

# Hemp Cos. Say Farm Act Preempts Va.'s New Law

By **Sam Reisman**

Law360 (September 5, 2023, 6:22 PM EDT) -- A hemp product maker and retailer have alleged in a new lawsuit that a recently enacted Virginia law designed to rein in goods with hemp-derived intoxicants oversteps by effectively criminalizing products that Congress legalized with the 2018 federal farm bill.

In a complaint filed Friday in Virginia federal court, retailer Northern Virginia Hemp and Agriculture LLC and manufacturer Franny's Operations Inc. said that the new Virginia law, S.B. 903, violated federal policy by interfering with their ability to make, sell and export their wares.

"In sum, a plethora of hemp products that are legal under the Farm Bill are now illegal in Virginia under SB 903, which negatively impacts the interstate commerce of hemp as protected under the Farm Bill," the complaint said.

The 2018 federal farm bill, which legalized hemp nationwide, set a standard of 0.3% for delta-9-THC, the main compound understood to give marijuana its high, but did not mention other THC isomers, which can be derived from hemp-extracted CBD and can mirror some of delta-9's psychoactive effects.

The plaintiffs claim that S.B. 903 overstepped by setting limits on the "total THC" — including delta-9-THC and isomers such as delta-8-THC and delta-10-THC — that can legally be sold in hemp products and by implementing policies that interfere with interstate commerce.

The federal legislation allowed states to regulate the production of hemp within their borders but could not set policies interfering with the interstate commerce of hemp products, plaintiffs said.

The complaint alleges that S.B. 903 placed unlawful limits on product-makers' ability to sell their hemp-derived compounds to operators in other states if the buyer "will use that product to create a new product that violates the 'total THC' standard."

The new law "prohibits the sale of industrial hemp extract to theoretically anyone in the world who might use the extract to create a now-prohibited product, even if the buyer is in a location where it is perfectly legal to engage in that use."

S.B. 903 went into effect July 1, less than three months after Gov. Glenn Youngkin, a Republican, signed it into law, making good on one of his principal cannabis-related policy promises to curtail hemp-derived intoxicating products.

The law's other prongs included new restrictions on how hemp-derived products could be packaged, but the lawsuit doesn't challenge any of those.

Thomas W. Croessmann, an attorney for the plaintiffs, told Law360, "Instead of taking a scalpel approach, the legislature basically took a sledgehammer approach and went too far."

The case mirrors another recent federal lawsuit, filed in Arkansas, alleging that a new hemp policy in that state is preempted by the federal farm bill.

The hemp parties allege that the challenged pieces of S.B. 903 are preempted by federal law and that they violate both the commerce clause and dormant commerce clause of the U.S. Constitution.

The plaintiffs have sought a preliminary injunction blocking state officials from enforcing the prongs of the new law that establish the "total THC" standard and block processors from doing business with out-of-state parties. The court has set a hearing on the preliminary injunction motion for Sept. 29.

The lawsuit names as defendants Youngkin, Virginia Attorney General Jason Miyares, the Virginia Board of Agriculture and Consumer Services and the Virginia Cannabis Control Authority, as well as more than 100 prosecuting attorneys throughout the state.

Representatives for the governor, attorney general and agriculture board did not immediately respond to a request for comment. The Cannabis Control Authority declined to comment.

The plaintiffs are represented by James N. Markels, Thomas W. Croessmann and Philip R. Croessmann of Croessmann & Westberg PC.

Counsel information for the state parties was not immediately available Tuesday.

The case is Northern Virginia Hemp and Agriculture LLC et al. v. Commonwealth of Virginia et al., case no. 1:23-cv-01177, in the U.S. District Court for the Eastern District of Virginia.

--Editing by Andrew Cohen.