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NY's New Marijuana Law: Implications for False Advertising and Products Liability Lawsuits

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On March 31, 2021, New York's Gov. Andrew M. Cuomo signed the **Marijuana Regulation and Taxation Act** (the MRTA), which legalizes recreational marijuana for adults 21 and older. **Media reports** project the MRTA will create "a potential $4.2 billion industry" in New York, which "could become one of the nation's largest markets."

With the creation of this new market for legalized marijuana products, a new wave of consumer litigation is bound to follow—particularly in the areas of false advertising and products liability. But in terms of private-plaintiff suits, prospective sellers of marijuana products may take some solace in knowing that New York's marijuana markets will be heavily regulated, and those regulations will take time to develop.

Below we explore the new law's framework for regulating marijuana advertising and safety, and how it is likely to be leveraged in consumer litigation.

Implementation

Though the MRTA takes effect immediately, **it will be at least a year** before we can expect to see recreational marijuana products hit the market. This lag is due to the **MRTA's mandate** to develop a regulatory framework to oversee the "the licensure, cultivation, production, distribution, sale and taxation of medical, adult-use and cannabinoid hemp within New York State." Per the statute, an Office of Cannabis Management, governed by the newly-created Cannabis Control Board (CCB), will be responsible for this oversight.

While the MRTA's contemplated regulatory regime has yet to be fully developed, the law itself already addresses a number of areas that may give rise to future lawsuits related to the packaging or labeling of marijuana products in New York. For example, the MRTA authorizes the CCB "to promulgate rules and regulations governing the advertising, branding, marketing, packaging, [and] labeling" of cannabis products (see MRTA, Art. 4, §81), and to approve product types, establish serving sizes, and regulate product labels by, for example, requiring accurate display of the product's THC content. Failing to conform with these rules "shall be grounds for the imposition of a fine and/or the suspension, revocation or cancellation of a license." Id. And once constituted, the CCB may promulgate additional rules and penalties to create a more specific framework for the advertising, labeling, and sale of marijuana products, including with respect to the quantity, purity, strand, and THC content of marijuana products.

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Consumer Claims and Manufacturer Defenses

As enacted, the MRTA does not include a private right of action. However, it does provide that those who violate cannabis regulations "for which a civil or criminal penalty is not otherwise expressly prescribed by law, shall be liable to the people of the state for a civil penalty of not to exceed five thousand dollars for every such violation." MRTA, Art. 2, §16, Para. 1.

Nonetheless, we anticipate that plaintiffs will try to bring deceptive advertising claims rooted in violations of the MRTA or of CCB regulations, without specifically seeking to enforce the statutory and regulatory provisions. For example, consumers may argue that violations of the MRTA's labeling provisions also constitute per se deceptive business practices under New York's consumer protection statutes, General Business Law (GBL) §§349 and 350, which private litigants are permitted to enforce. However, as courts have held in other contexts, such a regulatory (or statutory) violation, standing alone, is unlikely to sustain a GBL action without separate showings of, among other things, an actual injury and a materially deceptive or misleading act. See, e.g., *Daniel v. Mondelez Int'l*, 287 F. Supp. 3d 177, 192 (E.D.N.Y. Feb. 26, 2018) ("While non-functional slackfill violates the FDCA and parallel state statutes … New York courts further require that the misrepresentation be material to be actionable under [GBL] sections 349 and 350."); *Collazo v. Netherland Prop. Assets*, 35 N.Y.3d 987, 990 (2020) ("We have held that [GBL §349] cannot fairly be understood to mean that everyone who acts unlawfully, and does not admit the transgression, is being 'deceptive' within the meaning of [GBL §349]."") (internal quotation and citations omitted).

At least for now, however, New York marijuana producers can take comfort in a legal doctrine known as "primary jurisdiction" to avoid early consumer suits. This judicially created doctrine arises from the notion that it is better to allow specialized administrative agencies—such as the CCB—to express their views first, without risk of competing rulings from a court that is not as entrenched in such a novel area of the law. *Sohn v. Calderon*, 78 N.Y.2d 755, 768-69 (1991) (recognizing that primary jurisdiction "generally enjoins courts having concurrent jurisdiction to refrain from adjudicating disputes within an administrative agency's authority, particularly where the agency's specialized experience and technical expertise is involved," and dismissing landlord-tenant dispute to avoid encroaching on housing agency's exclusive original jurisdiction). Thus, until the Office of Cannabis Management and CCB have more fully fleshed out the regulatory regime, marijuana producers should be able to dismiss or stay consumer suits by arguing that these newly created agencies have primary jurisdiction to establish guidelines for production, labeling and advertising of marijuana products, which should not be supplanted by the judicial process. Primary jurisdiction can thus be a powerful tool to discourage both private-plaintiff suits and the piecemeal development of regulations, both of which could impede the development of a functional and efficient marketplace for recreational marijuana.

This article explores the NY marijuana law's framework for regulating marijuana advertising and safety, and how it is likely to be leveraged in consumer litigation.

And on the products liability front—e.g., suits alleging physical injuries as a result of an alleged "failure to warn" of a claimed risk—other legal doctrines may be available to aid manufacturers. For example, New York generally applies a framework known as "comment k" to suits against sellers of "inherently unsafe" products with well-known or obvious risks. See, e.g., *Martin v. Hacker*, 83 N.Y.2d 1, 8 (1993). A product such as a drug is not "defective" if accompanied by an appropriate warning. And compliance with a regulatory regime, while not in and of itself dispositive of liability, is certainly admissible as a defense.

A Modest Calm Before the Storm

New York's nascent recreational marijuana industry will likely be spared some time to acclimate to New York's forthcoming regulatory landscape before private-plaintiff consumer suits arrive in force. But there will still be rules to follow: the MRTA makes clear that New York intends to carefully regulate how recreational marijuana products will be marketed, labeled, and packaged, and manufacturers will need to pay close attention to how these regulations evolve to ensure compliance going forward. And if history serves as a guide, once these regulations are in place, false advertising and products liability lawsuits will not be far off on the horizon.