

Indiana's Vapor Revamp

Following a rebuke in court, Indiana fixes its vapor rules.

BY TIMOTHY S. DONAHUE

The vapers won. No longer is the Indiana, USA, vapor industry controlled by one company. After its first attempt at vapor regulation was found unconstitutional, the Hoosier State's General Assembly handed all e-liquid permitting responsibilities to its Alcohol & Tobacco Commission (ATC) in April, without the need to comply with stringent security requirements. The original law essentially created an e-liquid monopoly in Indiana. The new law crushed it.

Amy Lane, president of the Indiana Smoke-Free Alliance (ISFA), said the state's General Assembly was determined to correct its mistake and replace the illegal law with a reasonable regulatory framework. The new rules will allow access for both in-state and out-of-state manufacturers and distributors to Indiana's vapers.

"The Indiana Smoke-Free Alliance was formed to fight the unfair vapor products monopoly that passed two years ago, a monopoly that created significant burdens for small businesses to compete while using security provisions to create a market advantage for a few select business interests," said Lane in an exclusive interview with *Vapor Voice*. "The victory for vapor businesses is such a relief after what we had seen in 2015. Our involvement at the state House this year was crucial to educating the legislators about vapor products, and we were glad to see the politicians engaging in conversations to better understand the real effects of this law to Indiana businesses. The strong votes in both the Senate and the House are reflective of their desire to change the law permanently in Indiana and dispel the monopoly for good."

Tony Abboud, executive director of the Vapor Technology Association (VTA), which drafted the new legislation, stated in a press note that the new Senate Enrolled Act (SEA) 1 eliminates costly and unnecessary barriers to the emerging vapor market while maintaining appropriate consumer safety provisions. "We are honored to have had the opportunity to work with ISFA on this legislation. ISFA demonstrated professionalism, focus and steadfast resolve in the face of significant opposition," said Abboud. "The result is that we

have done what we set out to do and reopened the state of Indiana to all vapor businesses, who can now compete on a level playing field."

The state was forced to rewrite its 2015 Vapor Pens and E-Liquid Act after a roller-coaster battle through the courts. In January, a federal appeals court struck down part of the controversial law that regulated out-of-state production and the sale of e-liquids. In the lawsuit led by Legato Vapors and the Right to be Smoke-Free Coalition (RSF), the 7th U.S. Circuit Court of Appeals declared the law "unprecedented" and that the security and other requirements posed to out-of-state manufacturers was clearly extraterritorial and a violation of the Commerce Clause of the U.S. Constitution. "With almost 200 years of precedents to consider, our review of



Photo: ISFA

Amy Lane



Photo: Keller and Heckman

Azim Chowdhury



The ISFA team that fought together at the Indiana Statehouse (from left): Brad Baughn, Matt Norris, Amy Lane, Sandy Brown and Mike Leppert

prior dormant Commerce Clause decisions has not revealed a single appellate case permitting any direct regulation of out-of-state manufacturing processes and facilities comparable to the Indiana Act," the court stated. It was a major victory for vapor advocates.

Lane says she and the ISFA members are pleased with the new law and that she believes the organization achieved its goal of wanting reasonable regulations for e-liquid manufacturers. "It is really everything that we wanted at Indiana Smoke-Free Alliance, and working with the Indiana General Assembly has been a great experience for us," said Lane. "It has helped us build relationships for the future in the vapor sector."

The act began its life in controversy. The original law, enacted in 2015 and amended in 2016, was a constant source of agony for vapor shop owners. It drove dozens of them out of the state. It also caused the costs of e-liquid in Indiana to rise significantly. The act was rife with political favors from the onset. For example, the act forced e-liquid manufacturers to acquire a certificate from a security firm. However, the law's requirements for security firms were so narrow that only one company qualified—Lafayette, Indiana-based Mulhaupt's Inc. The requirements were so unusual that the U.S. Federal Bureau of Investigation began questioning their legality.

The act required e-liquid manufacturers to contract with a qualified third-party security firm to provide certain specific

services (such as 24/7 video surveillance). For a security firm to qualify under the law, however, it must have a certified rolling steel fire door technician and an architectural hardware consultant on its payroll. Certified employees had to be hired by July 2015, too, preventing future security companies from ever being able to meet the requirements.

On July 1, 2016, the stronghold was fully in place as the restrictive law did exactly what industry experts expected. Mulhaupt's approved only six companies to sell liquid in Indiana, therefore allowing only these companies to get permits to produce e-liquid in the state. By artificially limiting



Tony Abboud

the number of players, this annihilated the state's e-liquid market. Soon, a court battle ensued. *Legato Vapors and Right To Be Smoke-Free Coalition v. Cook* began to take shape. In September 2015, the RSF, a trade association of e-vapor companies represented by Eric Gotting and Azim Chowdhury of Keller and Heckman, a Washington, D.C.-based law firm, joined Legato Vapors' lawsuit challenging the act.

Among other things, the RSF argued that the act violated the dormant Commerce Clause of the U.S. Constitution, which prohibits extraterritorial legislation, by regulating e-liquid manufacturing activities that occur outside of Indiana. Their motions for preliminary injunction and summary judgment were denied by the District Court for the Southern District of Indiana. They appealed.

Then it happened: A decision issued by a three-judge panel from the 7th U.S. Circuit Court of Appeals disagreed with the lower court. In the decision, Judge David Hamilton of the 7th Circuit wrote that the act was written with "extraterritorial reach that is unprecedented" and that it forced out-of-state companies to conform to detailed requirements of Indiana law.

"The act regulates the design and operation of out-of-state production facilities, including requirements for sinks, cleaning security firms and the qualifications of those firms' personnel," he wrote. "Imposing these Indiana laws on out-of-state manufacturers violates the dormant Commerce Clause of the United States Constitution."

The battle was over. Indiana vapers had won. The General Assembly began to rewrite its faulty rules. The new law, among other things, removes the provisions that were found unconstitutional by the appellate court—especially the one pertaining to security companies.

Lane said she could not have accomplished the feat alone. She thanked Indiana state Senator Randy Head and Indiana state Representative Matt Lehman for their tireless efforts, along with the VTA, the membership of the ISFA, and Matt Norris and Mike Leppert of Krieg DeVault, a lobbying firm. She also expressed gratitude to the attorneys Chowdhury, Gotting and Greg Troutman for their groundbreaking legal work, which, she said, served as a guide to the legislators who had to stay away from those unconstitutional items. Lane thanked Hoosier Vapers for updating the consumers in Indiana on what was going on during session.

The new law creates a path to licensure for all manufacturers, distributors and retailers who are seeking to sell vapor products in Indiana, according to Abboud. "The bill further aligns requirements for manufacturers doing business in Indiana with the requirements of the federal deeming rule," he stated. "In addition, the legislation creates a clear path forward for online sales, removes arbitrary rulemaking authority from the ATC and onerous security requirements on manufacturers, which created a monopoly in Indiana for a limited group of manufacturers."

Photos: Krieg DeVault



Michael Leppert

Chowdhury agreed. "Specifically, SEA 1 eliminates the security, clean room, kitchen code requirements, various audit provisions, as well as the June 30, 2016, statutory deadline for both in-state and out-of-state e-liquid manufacturers to file permit applications with the Indiana [ATC]," Chowdhury said. "Keep in mind, however, that although the new law will effectively reopen the Indiana e-liquid market, e-liquid manufacturers are still required to obtain a permit from the ATC to sell products there."



Matt Norris

Lane says the ISFA is diligently working with the various agencies that are involved with implementing the new law, such as the ATC, the state Department of Revenue, and Indiana's secretary of state. Since the law is "effective immediately," she doesn't anticipate many delays with the ATC for manufacturers, especially since they have only 60 days to approve or deny an application.

"Our members, and businesses across Indiana, took tremendous financial losses during the life of the previous law. This was due to a 40 percent increase in e-liquid prices, which drove consumers online instead of shopping at our brick-and-mortars," said Lane. "We saw gross income losses of 60 percent on average, and approximately one-third of the vapor shops were forced to close their doors. ISFA believes SEA 1 will level the ledger balances back out by bringing e-liquid prices back to a competitive national price."

Moving forward, Lane says the ISFA has already begun working with local governments for exemptions on "smoking everywhere bans" that are likely to include vapor products. The organization will continue to fight unreasonable regulations in the state while growing the ISFA as the leader in Indiana for all things vapor. "Membership is the cornerstone of our association, and we plan on expanding our initiatives throughout the counties here. We have a pretty impressive track record and a great team with VTA for effective strategies," Lane said. "I believe that Indiana has learned a lot of lessons, and we don't forget. ... We will just continue to get stronger." ✓

Working with state legislative leaders, the Indiana Smoke-Free Association (ISFA) and the Vapor Technology Association (VTA) accomplished several important changes in Indiana's vapor legislation, including:

- A removal of security requirements
- The abolition of deadlines for manufacturing permit applications
- A provision for mail orders with simple age verification checks
- The delegation of auditing authority to the U.S. Food and Drug Administration

The VTA wrote 99 percent of the language for Senate Enrolled Act 1. The law firm of Keller and Heckman advised the ISFA on items related to the lawsuit and as issues came up in session.