

The “Free Market” for Marijuana

H. Justin Pace*

Abstract

The continued prohibition of marijuana at the federal level, at the same time states are not only decriminalizing marijuana but attempting to provide a regulatory apparatus for its sale, has created a unique business environment. In some ways there is a true “free market” for marijuana in states where it has been legalized—free, that is, of the legal and financial infrastructure available to fully licit businesses in America.

Contracts may not be enforceable because they lack a legal purpose. Relief in bankruptcy court may not be available, either as a debtor or as a creditor. Use of a legal entity to limit liability and take advantage of entity personhood may be impracticable. Marijuana businesses may not be able to avail themselves of patent and trademark protections. Federal money laundering laws effectively restrict access to the banking system, forcing marijuana businesses to operate as purely cash businesses.

While marijuana businesses must comply with state marijuana regulation and their employees are protected by labor statutes, marijuana businesses operate in almost a true “free market.” This is the first paper to use this situation to examine the value offered by our legal and financial infrastructure. An inability to use it hurts marijuana businesses in very real ways. But, at the same time, marijuana businesses are able to operate—to thrive even—nonetheless. That infrastructure is both more valuable and less valuable than is appreciated, and in surprising ways.

* Assistant Professor of Finance and Commercial Law, Western Michigan University, Haworth College of Business.