

# In the Weeds With the Farm Bill: 7th Circuit Says States Can Regulate Smokable Hemp but Can't Go Too Far

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The 2018 Farm Bill made waves in the cannabis industry by descheduling some cannabis products from the Controlled Substances Act for the first time. While the bill removed restrictions under federal law, it also encouraged states to regulate the production of those newly descheduled cannabis products, including smokable hemp, a variety of cannabis plant low in THC, the main psychoactive compound that produces a high feeling.

How far can states go in regulating smokable hemp without interfering with federal law? The Seventh Circuit last month in *C.Y. Wholesale Inc. v. Holcomb* became the first federal appellate court to examine this issue. The court vacated an injunction that halted Indiana's ban on smokable hemp as too broad but remanded the case to the district court to consider a narrower injunction that might let Indiana severely limit smokable hemp within the state.

The Seventh Circuit's decision could have huge consequences for hemp and CBD manufacturers, sellers, and wholesalers across the country. Should other federal courts follow the Seventh Circuit's analysis, the manufacture and sale of smokable hemp would only be permitted in states like Illinois and Colorado that expressly authorize its manufacture and sale.

The decision could influence other states scrambling to regulate smokable hemp out of fear that law enforcement cannot easily distinguish smokable hemp from cannabis with higher THC concentrations. Just recently, on July 13, 2020, the Hawaii Legislature passed a bill banning smokable hemp and edibles infused with CBD, the major nonpsychoactive compound found in the cannabis plant. If the bill is enacted, Hawaii would join several states such as Louisiana and Kentucky that have already enacted bans on the sale of smokable hemp or states such as Texas or Iowa that have prohibited the manufacture of smokable hemp.

Indiana last year passed a law setting up a regulatory process for the commercial production of hemp. The law criminalized in part the possession, finance, manufacture, and delivery of smokable hemp as misdemeanors. Several Indiana hemp and CBD sellers and wholesalers sued the state and sought to enjoin the state's enforcement of its law criminalizing smokable hemp. The sellers and wholesalers asked for an injunction on the grounds that the 2018 Farm Bill preempted Indiana's law. They also claimed that the Indiana law violated the commerce clauses. Indiana argued that the law was a valid exercise of the state's police powers.

U.S. District Judge Sarah Evans Barker granted a preliminary injunction in September 2019 prohibiting Indiana from enforcing the portions of its law that criminalize the possession, finance, manufacture, and delivery of smokable hemp. The district court found that the 2018 Farm Bill preempted this portion of the Indiana law. Specifically, the district court found that the 2018 Farm Bill provided that states cannot pass laws that interfere with the right to transport lawfully produced interstate commerce hemp. Further, the court found that the challenged portions of the Indiana law conflict with Congress' interest in legalizing and destigmatizing low-THC hemp and its derivatives and extracts.

Indiana appealed to the Seventh Circuit, and a three-judge panel found that while the hemp and CBD sellers and wholesalers may have been entitled to block certain aspects of the Indiana law, the trial court's injunction went too far. The court explained that the 2018 Farm Bill expressly preempts states from prohibiting the transport or shipment of hemp and hemp products. The panel also reasoned that states are expressly preempted from regulating the possession and delivery of smokable hemp to the extent that states interfere with the transport and shipment of smokable hemp. Thus, the panel found the portions of the Indiana law that interfere with the transport and shipment of smokable hemp across the state and state lines conflicted with federal law.

However, the Seventh Circuit also found that the Farm Bill did not expressly preempt a state's right to regulate the cultivation and production of hemp. In fact, the court reasoned that as the Farm Bill authorizes states to regulate hemp production, states can pass regulations on the cultivation and production of smokable hemp - even if those regulations are more stringent than federal regulations. As such, the court explained that the trial court impermissibly enjoined the portion of the Indiana law that prohibited the manufacture and finance of smokable hemp.

The Seventh Circuit also mentioned that the district court failed to "enter a standalone document containing the injunction" as required by Federal Rules of Civil Procedure 65(d)(1)(C) and 58(a). The requirement of a stand-alone document exists to force district courts to explain the basis for an injunction. The appeals court recognized that if the district court had entered a

stand-alone document laying out the injunction, it may have issued a more properly tailored injunction.

Read the full opinion: *C.Y. Wholesale Inc. v. Holcomb*, No. 19-3034 (7th Cir. July 8, 2020).

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