreme Court, alleging that the conditional adult-use retail dispensary program, or CAURD, is unconstitutional.

This is the latest setback in a program rollout riddled with legal challenges and other delays, revealing the complexity of creating a new state-regulated industry.

The delays have spurred frustration among those trying to capitalize on the legalization of a market projected to generate billions of dollars, while simultaneously encouraging an illegal market to meet that demand.

While the OCM announced new regulations and opened up licensing on Sept. 12, even that move drew criticism, and the courts have yet to weigh in.

The state prioritized people harmed by marijuana enforcement so they could reap the financial benefits of legalization. However, the veterans' group argued that the prioritization of the CAURD applicants created a new class of licensee that was not previously contemplated by the legislators who developed the Marijuana Regulation and Taxation Act, which was enacted in 2021.

The MRTA lists five social and economic equity groups that would receive priority for a cannabis license: distressed farmers, individuals who live in areas disproportionately affected by the war on drugs, minority-owned businesses, service-disabled veterans and women-owned businesses.

In *Fiore v. CCB*, the veterans claim they want to open dispensaries across the state, including in Manhattan and Queens; however, because they are not justice-involved individuals with a qualifying arrest, they do not meet the criteria for a CAURD license.

New York Supreme Court Justice Kevin Bryant granted the veterans' request for a temporary restraining order and injunction. The injunction prevents the OCM from approving any additional CAURD licenses.

Justice Bryant's stern ruling criticized the state's legal cannabis program, saying the veterans' group was likely to be successful in its lawsuit alleging regulators acted unconstitutionally by prioritizing cannabis retail licenses for those with past cannabis convictions or family members with past cannabis convictions.



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While the MRTA prioritizes social and economic equity applicants that would include service-distressed veterans, the veterans' group claims regulators are prioritizing a narrower pool of applicants.

Justice Bryant noted, "Plaintiffs have presented persuasive and compelling authority in support of their argument that Defendants failed to follow the clear language of the applicable legislation."

The veterans' group claims the licensing framework is more restrictive than legislators intended and restricts cannabis licenses from disabled veterans and other minority groups.

Justice Bryant's ruling agreed, saying regulators veered from the MRTA's language:

In determining this application, this Court must follow the well-accepted rules of statutory construction. In this regard, it is well accepted that as "the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself." ... "[W]hen the Legislature enacted the statutes and when the Governor signed them into law, they stood for what their words manifested and not the inner thoughts of a draftsman or advisor. After all, it was the words, not the thought, which were to influence the conduct of others."

Bryant's injunction does not apply to pending applicants who met all licensing approvals before Aug. 7.

A lawsuit similar to the veterans' case was filed in March by a group of multistate operators known as the Coalition for Access to Regulated and Safe Cannabis, several of which plan to apply for a dispensary license to sell cannabis legally.

On Aug. 8, the coalition submitted a letter to Justice Bryant requesting the court to either "maintain the [temporary restraining order] in place until the Court decides the competing motions for summary judgment in the Coalition Suit ... [or] permit [the Coalition's attorneys] to appear on behalf of the Coalition, and to be heard, at the hearing scheduled for August 11, 2023, on the limited question of the CAURD program's constitutionality (or lack thereof)."

Justice Bryant ultimately denied the Coalition's request to intervene, finding that intervention would unduly delay the action's determination and prejudice the parties' substantive rights.

While issuing an injunction halting new retail licenses, the judge criticized the OCM and CCB for moving forward with its licensing program despite numerous legal challenges to its fairness. He wrote, "This Court also notes that it was Defendant that decided to move forward and accelerate the CAURD program in the face of unresolved litigation and they were undeniably on notice of the alleged constitutional defects at issue."

He also ordered the regulators to finalize their marijuana regulations promptly.

On Aug. 25, Justice Bryant lifted the temporary injunction for nearly 30 licensees who were able to show they needed their dispensary income to help them financially. However, the veterans' group objected to the judge's lifting of the injunction, citing discrepancies with the documentation provided by the OCM.

Justice Bryant reversed course, agreeing with the veterans' group and stating that "[i]t is not clear to this Court whether any of the thirty identified licensees have completed all post-selection requirements and inspections, and it should be clear that those who have not, should not have been included on the list submitted to the Court as set forth in the prior Order."

Justice Bryant went on to call out the attorneys representing the state for the list they presented and directed the OCM to submit supporting underlying documentation regarding those licensees who were hoping to be exempted from the injunction. As a result, more than 400 applications are now on hold.

Potential Impacts

Currently, only 23 licensed cannabis stores are open for business in New York, and the decision has halted all progress, negatively affecting cannabis owners across the state.

Those who championed the MRTA, like New York Assembly Majority Leader Crystal Peoples-Stokes, did so with the hopes of addressing the disparate rate at which minorities were prosecuted for low-level marijuana offenses and to assist those individuals and communities by allowing them to be the first to enter the legal market.

Unfortunately, legal challenges to the regulatory rollout, lack of funding and understaffing issues at the OCM have greatly slowed the ability of CAURD applicants and licensees to open their doors, and have exposed a gap in the adult-use market.

In their Sept. 12 meeting, the CCB and the OCM announced the state's plan to open the application portal to all cultivator, processor, microbusiness, distributor and retail dispensary applicants on Oct. 4, and to open a pathway to licensure for registered organizations.

While this should increase the availability of legal cannabis, many conditional cultivators and processors fear that allowing registered organizations and out-of-state big cannabis companies to enter the legal market at this juncture could jeopardize their ability to compete.

Should the judge not agree with the proposed regulations, there could be further delay in the rollout of the application process for other retail dispensaries.

The cannabis industry has proven to be a lucrative source of revenue for states that have legalized it, and New York continues to miss out on a substantial stream of tax revenue and job-creation opportunities due to the numerous delays in finalizing the adult-use regulations.

Many who were once excited to have the chance to enter the legal market are losing interest due to the constant roadblocks and fear that they may never get the opportunity to apply for a license.

Meanwhile, licensed operators all along the supply chain are feeling strained as farmers and processors struggle to sell excess product to the limited number of operable dispensaries.

New York may also miss out on potential tourism revenue from out-of-state visitors seeking access to legal cannabis.

The delays also allow for the illicit cannabis market to persist, as consumers who want access to recreational marijuana in areas without licensed dispensaries may seek to purchase it from unregulated sources, undermining the state's efforts to ensure product safety and quality control.

Careful consideration of these impacts is essential as the state continues to shape its cannabis regulations and policies.

The delays in finalizing the regulations and the multiple lawsuits filed arguably stripped justice-involved applicants of the head start they were promised, and may prove catastrophic for small cannabis businesses before they even get a chance to swim.

That said, the new regulations and Oct. 4 licensing opportunities should lead to better days for the New York cannabis market, creating a more competitive market for the consumer.

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[1] The service-disabled veterans who filed suit are Carmine Fiore, William Norgard, Stever Mejia and Dominic Spaccio.