

The Grass is Greener: Cannabis Law News



Episode 1 – The State of the Cannabis Industry: Where Do We Go from Here?

October 20, 2021

Speaker	Statement
Marshall A. Custer	<p>Hello, and welcome to The Grass is Greener: Cannabis Law News, hosted by Husch Blackwell’s Cannabis Law group, where we update you on the latest trends and topics in the evergreen and ever-evolving cannabis industry.</p> <p>Hello, this is Marshall Custer and I am here today with our first, our inaugural, debut episode of The Grass is Greener. And like all things that you do that are brand new, I’m sure it will be excellent.</p>
Steven N. Levine	<p>It usually is.</p>
Marshall A. Custer	<p>So let’s start off, I guess, with what this series is intended to be. These are going to be a series of podcasts. I don’t know how many yet, but we’ll try to get them out, you know, in somewhat regular fashion. Usually pretty short, hopefully targeting around the 10- to 15-minute range where we’re going to interview members of our Cannabis group here at Husch Blackwell on, you know, various hot topics or topics of their legal expertise.</p> <p>And we’ll also then be bringing in, on occasion, some of our clients and other industry participants that we know of to get their business view of the world. You know, there’s no way to avoid it, but sometimes we’ll get into some pedantic legal issues. But I promise if we do it will be because they are important. We’ll try to keep it high-level and relatively interesting.</p> <p>But for this first episode, we’re definitely going to stay high-level. We are going to talk about the macro picture today because in my opinion – and I think everybody more or less in this industry shares it – we are</p>



Speaker	Statement
	entering a very unique time in this industry, and unique even for an industry that has been essentially nothing but unique since it started. I think many of us have been thinking of this as essentially the tipping point of the industry, and who better to talk about that than my partner and also co-leader of the cannabis practice here, Steve Levine? So, hi, Steve.
Steven N. Levine	Hi, Marshall. How are you doing?
Marshall A. Custer	I'm great, same as I have been all day here in the office.
Steven N. Levine	Good to hear. Good to hear.
Marshall A. Custer	So, hey, why don't you give me a short intro about yourself?
Steven N. Levine	Sure. So, been in the cannabis space since 2009, which makes me probably one of the more elder statesmen as far as legal practice is concerned. Helped co-lead the cannabis practice here at Husch Blackwell – about 70 attorneys touching the practice, along with you, Marshall. And I also had our Food & Ag business unit doing all things food and ag.
Marshall A. Custer	Well, excellent. Thank you. Thanks for helping kick off this super-professionally-developed-and-not-awkward-at-all initial podcast. What we're going to talk about today, which we already gave a little bit of a preview of, right, it's we're at a tipping point in this industry. And, you know, as you just mentioned, you've been in this since 2009. That's the start of the state-regulated, the legal marijuana industry. You know, those of us that have been in that long, you know that everyone that's been doing the actual work, right – the operating, the cultivating, the setting up of the laws and regulations and running these businesses – many of them have been kind of collectively holding their breath, right, this whole time of, "What's my exit going to look like? How does this industry finally mature and we get to ride off into the sunset?" And I think we're getting, you know, close to that moment. That said, I think we've had three or four of those moments, really.
Steven N. Levine	For sure. We definitely have.
Marshall A. Custer	But this one feels different. This feels like the big money everyone has ever dreamed about is finally showing up. But I don't think that it's actually going to turn out the way that, you know, many of those individuals have been thinking over the past, you know, five, six, seven years of the Marlboro man's going to come down from on high and hand you a bag of cash for your 1,000-square-foot multicultivation.



Speaker	Statement
---------	-----------

Like, that's not going to be how this ends up. So, from your take, what do you see as happening, you know, in this tipping point period as the industry does mature? What does this, the exit moment kind of look like for most operators?

Steven N. Levine

Yeah, you know, I think it has been... I would probably say since '09 every single year has been a different year. There's always been expectations of what that next tipping point is going to look like, people trying to time the market. But I do agree, you know... Whether it's next year, two years, three years, I'm not really sure. You know, lots of different factors can accelerate what that's going to look like. But at some point here we're going to have a move towards actual real laws that are going to help benefit the industry, whether that's through the banking, Safe Banking Act, the MORE Act, potentially, which doesn't have a lot of legs, and then eventually, hopefully, getting to some sort of legalization.

What does that legalization look like is really what I think the, you know, the million-dollar, billion-dollar question is. And for a lot of market participants, you know, they're looking to get squeezed out, frankly. I mean there is a lot of money going into some of these larger MSOs. Tobacco is putting a lot of money in. You look at Altria and others going after some of these large MSOs, making huge investments. The alcohol business is also doing the same thing. And so, everyone is trying to, you know, sort of carve out their piece of the business and those operators with that multicultivation are going to find themselves likely getting left out in the cold.

Marshall A. Custer

Yeah, I do agree with that take. It is very much on the, "Hey, it all depends." But you bring up the massive, you know, the conglomerates, essentially, that are coming in, right? The big money. And so, from that standpoint I wonder if it's almost helpful to take a step back and think through what have been kind of the generational entrants into this market so that we can then maybe talk about what's dragging that federal legislation that you bring up here, too.

And in my mind it feels like, you know, kind of we're calling this, that there's four or five versions right? Like you said, every year's been different.

Steven N. Levine

Right.

Marshall A. Custer

I agree with that completely. But there seems to be these eras, these epochs in the industry. And the first one to me, you know, is the obvious. It was the solo entrepreneur or the extreme risk taker that figured out, "I would like to get into this business despite the fact that



Speaker	Statement
Steven N. Levine	it's federally illegal and, you know, hardly even accepted within the stateside.” And that to me, you know, probably was the first two, three, easily four years of this industry.
Marshall A. Custer	Sure. And from there it sure sounded...it felt like we started to get what I would call, you know, “eccentric rich people” in. Maybe many of them mostly landlords, but for these first-generation, solo entrepreneurs to fund their business, they needed money from somewhere and the only place they got it was wealthy individuals.
Steven N. Levine	Absolutely.
Marshall A. Custer	That was the only lenders that were out there. And then this third stage, which I feel like started happening around, I don't know, 2014, maybe '15, is where I think the first, like, real iteration of maturity in the business started to happen. And it's odd that this was the first iteration maturity because the people that came in to me were almost more of the con artists, get-rich-quick kind of schemers. You know, there was also along with that set of entrants, I think, some very, you know, early-in-their-career professionals willing to take a chance – you know, hadn't quite proven themselves yet. And they did help very much, I think, bolster some of the companies that were doing well. Some of those early-stage professionals, I think, have proven themselves and done very well over the past five or six years. But that, to me, was also the first instance in this industry where we started to see some people really shake out because they were taken advantage of those, by like, you know, who were coming in as the get-rich-quickers or, essentially, the con artists. And then, I think, the fourth is kind of where we are right now. And that seems to be where, as you said, the tobacco industry, the alcohol industry, to maybe a lesser extent Big Pharma, is starting to poke around the edges if not get fully engaged and put real money in with real competent professionals with, you know, industrial backgrounds that know how to run these sort of vice industries. And I think that's what's starting now to drive the change. And so, the question here is, maybe: This seems like it's chicken and egg to me. Like, is federal policy being driven by the fact that we've got these new entrants that are clearly ready to go or is it the other way around? Is it that we've finally started to get some movement on federal policy and, you know, the money is starting to follow?
Steven N. Levine	Yeah, I would say it a little bit differently. I would almost frame it as



Speaker	Statement
Marshall A. Custer	<p>we're sort of, like, sort of the 3.5 version of the industry in that we're sort of more on the cusp of getting to that sort of version 4.0 where there's actual real money, credit facilities, people can go out and get loans...</p>
Steven N. Levine	<p>... You know, things that normal businesses do. We're still not there yet, but I think the people that are engaged in those industries – whether it's banking, whether it's big law firms, whether it's accounting firms – they are all seeing those opportunities. And because they're seeing those opportunities they're trying to encourage that next step to get to that sort of fourth iteration of what the industry looks like. And that, I think, is what is driving functionally more of the pressure on politicians, people with sort of other vested interests that might be sort of ancillary to the business, that I can see how it can be a creed of to their various industries, are saying, “Okay, now we're at that inflection point, let's see what pressure, what monies, we can start throwing behind things to start benefiting our respective businesses.”</p> <p>You know, take law firms as an example: We were one of the only Am Law 100 firms doing this for quite some time. Now that's not the case at all. They're all starting to sort of work around those fringes, working on SEC matters, working on credit facilities, you know, doing other things that Am Law 100 firms do. But they're still not sort of in-depth built into the industry, having real big cannabis practices. And likewise with banking and everybody else. And so, I think now they're seeing what that opportunity is going to look like, what that next 10 years is going to look like from how that's going to impact their business, and they said, “Okay, this is an impactful thing and so let's start helping push what that looks like.” And I think that's what's driving a lot of the change.</p>
Marshall A. Custer	<p>I would agree with that as well. The... So this change that's being driven... This kind of leads into, I think, the next set of topics that we should discuss, which is what is that federal policy? What is the federal landscape that we're looking at out there? To anyone, including all of our family members that I'm sure are listening to this, they're probably well aware of, you know, what really is out there, but...</p>
Steven N. Levine	<p>A shout out to Mom. How you doing?</p>
Marshall A. Custer	<p>Well, yes, you know, explain it to me like I'm 5. Like, what is happening at the federal level right now as far as policy? And then we can probably talk about, you know, clearly who's driving that train.</p>



Speaker**Statement****Steven N. Levine**

Yeah, so I think the sort of three big things that are being sort of proposed is (1) the Safe Banking Act, which functionally just codifies fenced-in guidance to allow for banks to at least have some level of comfort that they're not committed to money laundering. We have the MORE Act, which functionally legalizes marijuana, just keeps in our existing safe system. And then we have the bill that was proposed by Schumer, Booker and others that is an attempt to create a framework for legalization.

The Safe Banking Act has been very close, has passed Congress several times. The likelihood of getting passed in the Senate seems to be somewhat of a sticking point. Even Senator Booker at this point has raised issues with it because it doesn't do enough for social equity and social justice. So that one seems to have had a lot of momentum, now is dying a little bit because even the Democrats are now saying it doesn't go far enough.

The MORE Act, you know, functionally just won't get passed. It's just really way too broad. There's way too many other vested interests in seeing a more regulated system. That's really not going to be anything of value is my guess.

And then the Schumer-Booker bill that recently got put out there – you know, functionally I call it, you know, the “Tobacco-Pharma Bill” because that's functionally really who it helps. It's really created a system under the FDA, which pharma is very familiar with, likewise with tobacco, and really sort of disregarded everything that's happened at the state level. You know, the industry was, rightfully so, up in arms with respect to what was presented there. There's been a lot of response to that. And, you know, I think... I'm sure Schumer and Booker will listen to all what the industry says, but I'm pretty sure they'll still have the ear of tobacco and pharma and other constituents that are very interested in what that's going to look like. And the bill as proposed would functionally end the entire medical market in our country and put severe restrictions on the recreational market that, you know, functionally would crush the industry. I mean, that law is not functional.

So a lot of work to be done there. How quick can that happen? You know, you look at how dysfunctional the federal government is at this point. Cannabis is not high on the list. We're more worried about infrastructure, more worried about the debt ceiling. This is not a topic that anybody is willing to put out there, talk about. And that might push it to next quarter and then now we're getting into a federal cycle of... a presidential cycle where now people are going to start running, and is this an issue that they're going to run on? And if it's not, does it



Speaker	Statement
	get pushed off for another two years? I mean, that's the reality.
Marshall A. Custer	Yeah, I agree. It sounds like, or it feels very much like, we've got a short window of opportunity for anything to happen. You know, the Schumer bill doesn't seem like it's going to get done despite the fact that the people that have run that bill, you know, the tobacco-pharma industry as you put it, they are, you know they're the New York Yankees, right? And the cannabis industry is pretty much like 8-year-olds with a stick and a ball. Just because there's just such disparity of cash on hand and political experience there.
Steven N. Levine	Yeah, no, absolutely. I mean, you just look at one tobacco company. I mean, I was talking about this yesterday to somebody where Altria on their balance sheet has \$2.5 billion in cash. And to give that context, the entire industry in Colorado did less than \$2.5 billion in sales...
Marshall A. Custer	Yeah.
Steven N. Levine	...let alone profited enough money to actually spend to go after some of these endeavors. So there's a huge disparity. And, frankly, that's why I think you see marijuana companies aligning themselves with tobacco. I mean, you know you can – or alcohol or other industries – so that they can wield some of that influence.
Marshall A. Custer	That's highly accurate. Take into account, too, that if you are a marijuana company and you're paying your taxes the right way, there's really no possibility for you to have a lot of cash on hand.
Steven N. Levine	Exactly. Exactly.
Marshall A. Custer	So if you were looking into the crystal ball – and you kind of alluded to this already – what do you think does actually get done, if anything, in the next 12 months before we're consumed by another presidential election?
Steven N. Levine	So I think that, I think that the politicians have to give some sort of a token for a lot of the effort that the marijuana industry has put into this for quite some time. I think Safe Banking is an easy one for them to pass. We'll see if that gets bogged down and sort of how to deal with reparations or social equity. But I see that really getting passed next year.
Marshall A. Custer	I see... Yeah, combining those two seems... I mean, I'm not a political junkie, but it feels like a no-brainer.
Steven N. Levine	Well, you would think so.



Speaker	Statement
Marshall A. Custer	Couple those together, but...
Steven N. Levine	It depends on how the social equity piece is structured because that has a lot of ramifications. You know, clearly people of color have been disproportionately affected by the war on drugs and so there needs to be something. It's just that's a really challenging and difficult question to answer. And will it be enough to get through for Safe Banking? I would think so. You know, I think there needs to be at least a level of comfort for banks to feel safe about what they're doing. And then, now we're talking about what does legalization look like? And that, presumably, is going to be some more, some additional expansion of social equity. And that's likely going to take a long conversation. And does that get into the cycle of the next president? And is that Biden? Is that Trump? And what does that convoluted mess look like? Which makes me nauseated just to think about...
Marshall A. Custer	So the only two options is....
Steven N. Levine	Yeah.
Marshall A. Custer	...is nothing.
Steven N. Levine	Right. And so what does that mean? So, you know, I mean, frankly, I don't know. You know, I think there's also some, some, I think, rightful conversation about people that are in the... And, you know, some of these MSOs that... Getting to legalization is not that critical to them right now. The longer it lasts, the longer they're able to build war chests, the longer they're able to recoup investment on all these different manufacturing facilities and cultivations that they've built throughout the country. Frankly, time is better for them. You know, I don't think they'll come out and say it so bluntly but, you know, time is to their advantage. And waiting for what that system shakes out, I think, won't do anything but benefit them.
Marshall A. Custer	Yeah, and that gets to really the... Kind of the last set of questions, I think, we've got here is, you know, what does a post-federal legislation legalization – not just the Safe Banking or a temporary Band-Aid – what does that start to look like for the industry? You raised the legacy PP&E that is sitting on really every operator's books. We all of a sudden enter a period of interstate transfer. You know, well, you don't need a \$50 million cultivation in Illinois and in Michigan. That's kind of a waste of money. Well, at least it's a burden. But how does that start to shake out for the different, you know, participants we have? And our participants, I think, are pretty clearly defined at this point. We've got mom-and-pop shops. We've got some mid-levels. And then



Speaker	Statement
Steven N. Levine	<p>we've got the monsters. And there's not a lot of different, you know, people that fit outside of those categories. You know, what are the options for individuals that you see that, you know, that want to continue to operate in each one of those categories?</p> <p>Yeah, I mean, I think... I would hope that we don't come up with a system that just completely cuts off what's gone on from the state level. There's got to be some sort of phase-in as it relates – to the extent we have legalization and then there's interstate commerce, right? There has to be some phase-in to that. I mean, we can't just automatically flip on a switch and say, "Okay, interstate commerce. We're going to start importing marijuana from Colombia, and that's just how we're going to run this." Because, I mean, ultimately 30 years from now, how much marijuana is grown in the United States is probably going to be limited because it's a commodity, it's a highly intensive, labor-intensive business and it's going to get shopped out to other countries, frankly.</p> <p>So how long of a window is that? I don't know. But I would think the industry as a whole is going to look to that. I think from the mom-and-pop all the way up to the MSO wants that system to stay in place. And so, I think if I'm sitting in a mom-and-pop I wouldn't be necessarily afraid of all of a sudden I'm going to get, you know, boxed out by Big Tobacco or Big Pharma because I think whatever happens from a legalization standpoint is going to allow for some transition period. And that transition period, frankly, might be five or seven years. You know, this is not going to be something that governors, senators and Congress people are going to say, "Wait a minute. You're telling me you're going to cut off all this great farming stuff that I've been pitching forever and creating jobs in my state, and you're going to say we're going to turn that off?" I just don't know how they get around that, right? And so, there's a phase-out to it or some other sort of element to that, I think, that gives a lot of people a decent runway, even if you're that mom-and-pop with small cultivation and maybe a couple of dispensaries.</p>
Marshall A. Custer	<p>I'm a little more cynical on the mom-and-pop side. I think it's... I think it's... I agree there will likely be a runway. This doesn't mean the end, right? The conglomerate is coming in, federal legalization on the horizon doesn't mean you're going to be squeezed out. But it does mean increased competition.</p>
Steven N. Levine	<p>Sure.</p>
Marshall A. Custer	<p>And the game is going to get leveled up significantly, both on the</p>



Speaker	Statement
	regulatory compliance side and just the cost, you know, the cost structures are going to be much more competitive. And so, to me, I'm starting to think about if I'm a mom-and-pop, I run a few stores, I have a regional brand... I'm starting to think I need to be a craft brewer, which is probably what they're already running. This isn't a giant mental leap. But that sort of change in mindset of making sure I dominate my region and provide, you know, value to my community.
Steven N. Levine	Right. Quality product.
Marshall A. Custer	Exactly.
Steven N. Levine	You're not going to be on the lower end of things. That's going to be the bigger shops. And if you're going with that model you're done.
Marshall A. Custer	Okay, last question. This is a good one to put you on the spot with. If you own a company, do you sell right now? Is this your last chance?
Steven N. Levine	Like, sell today?
Marshall A. Custer	I mean, next 12 months, 12 or 18 months?
Steven N. Levine	Yeah...
Marshall A. Custer	Granted, no one's going to pay you any cash. You're just going to get stock. Do you sell?
Steven N. Levine	Look, I think... Look, somewhat of a loaded question. I mean, it depends on each individual seller. It depends on where and how prepared they are to be able to sell. You know, do you have proper financials? Do you have your books and records in place? Can you even be in a position to sell yourself?
Marshall A. Custer	Okay, so that's a great point that I want to highlight because, I mean, we've both seen this in the past, you know, two years, right? Two years ago, you could have been a very hairy deal. It's still going to close, right? Today, buyers are more discerning.
Steven N. Levine	Yeah, no, buyers are more discerning and, frankly, I think they're depressing valuations. I mean, you know, the beginning of the year market was probably up 30 or 40 percent and people are not getting what they were thinking that they were worth. Even some of our, you know, large clients, you know, \$100+ million in revenue, to go and raise capital at a valuation that they think is reasonable is challenging. And so, look, I think, you know, selling is always the right time if you sell and then all of a sudden the whole market goes to crap. I think



Speaker	Statement
	<p>we're anticipating that the market is going to increase, valuations presumably would increase. But all that means is it's just going to be more hyper-competitiveness to be the one that gets acquired. Because, you know, in a place like Colorado, for example, they're a dime a dozen at this point and so just because you have those two dispensaries and cultivation as a mom-and-pop doesn't differentiate you from the crowd. And so, what is differentiating you? And I would say for, you know, if a seller walked in the office right now and they were in that mom-and-pop stage, I would say, "Let's get you organized. Let's figure out a way to put you on your best foot forward, and then let's look to sell. Because, you know, especially on the retail side, you're probably going to get out-competed here in the near term."</p>
Marshall A. Custer	Well, with that, I think we'll let you get back to billing hours.
Steven N. Levine	Okay. My favorite thing.
Marshall A. Custer	<p>And we've got a number more of these interviews kind of lined up for the next few weeks. You know, future topics we're going to talk about: some ESG and climate change and how that's going to be affecting the marijuana market. We'll get into, you know, some nuts and bolts of plant genetics and IP and the future IP worth that we're going to be seeing here in the relatively near term. And then, one of my favorite topics and very much related to what we just talked about is, what should you do if you're going to end up one of these sellers over this next 12 or 18 months to really get ready? What's the process? Because a lot of people, they don't know.</p>
Steven N. Levine	Well, clearly, it's to call Husch Blackwell and we'll get it all squared away for you. I mean, that's the easy answer.
Marshall A. Custer	You're right. It is one big commercial.
Steven N. Levine	That's right.
Marshall A. Custer	Alright. Well, thank you.
Steven N. Levine	Oh, thank you, Marshall. I appreciate it.
Marshall A. Custer	<p>That's all for today's episode of The Grass is Greener: Cannabis Law News. Thank you for joining the conversation. To subscribe to our podcast, visit our website at huschblackwell.com or sign up wherever you listen to your podcasts. Until next time.</p>

