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The Business of Cannabis Law

By Carlos N. Martinez

New Mexico's Cannabis Regulation Act has brought to the forefront what has long been considered an illicit industry, having evolved from "Reefer Madness" into an acceptance and recognition of its numerous medicinal benefits. As a consequence of this rapidly evolving industry, it is necessary for business law attorneys who are looking to enter the cannabis law space to be a jack of all trades and a master of most. It is difficult to gauge what the anticipated demand will be, and whether or not New Mexico's cannabis industry will be able to meet it. However, the medicinal and adult-use markets have huge potential to provide an immensely positive impact for the state of New Mexico and its residents.



are 29 debilitating medical conditions for which a person may qualify to be a participant in the medical program.⁵

As the medical cannabis program began to expand, efforts were made to bring a recreational adult-use cannabis program to New Mexico. In 2021, with the assistance of a special session, New Mexico was able to pass the Cannabis Regulation Act.⁶ The Cannabis Regulation

Act allows adults 21 years or older, or medicinal cannabis patients with a valid medical cannabis card, to purchase "two ounces of cannabis, 16 grams of cannabis extract and 800 milligrams of edible cannabis at one time."⁷ The Cannabis Regulation Act further allows New Mexican residents to grow six mature-female cannabis plants per person and up to 12 mature cannabis plants per household.⁸

As a business law attorney transitioning into cannabis law work, one must wear a number of familiar hats while being open to trying on or creating new hats along the way. It is essential that budding cannabis law attorneys are willing and able to put in the work to truly understand not only the State laws, rules and regulations but the cannabis industry as a whole. The genesis of New Mexico's cannabis laws and their present-day form, along with an ability to anticipate legal issues and develop solutions for your clients will ultimately determine one's level of success as a cannabis law attorney.

New Mexico was the first state in the nation to enact a medical cannabis law via legislature in 1978; the Controlled Substances Therapeutic Research Act¹, later renamed in 2007 in honor of Lynn Pierson and Erin Armstrong; the Lynn and Erin Compassionate Use Act (LECUA).² Under New Mexico's medical cannabis program, a qualified patient³ had to be diagnosed by a practitioner as having a debilitating medical condition in order to obtain a medical cannabis card, and patients were limited to approximately eight ounces of cannabis flower in a three-month time-period.⁴ Under the statutory and regulatory language, there

Under the Cannabis Regulation Act, a potential cannabis establishment licensee has the option to apply for a number of license types: 1. Cannabis Producer License; 2. Cannabis Producer Microbusiness License; 3. Manufacturing License; 4. Vertically Integrated Cannabis Establishment License; 5. Retailer License; 6. Cannabis Consumption Area License; 7. Courier's License; 8. Cannabis Testing Laboratory License; ⁹ Cannabis Research License; and ¹⁰. Integrated Cannabis Microbusiness License.⁹ Additionally, there are intangible considerations in the cannabis industry that business law practitioners should address and understand with their clients prior to applying for a cannabis license. Although cannabis law seems to change daily (or when the Cannabis Control Division decides), there are general considerations and business issues you can address and discuss during your consultation with a potential client. Although a generally-accepted approach to starting a business for any entrepreneur is to create a business plan, potential licensees usually fall in one of three categories when asked if they have a business plan: 1. I do not have a business plan; 2. I have the business plan in my head but I'm not done writing it down; or 3. I have a business

plan. Dealing with any of the three types of entrepreneurs brings their own unique challenges which must be overcome by quality legal representation. Additionally, discussions regarding initial startup capital needed for real estate and infrastructure could be an insurmountable task for some entrepreneurs, which is an unfortunate reality that discourages applicants from entering the industry. Nonetheless, once you have accepted a cannabis client, the conversation generally turns towards the licensing process.

Transitioning from business law attorney to cannabis law attorney is a lesson in being able to adapt and think outside of proverbial box.

The Cannabis Control Division mandates that all applicants applying to obtain a cannabis license must submit their applications online through the Regulation and Licensing Department's portal. The Cannabis Control Division requires that each applicant submit a wholly completed application to the division, and once received, the Division has a 90-day window to provide a response. Clients should be made aware of the benefits of incorporating, and practitioners should help the client choose the legal entity that best suits their respective situation. Under the LECUA, companies were forced to incorporate as non-profit entities and be subject to arbitrary board compositions.¹⁰ In contrast, the Cannabis Regulation Act does not mandate a specific type of legal entity to be utilized in order to own and operate a recreational cannabis license. It is important for cannabis law practitioners to recognize the potential tax consequences associated with the various entity choices, and tax consequences associated with the cannabis industry in general. It is becoming more common for business owners to choose a combination of corporations, limited liability companies and wholly owned subsidiaries to navigate around the Internal Revenue Service's prohibitions against cannabis companies found in code section 280(e). Not every attorney is comfortable with tax law, and therefore, it is crucially important for a practitioner to have the ability to recognize their weaknesses, and to competently refer clients to knowledgeable cannabis tax attorneys, CPAs or other financial professionals.

Other common pitfalls entrepreneurs face outside of proper legal entity choice oftentimes include water and zoning issues. Once the client has provided an address of the proposed licensed premises, the cannabis law practitioner must investigate whether or not a proposed location is properly zoned for the function that their cannabis license would allow. Within the Cannabis Regulation Act, there are explicit provisions providing that local jurisdictions throughout the state have the ability to regulate time, place, manner and density of license restrictions.¹¹ Oftentimes, business owners are wholly ignorant of the fact that they must deal with local zoning boards and commissions, and that they must abide by their local cannabis ordinances and permitting processes. Mistakes will lead to delays in getting requisite zoning approvals as well as holding up much needed inspections, permissions and other necessary approvals required to operate a cannabis business.

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The Cannabis Control

Outside of zoning issues, the Division's application also requires the licensee to demonstrate they have a legal right to use the water for their respective farms or manufacturing operations. However, caution should be advised as not all water rights are created equal. The requisite water documentation can be proven in one of two ways: 1. Provide documentation from the respective water provider indicating that the applicant has the right to use the water from the provider and that the use is compliant with the water provider's rules; or 2. Provide documentation from the office of the state engineer's office "showing that the applicant has a valid and existing water right, or a permit to develop a water right, for irrigation purposes for outdoor cultivation, or a commercial purpose for indoor cultivation at the proposed place of use of the cannabis establishment."¹² Should your client's business have a hook-up to the local water supplier, a simple letter affirming the existence of an account that is in good-standing will suffice for your cannabis application. However, if your client's water supply is dependent on a well, irrigation rights or some other water right, it may be in the practitioner and/or client's best interest to consult with a water law attorney to ensure the client's "right" is a legitimate water right.

Transitioning from business law attorney to cannabis law attorney is a lesson in being able to adapt and think outside of proverbial box. It is being able to issue spot, recognize deficiencies and having the courage to reach out to those who may know more than you on any given subject for help. Ultimately, it's an exciting industry to get involved with and gives practitioners opportunities to expand their knowledge base. Here's to the future. Cheers. ■

Carlos N. Martinez is a cannabis law attorney and trial litigator at Legal Solutions of New Mexico, LLC. Holding degrees in accounting, finance, an MBA in international business and a juris doctorate, Martinez founded the New Mexico State Bar Cannabis Law Section and serves on the board of directors. Martinez has represented a variety of medical and recreational cannabis companies, including producers and retail dispensary owners.

Endnotes

¹ NMSA 1978, § 26-2A-1 to 26-2A-7

² NMSA 1978, § 26-2B-1 to 26-2B-10

³ NMSA 1978, § 26-2B-3(N)

⁴ NMAC 7.34.3.9, et seq.; However, see Case No. D-202-CV-2021-04058

⁵ NMSA 1978, § 26-2C-1, et seq.;

⁶ NMSA 1978, § 26-2C-1 to 26-2C-42

⁷ NMSA 1978, § 26-2C-3(B)(4)(a); a person who is twenty-one years old or older

⁸ NMSA 1978, § 26-2C-25(A)(9)

⁹ NMSA 1978, § 26-2C-6(B)

¹⁰ NMAC 7.34.4.8(J)

¹¹ NMSA 1978, § 26-2C-12 et seq.

¹² NMAC 16.8.2.22(A)(5)

So, You Want a Business Divorce?

Advising Clients During Internal Business Disputes

By Ryan M. Walters

The term “business divorce” is a useful description for the wide variety of internal disputes within a business that can arise, whether they involve business owners or other affiliated stakeholders like corporate officers. For small and family-owned businesses especially, a business divorce can create incredible financial and emotional demands for everyone involved.

Much like a marital divorce between individuals, personal resentments that have festered over the years between business stakeholders can manifest in unusual ways once the situation matures to a formal legal dispute. It is not uncommon for clients to discover that their close friends or family have taken retaliatory actions against the business or other owners, sometimes hiding such misconduct for years. For a medium to large business, a major internal dispute can hobble even a well-established company. Those involved in such a dispute often underestimate how significant of a drag the dispute can be on the company’s operations. The lawyer may also face various forms of resistance from those within the business who feel they may have something to lose from a thorough investigation.

Clients whose interests are implicated by a business divorce encounter a variety of challenging but often predictable problems during representation. At the matter intake phase, the attorney grapples with the sometimes-complex adversities and allegiances between the parties. Those adversity dynamics can change significantly during the course of the representation once the parties uncover more facts, a challenge which complicates joint-representation efforts. The business may require separate counsel to protect its own interests, which can differ dramatically from those of the individual owners. In a closely held business especially, the business owners may owe fiduciary or comparable duties to one another—a dynamic that can surprise many clients.¹ Attorneys advising clients on how to navigate such disputes must be aware of the numerous different types of obligations that constituents within an organization may owe to one another, with corporate officers and other high-level employees generally owing the highest degrees of loyalty to the organization.

If the dispute involves owners and officer-level employees of a company, counsel must often gather and investigate a wide variety of corporate records. It is common to encounter highly disparate levels of recordkeeping and observance of corporate formalities between different businesses. Clients often fail to appreciate that lack of attention to seemingly mundane details—like maintenance of corporate meeting minutes, ownership records and other core organizational material—can present major obstacles to speedy resolution of a given situation. In particular, if the company did not have counsel involved in initial preparation or ongoing maintenance of the company’s organizational documents, these case dynamics can severely limit available strategies or perhaps open new ones for clever counsel.

If a business divorce has been brewing for some time, counsel may find that the company in the midst of the dispute is in a significantly compromised operational and/or financial state. It is not uncommon



for such disputes to arise during a time of financial distress for the company or for a particular individual associated with the company. Some personal challenge on the part of a given individual like significant debt obligations or personal grievances towards perceived mistreatment by the company may end up as the precipitating event for the dispute. Whether driven by economic conditions or other factors like the necessity of a key individual for the

company’s ongoing success, the organization may not be in a viable position to succeed even if the business divorce is successfully resolved. Alternatively, the fallout from the business divorce may spill over into the company’s operations, which can further complicate resolution of the dispute.

If there are potential irregularities with the company’s accounting records, it may be necessary for individual business owners (or the business itself) to engage a skilled accountant to conduct a forensic audit. It can be easy for both clients and counsel to underestimate how lengthy and complex such an investigation can be. For example, during the investigation significant new information on potentially dubious conduct may be discovered that warrants factual investigation into previously unrelated topics. In the case of misappropriation of funds from a company or comparable financial misconduct, the true scope of such activities is often not apparent until the investigation has progressed significantly. Lawyers assisting clients who are looking into potential misconduct of business stakeholders often must delve deeply into available records to unwind a complex puzzle that may involve surreptitious misconduct.

There are often a variety of non-litigation solutions for clients who find themselves in a business divorce. Even a partial owner of a business has relatively limited options to challenge their duly authorized removal from an employment position within the company, a demotion, or other remedial action. One or more of the business owners may be interested in a buyout of their ownership interest or comparable exit from the business. While sometimes a client has no feasible option besides litigation, friends and family members associated with a business often underestimate how damaging litigation can be to their relationships with one another. Opposing counsel communicating with one another about mutually beneficial resolution options may be the only ones who can keep the dispute from turning into a loss for everyone involved. Ideally, what was once an existential threat to the business becomes a temporary setback once the business divorce is in the rearview mirror. ■

Ryan Walters is a litigation partner in the Albuquerque office of the law firm Jennings Haug Keleher McLeod LLP. The author was formerly a litigation associate in the Albuquerque offices of an Am Law 100 firm and an Am Law 200 firm, and also previously clerked for the Honorable James O. Browning of the U.S. District Court for the District of New Mexico.

Endnotes

¹ See *Clark v. Sims*, 2009-NMCA-118, ¶ 12, 147 N.M. 252.

PROTECTING THE INTANGIBLE:

Practical Guidance on Intellectual Property

By Breanna Contreras

Setting up a business is complicated—and when an entrepreneur approaches you for help, you're likely adept at advising them about what entity type to choose, the tax implications of that choice, how to set up an operating agreement, registering to do business with the appropriate governmental entities and choosing the right insurance policy¹ to cover their business needs.

But do you know how to advise them about matters involving developing and protecting their intellectual property? Some studies have shown that well over 50% of a typical business's value may not be in the business's "hard" assets, but instead in its intellectual property and other intangible assets like goodwill. Nonetheless, intellectual property law is often the area business-focused attorneys know least about and an area that a cost-conscious entrepreneur may want to avoid investing in right away. But it could be an expensive mistake to put off addressing your client's intellectual property needs.

This article offers a targeted list of typical trademark and copyright problems facing start-ups with practical examples of and solutions for issues clients face.



Brand Identity/Trademark

Considerations: What's in a Name?

Your client Dax asks you to advise him on setting up a film studio that he intends to call "MARVEL." He wants to get in on all the film action happening in New Mexico. Most people know that your client should refrain from using MARVEL—Marvel Entertainment, LLC probably would not take kindly to Dax's use of its famous trademark. You tell Dax he has to come up with another name. So now Dax tells you he plans to name the business "Marbell Entertainment, LLC" ("MARBELL" for short). You know Dax is trying to riff off Marvel—he admits as much. Is "Marbell" okay to use? Probably not, even under a parody

theory to the extent this defense might apply.² Under federal trademark law, the key question is whether use of a particular trademark is likely to cause confusion among consumers in the marketplace.³ The US Patent and Trademark Office ("USPTO") and federal courts consider multiple factors in this likelihood of confusion analysis, including most importantly:

- The similarity of the marks in their entireties as to appearance, sound, connotation and commercial impression (here, they sound and are written very similar- MARVEL vs. MARBELL); and

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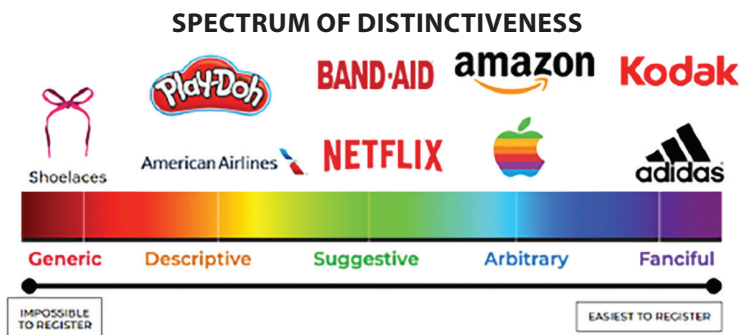
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- The relatedness of the goods or services offered in connection with the trademark (here they're identical since both offer film studio and related services)

You tell Dax to choose a different name for his business, to which he responds by asking for advice on how to make sure he'll be in the clear this time. The best thing Dax can do is come up with a highly distinct name not used by anyone for the same or similar goods or services that he plans to offer. The strength of a trademark is considered along a continuum of distinctiveness and descriptiveness:



At one extreme are marks that, when used in relation to the goods or services, are completely arbitrary or fanciful (think: XEROX for a photocopy machine). The more descriptive the trademark (think: Dax's Film Studio), the less likely it is that Dax will be able to register his trademark with the USPTO and the more difficulty Dax will have distinguishing his services in the marketplace.⁴

If Dax finds a name he's satisfied with, it is worth spending time searching on the USPTO database and on Google to make sure there are no businesses using the same trademark for the same or similar services.⁵ It's also best practice to put the public on notice that Dax claims trademark rights in the brand name he chooses—he can do this by including a ™ on the upper right hand corner of the trademark.

(Dax should not use the ® symbol until he applies for and registers his trademark with the USPTO— something I recommend qualified IP counsel assist with.)

Copyright Considerations-When to Use Work for Hire and Assignment Provisions in Agreements

For your clients who regularly engage in work in the intellectual property arena (e.g., new technology start-ups, architectural services, freelance photographers, interior designers or other creative entrepreneurs), it is important to ensure appropriate agreements are in place when engaging vendors and contractors who produce creative output on your client's behalf. For example, if your client Bernadette hires a contractor to create a logo design, marketing materials, photography or other creative output intended to be an integral part of Bernadette's business, she should have an appropriate agreement in place that ensures the work created by the contractor will be wholly owned by her—either through an assignment provision or "work for hire" language added to the parties' agreement. It's common to see a belt and suspenders approach, with both assignment and work for hire language along the lines of the following:

The *Work* produced by *Contractor* is being specially ordered by *Client* for use in connection with *Client's* brand. All results and proceeds of the *Work* provided by *Contractor* to *Client* constitute,

within the meaning of the copyright laws of the United States, a "work made for hire" for *Client* and, as between *Client* and *Contractor*, *Client* owns all right, title and interest in and to the results and proceeds of the *Work* exclusively, in perpetuity, in all media, throughout the universe for all purposes. *Contractor* agrees that if for any reason any of the results and proceeds of the *Work* are considered not to be a work for hire, *Contractor* irrevocably assigns in *Client* in perpetuity all right, title and interest in and to such results and proceeds and all intellectual and proprietary rights therein, including all copyrights, moral rights, contract, and licensing rights, pertaining to the *Work*.

Use of assignment and work for hire language when contractors provide creative works is critical—it allows your client to use the creative output in any way that may be necessary to the business, whether or not such consideration was contemplated when the contractor was first engaged.

Engage Co-Counsel Before There's a Problem

You may feel like you know enough about intellectual property law to set your client on the right path, but if you feel you need support to ensure your client receives a more targeted approach to their intellectual property needs, consider pairing up with competent IP counsel to assist you. There's a strong business case to be made to protect your client's brand and other intangible assets as a comprehensive start up strategy that will pay dividends for your client in the future. ■

Breanna Contreras is a graduate of Notre Dame Law School and serves as Vice President of Legal at Meow Wolf, Inc. Prior to her work at Meow Wolf, Breanna was a partner at Bardacke Allison LLP where she represented a variety of clients in brand strategy, trademark and copyright registration and licensing, and intellectual property enforcement.

¹ Typical commercial insurance programs do not cover intellectual property claims. Consider discussing with your client whether they have media liability coverage for their business, which covers claims of intellectual property infringement that are otherwise expensive to defend.

² The individual nuances of a given dispute involving a claimed parody can be quite complex, and many parody defenses are not successful. There are, however, interesting exceptions. See, e.g., *Louis Vuitton Malletier, S.A. v. Haute Diggity Dog, LLC* ("Haute Diggity"), 507 F.3d 252 (4th Cir. 2007) (ruling that CHEWY VUITON dog toy that mimicked the shape, design, and color of a Louis Vuitton handbag was not infringing). Haute Diggity sold other parody dog toys, including Chewnel No. 5, Jimmy Chew, Dog Perignon, Sniffany & Co., and Dogior.

³ See 15 U.S.C. § 1052(d). See also Trademark Manual of Examining Procedure ("TMEP") § 1207.01 ("The issue is not whether the respective marks themselves, or the goods or services offered under the marks, are likely to be confused but, rather, whether there is a likelihood of confusion as to the source or sponsorship of the goods or services because of the marks used thereon."). The TMEP, published by the USPTO provides extensive practical guidance about procedural and substantive nuances of the trademark application process.

⁴ See TMEP § 1209.01(c)(iii) (setting forth examples of marks that have been held generic).

⁵ A simple search of the prospective business name can be run on the USPTO database by visiting tmsearch.uspto.gov.

EMERGING TECHNOLOGIES— 2022 Amendments to the Uniform Commercial Code

By Edwin S. Smith, Juliet M. Moringiello, Benjamin Orzeske and Jack Burton

Initially adopted by many state legislatures in the 1950's, the Uniform Commercial Code ("UCC") is a set of rules to governing many forms of commercial transactions. The UCC has proven to be an effective system to facilitate commerce throughout the United States because it offers a nearly identical system implemented by virtually every state. As a result, it does not matter if the parties to a transaction are in different states – the law governing the transaction is substantially the same.

The UCC has been so widely accepted because its provisions are sensible and consistent with most people's expectations. For example, if a merchant agreed to sell the same television to two different buyers, obviously only one of them could take delivery of the television and use it. Under the UCC, the merchant would be required to either provide an equally good television to the second buyer or to refund the purchase price. This is a simple but illustrative example. The UCC contains many such rules to provide ready answers when something goes wrong with a transaction.

Most UCC rules are default rules. The parties to any particular transaction can agree to different terms in a contract and their agreement will be enforceable. But if they have not agreed otherwise the UCC default rules will apply. In this way, the UCC provides legal certainty, which in turn gives many millions of Americans the confidence to conduct business with strangers. Because this uniform set of rules is in place, strong commercial markets have developed and thrived.

The UCC is updated periodically to keep pace with legal and technological developments. The 2022 amendments proposed by the Uniform Law Commission but not yet adopted by the New Mexico Legislature are intended to modernize the UCC as it continues to facilitate commercial activity well into the future by implementing the following updates:

- **Digital Assets.** A new Article 12 provides default rules for transactions involving certain new types of digital assets, including cryptocurrency such as Bitcoin and non-fungible tokens (NFTs). Under the UCC, these intangible assets are called "controllable electronic records," or "CERs." To ensure that the UCC remains relevant, CERs are defined to include not only assets created using today's distributed ledger or



"blockchain" technology, but also any assets that may function similarly using future technologies.

- **Control of Digital Assets.** Section 12-105 introduces the concept of "control" as it applies to intangible property such as cryptocurrency. Control of an electronic record is roughly analogous to possession of a tangible asset – the person with control has the power to "spend" the intangible asset by transferring it to another person in exchange for goods or services. The person with control can also prevent any one else from using the property. The person with control can be anonymous but must be positively identifiable in some manner, such as through the use of a cryptographic key.
- **Security Interests in Digital Assets.** Amendments to Article 9 will facilitate the use of digital assets as collateral for loans. Under the prior version of Article 9, there was no effective way for a lender to perfect a security interest in digital assets except by filing a financing statement, and no way to ensure priority of the security interest without obtaining a lease or subordination from all other secured parties, if they are even disclosed. The amended Article 9 will provide that a lender with control of digital assets has a perfected security interest with priority over the interests of any other lenders who do not have control.
- **Tethered Assets.** Some digital assets may not have intrinsic value, but rather represent a right to payment. A simple example would be an electronic promissory note with terms stating the borrower agrees to pay the lender a fixed monthly payment for a period of time. When the promissory note was executed on paper, the paper itself could be sold by the original lender to another party who bought not just the paper itself, but the right to receive future payments from the borrower. The right to payment was "tethered" to the paper. The 2022 amendments will provide similar rules for "controllable accounts" and "controllable payment intangibles," which are simply

digital versions of a tethered asset, e.g. a promissory note in electronic form rather than in writing.

- **Take-Free Rules.** The UCC includes rules to protect innocent parties who receive digital assets subject to competing property claims. For example, imagine a bank robber who uses stolen cash to purchase goods at a store. If the store accepted the cash in exchange for valuable goods without knowing it was stolen, the store is not liable for the bank's loss even if the cash received is later traced to the robbery. The robber remains liable for the amount stolen. Similarly, new UCC provisions will protect innocent parties who accept in good faith digital assets in exchange for value without knowledge of any other property claim to the assets.
- **Governing Law.** Because digital assets have no physical location, conflict of laws questions may arise. The UCC amendments will allow the parties to a transaction involving digital assets to choose the law that applies to their transaction for commercial law purposes and incorporate the choice into their CER. If the parties do not choose a governing law in the CER, the law governing for the system on which the CER is recorded will apply. Otherwise, the law of the District of Columbia will apply. Such default choice-of-law rules are useful, among other reasons, because transactions for items like cryptocurrency frequently occur across state and international lines.
- **Transition rules.** The UCC amendments will be effective on the effective date in the enacting legislation. However, to protect any lenders who hold a security interest in digital assets that were perfected under the prior rules, there will be a transition period during which the lender's priority will be maintained. This provides a grace period during which the parties to a pre-existing loan agreement can renegotiate terms as necessary and comply with provisions of the new law to ensure their respective interests remain protected.
- **Tangible and Electronic Money.** "Money" is defined under the UCC as a medium of exchange authorized by a domestic or foreign government and was presumed under many UCC rules to exist only in tangible form. Recently, some countries' central banks have proposed creating virtual currencies to supplement or replace traditional forms of money, and at least two countries have adopted the virtual currency Bitcoin as an alternate form of legal tender. An amendment to the Article 1 definition of money clarifies that governmentally created forms of money may be tangible or electronic and that pre-existing virtual currencies, like Bitcoin, while they maybe CERs, are not "money" for purposes of the UCC. New amendments in Article 9 provide that a security interest in "electronic money," i.e. virtual currency created by a government's central bank, like a security interest in a CER can only be perfected through control.
- **Chattel Paper.** "Chattel paper" is defined under the UCC as a record containing both a monetary obligation and a security interest in goods, e.g. the documents governing an automobile loan. The 2022 amendments modify this definition to refer to the right to payment evidenced by the record, rather than to the document itself. This makes the rules for chattel paper more consistent with the new rules for CERs. Similarly, the rule governing control of electronic chattel paper is amended for consistency with the rule governing control of CERs.
- **Hybrid Transactions.** Articles 2 and 2A of the UCC apply to the sale and lease of goods, respectively, and not to contracts for services. The line between these categories has blurred with the emergence of transactions involving both the sale or lease of goods and the provision of other property or services. As a result, a new rule is needed for these hybrid transactions. The UCC amendments provide that, absent the parties' agreement otherwise, the UCC rules will apply to a hybrid transaction if the sale/lease of goods is the predominant purpose of the transaction. If the sale of services predominates, the UCC rules will apply only to aspects of the transaction that involve the sale or lease of goods.
- **Negotiable Instruments.** Changes to Article 3 clarify that a choice-of-law or choice-of-forum clause included in an instrument does not affect the negotiability of the instrument, and that an image of a negotiable instrument (i.e., photos of the front and back of a check) may be substituted for the actual instrument in accordance with federal banking regulations.
- **Terminology.** Various UCC provisions are amended to replace obsolete terms that applied only to transactions on paper. For example, the term "sign" is redefined to include electronic signatures, the term "record" is substituted for "writing" to encompass electronic documents and the term "conspicuous" is redefined to apply more broadly to the terms of both paper and electronic agreements.
- **Enactment.** The UCC is a product of the American Law Institute and the Uniform Law Commission. The 2022 amendments were drafted over a multi-year period by a drafting committee appointed by both organizations. More than 300 observers from user groups participated in the drafting process. The amendments were approved by the ALI in May 2022. The ULC approved them in July 2022. There is a demand for these amendments to deal with new technology. They will be submitted to the states for enactment in 2023. All of the states are expected to enact them by the end of 2024. ■

Edwin Smith was Chair of the Drafting Committee for the 2022 Amendments to the UCC. Professor Juliet Moringiello was Vice Chair of the committee. Benjamin Orzeske is Chief Counsel of the Uniform Law Commission. Jack Burton was an observer to the drafting committee, representing the other New Mexico Uniform Law Commissioners.

Business Without Borders

Business Restructuring for Immigrant Entrepreneurs

By Joaquín Sánchez-Leal

Immigrants play a vital role in New Mexico's economy as nearly one in ten residents and one in eight workers is an immigrant. Immigrant entrepreneurs in New Mexico generate hundreds of millions of dollars in business revenue per year. In 2018, 18,935 immigrant business owners accounted for 17% of all self-employed NM residents and generated \$319.5 million in business income.¹

The COVID pandemic forced businesses across the state to close their doors, leaving thousands of workers unemployed until businesses could recover. For undocumented immigrants, their options for employment and economic recovery are limited due to an immigration system riddled with obstacles, delays and border politics. Where lawful employment is not an option under the US immigration system, entrepreneurship is a lawful alternative for undocumented immigrants under the federal tax system and the New Mexico Secretary of State.

In 1996, the Internal Revenue Service (IRS) created the Individual Tax Identification Number (ITIN),² a tax-processing number, to allow income-earning foreign nationals in the US without a Social Security Number to report their incomes to the IRS. The IRS is required to protect taxpayer privacy and information, which is a fundamental cornerstone of the US tax system to encourage tax-reporting. See Confidentiality of return information, 26 U.S.C. § 6103(a). Since the IRS protects taxpayer privacy, the ITIN is not an immigration enforcement tool within the purview of the Department of Homeland Security. For many immigrant individuals and head of households, who do not have a Social Security Number or are "out of status," the ITIN is invaluable. In addition to reporting income, the ITIN can be used to apply for an Employer Identification Number (EIN) with the IRS, after incorporating a business in the state, thereby creating a pathway for the lawful formation of a business by the immigrant entrepreneur regardless of their immigration status.

Entrepreneurship plays a fundamental role in establishing roots and stability in the US and this dynamic is particularly true for the immigrant entrepreneur. Those who are undocumented or



otherwise lack legal immigration status may have no other financial option. While an undocumented immigrant cannot legally work for an employer in the US as a traditional W-2 employee, an undocumented immigrant is free, independent of her or his immigration status, to create and conduct business and pay taxes in the US. For many immigrant entrepreneurs, this option is their only lifeline. For New Mexico businesses, this alternative creates an opportunity to form new businesses in the state to bridge the gap between businesses that need a service and the immigrant entrepreneurs who can deliver it. The key IRS restriction on such an arrangement is that both parties must be able to demonstrate a business-to-business relationship as determined by the IRS in a twenty-factor test³ that aims to distinguish between employees and independent contractors. For businesses with grandfathered undocumented workers that are looking to restructure their business, the IRS currently provides these employers with an opportunity under Section 6103 to make the mutual transition necessary to conduct more business without borders. ■

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Endnotes

¹ Immigrants in New Mexico: Facts Sheet, American Immigration Council, (August 6, 2020), <https://www.americanimmigrationcouncil.org/research/immigrants-in-new-mexico>

² The Facts About the Individual Taxpayer Identification Number (ITIN), American Immigration Council, (March 14, 2022), <https://www.americanimmigrationcouncil.org/research/facts-about-individual-taxpayer-identification-number-itin>

³ Independent Contractor (Self-Employed) or Employee?, Internal Revenue Service, (August 26, 2022), <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee>

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