

Conn. Regulators Are Coming For Unlawful Cannabis Sales

By **Eric Del Pozo** (September 7, 2023)

In Connecticut's evolving world of recreational cannabis regulation, one thing seems increasingly clear: Regulators have made a priority of patrolling the market and will readily take enforcement steps against unlicensed cannabis sellers or those whose products otherwise violate state law.

These regulatory efforts have ramped up since the beginning of this year, show no signs of abating, and have so far taken several forms, from industrywide warning letters to inspections and raids of businesses, to civil enforcement lawsuits under the Connecticut Unfair Trade Practices Act.



Eric Del Pozo

To date, these actions have largely focused on sellers and sales of merchandise containing Delta-8 THC, a cousin of Delta-9 THC, the active ingredient in traditional cannabis.

A less potent compound primarily derived from hemp-based cannabidiol, or CBD, Delta-8 THC falls within the definition of cannabis under Connecticut law, and thus cannot be manufactured or sold without a state license.

But there is little reason to assume that regulators will strictly limit enforcement of any one type of legally noncompliant offering.

Relevant Legal Provisions

Initially enacted in June 2021 and repeatedly amended since, the state's adult-use cannabis scheme until recently defined regulable "cannabis" as any hemp product with a total THC concentration exceeding 0.3% on a dry-weight basis.[1]

The term now also encompasses any "high-THC hemp product," defined to include edibles, creams, concentrates and extracts above a minimum THC volume per item.[2] The governing statute expressly defines THC to include both the Delta-8 and the Delta-9 isomers.[3]

Thus, these products' purveyors must comply with statutory licensure and advertising restrictions, among others, as well as with the Connecticut Department of Consumer Protection's implementing rules and regulations.

As relevant here, Connecticut's cannabis statutes prohibit unlicensed sellers from advertising cannabis for sale, and bar anyone at all from advertising cannabis in a way designed to appeal to individuals under the age of 21.[4]

The statute expressly deems violations of these proscriptions to be unfair or deceptive trade practices under the Connecticut Unfair Trade Practices Act, or CUTPA, raising the specter of civil enforcement by the state attorney general.[5]

The DCP has crafted detailed policies and procedures touching nearly every aspect of the adult-use cannabis industry — including, but not limited to, cultivation, testing, labeling, packaging and advertising.

For example, the DCP demands that cannabis be sold only in child-resistant and tamper-resistant containers, that the containers display conspicuous boxed warnings, and that servings of edibles be clearly separable.

The DCP also prohibits any cannabis product from bearing a notable likeness to a commercial product lacking cannabis, and the agency will refuse to register any cannabis brand name that is confusingly similar to an existing noncannabis brand. In other words, however creative, tweaking an established trademark or logo into a cannabis brand is out.

Enforcement Steps Against Noncompliant Retailers

If news reports, press releases and lawsuits are any indication, many retailers selling cannabis have strayed from the law's requirements.

Late last year, during a string of unannounced site visits, an investigator from the Connecticut Attorney General's Office encountered unlawful Delta-8 THC products for sale at every single vape shop visited, plus one gas station.[6]

Those efforts led to two noteworthy developments in February.

First, the attorney general's office published letters warning all in-state, electronic vape retailers that offering products with Delta-8 THC for sale might violate state law.[7]

And second, the attorney general sued five retailers in five separate civil actions under CUTPA for selling Delta-8 THC cannabis products without the requisite state license, and in packaging that lacked mandatory warning labels and mimicked children's snacks.[8]

These enforcement actions sought prospective injunctive relief, civil penalties, disgorgement, restitution and attorney fees.

Four of these civil enforcement actions were promptly withdrawn, most likely after informal resolution. The fifth resulted in a stipulated judgment in which the retailer, 7 Puff LLC, agreed to a monetary fine and an injunction on selling any regulable cannabis product without a license.[9] A sixth and subsequent CUTPA action against a different retailer, Hadi LLC, yielded a similar stipulated judgment.[10]

In April, law enforcement raided three Stamford smoke shops and confiscated thousands of nonpermitted THC products. In a press release, the state attorney general characterized some of the seized wares as resembling packages of Oreos, Cheetos and Sour Patch Kids.[11]

The attorney general's office has since brought a suit under CUTPA against at least one of these retailers, Zaza Smoke Shop 2 Corp., in the Hartford Judicial District of the Connecticut Superior Court.[12] While asserting similar claims to those seen previously, this latest complaint further alleges the defendant's unlawful sale of products purporting to contain Delta-9 THCO, another synthetic analogue.

The retailer has since answered the complaint and raised various constitutional defenses to enforcement. Among them are that federal law preempts the state's ability to regulate certain hemp-derived products, that the state statutory definition of cannabis does not give sellers fair notice of what the law prohibits, and that the statute's advertising restrictions infringe on retailers' protected commercial speech.

Time will tell how these defenses fare, if the court ends up adjudicating them.

Takeaways

Retailers that advertise or sell unlicensed cannabis products — including those dressed up as lawful hemp-based or CBD products — risk enforcement action and the threat of significant sanctions.

In a CUTPA lawsuit, the state attorney general may pursue civil penalties of \$5,000 per violation, which can add up quickly; punitive damages; equitable relief like disgorgement of profits; and prospective injunctions.

Although regulators have so far zeroed in on unlawful sales of Delta-8 THC products, many of the enforcement theories would extend more broadly to any merchandise meeting the statutory definition of cannabis. For example, the claim that a retailer lacked the requisite state license to offer cannabis products to the public could extend to sales of any type of product meeting the state statutory definition.

The same is true of claims that retailers have sold cannabis products in packaging without the mandatory warning labels or that unlawfully resemble existing products like children's cookies or candy.

Indeed, stipulated judgments entered with at least two retailers, discussed above, have included injunctions on selling any items meeting the statutory definition of cannabis, and a pending state enforcement action against a Stamford smoke shop explicitly targets the marketing of a product containing a substance other than Delta-8 THC.

In addition, the unlicensed manufacture and sale of cannabis creates confusion among consumers and gives these unlicensed entrants an unfair competitive advantage in the regulated marketplace.

The state's CUTPA complaints have relied on the theory that having, or appearing to have, state permission to sell cannabis impliedly represents that the products have been manufactured according to state safety standards — which require, among other things, laboratory testing to screen for harmful adulterants.

Naturally, sellers that eschew compliance with these legal strictures can reduce their overhead, at the expense of customers who buy those sellers' usually cheaper and possibly untested offerings.

Flooding the zone with illicit products will also divert market share from businesses that follow the rules, and many consumers will not easily be able to distinguish between products that are legitimate and those that are not.

Needless to say, it behooves retailers to obtain licenses and to follow all relevant statutes and regulations in selling cannabis to the public — lest they attract unwelcome scrutiny.

Eric Del Pozo is a partner at Shipman & Goodwin LLP.

Shipman & Goodwin partner and cannabis team chair Sarah Westby contributed to this

article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See Conn. Gen. Stat. §21a-420(3) (cross-referencing §21a-240(29)).

[2] See id. §21a-240(63).

[3] Id. §21a-240(59).

[4] Id. §21a-421bb(a)-(b).

[5] Id. §21a-421bb(f).

[6] See Conn. Office of the Att'y Gen., Press Release, Attorney General Tong, Stamford Police Confiscate Thousands of Illegal Delta-8 THC Cannabis Products Following Vape Shop Inspection (Apr. 11, 2023), <https://portal.ct.gov/AG/Press-Releases/2023-Press-Releases/Attorney-General-Tong-Stamford-Police-Confiscate-Illegal-THC-Cannabis-Products-Following-Inspection>.

[7] See id.

[8] State v. Anthony's Service Station, Inc., No. HHD-CV-23-6165435-S (Super. Ct., Hartford J.D., filed Feb. 9, 2023); State v. AZ Smoke Shop & Wireless, No. HHD-CV-23-6165430-S (Super. Ct., Hartford J.D., filed Feb. 9, 2023); State v. Raheem Mini Mart, No. HHD-CV-23-6165431-S (Super. Ct., Hartford J.D., filed Feb. 9, 2023); State v. Smokers Paradise, No. HHD-CV-23-6165432-S (Super. Ct., Hartford J.D., filed Feb. 9, 2023); State v. 7 Puff LLC, No. HHD-CV-23-6166835-S (Super. Ct., Hartford J.D., filed Mar. 20, 2023).

[9] Stipulated Judgment entered by 7 Puff LLC & Emam Qaddoumi (May 19, 2023), in State v. 7 Puff LLC.

[10] Stipulated Judgment entered by al Hadi LLC & Asma J. Saeed (Apr. 27, 2023), in State v. al Hadi LLC, No. HHD-CV-23-6167434-S (Super. Ct., Hartford J.D., filed Apr. 4, 2023).

[11] See Press Release, *supra* note 6.

[12] State v. Zaza Smoke Shop 2 Corp., No. HHD-CV-23-6167742-S (Super. Ct., Hartford J.D., filed Apr. 12, 2023).