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New Jersey Pay-to-Play Law Ensnares Another Contractor: Business Loses $7 Million in Contracts Over $500 'Inadvertent' Contribution

By D. Mark Renaud and Brandis L. Zehr

A New Jersey paving contractor recently learned firsthand why New Jersey's pay-to-play laws have a reputation for being among the harshest in the country. Last month, an appellate court upheld the state's decision to rescind its contracts with Della Pello Paving, Inc. (Della Pello)—valued at nearly $7 million—over a $500 contribution that Della Pello inadvertently made to the Somerset County Republicans. Della Pello is also barred from receiving any new state contracts for the remainder of Governor Chris Christie's term. New Jersey's pay-to-play law and Executive Order prohibit companies with government contracts of $17,500 or more from making political contributions over $300 to the governor (or lieutenant governor), a candidate for governor (or lieutenant governor), a legislative leadership committee, or any state or local political party.

According to the court's opinion, in April 2014 Della Pello received an invitation to attend a fundraising event on behalf of the Somerset County Republican Organization, a local political party, and the Committee to Elect Palmer and Zaborowski, a local candidate committee. The event invitation stated that contribution checks could be made payable to either committee. Della Pello's $500 contribution check was made payable to the "Somerset County Republican Org to Elect Provenzano." (Provenzano was a local candidate who was

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Heavy Penalties Assessed against Unregistered Lobbyist in Chicago

$90,000 for One Email

By Carol A. Laham and Louisa Brooks

2017 is shaping up to be an expensive year if you are an unregistered lobbyist in Chicago. In mid-February, the Chicago Board of Ethics assessed an eye-popping $92,000 in fines against David Plouffe and Uber for Mr. Plouffe's failure to register as a lobbyist for nearly five months after first communicating with City officials by email.

Then, at its Feb. 24 meeting, the Board voted to issue notices to four additional individuals, finding probable cause

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Supreme Court Passes on Judicial Review of Campaign Finance Reporting Laws

By Jan Witold Baran and Eric Wang

In what could have been the most consequential campaign finance case to arise since the 2010 *Citizens United* decision, the Supreme Court of the United States declined late last month to consider a challenge to the federal "electioneering communication" reporting requirements, which were enacted as part of the 2002 "McCain-Feingold" law. For many organizations burdened by the enormous challenge of complying with campaign finance and lobbying disclosure laws not only at the federal level, but in all 50 states and countless municipalities too, the Court's pass on articulating a clearer standard for judicial review of such laws was disappointing.

So-called "electioneering communication" laws exist in some form at the federal level and in more than half of the states (although they may not always use the term "electioneering communications"). These laws require sponsors of public communications that merely refer to candidates or elected officials, typically within a specified time period before an election, but that do not advocate for the candidates' election or defeat, to file campaign finance reports and/or include special disclaimers on the communications. Many ads that are commonly known as "issue" or "grassroots lobbying" ads may become entangled in these laws (in addition to the lobbying laws in some states).

The Supreme Court upheld the federal electioneering communication law in 2003 against a facial challenge. Nonetheless, the Independence Institute, a 501(c)(3) nonprofit think tank in Colorado, saw an opening in the Court's 2003 decision for an as-applied challenge based on the Institute's particular circumstances. Specifically, the Institute planned to run television ads in 2014 within 60 days before the November election asking Coloradans to urge their home state senators, Sen. Michael Bennett and then-Sen. Mark Udall, to support a criminal justice reform bill that was pending before the U.S. Senate.

Under the McCain-Feingold law, sponsors of electioneering communications are required to file a report with the Federal Election Commission (FEC) within 24 hours of the ads' dissemination any time more than $10,000 is spent on such ads. The reports must disclose not only how much was spent and to whom payments were made, but also the names and addresses of certain donors to the organization sponsoring the ad.

In other recent litigation, then-Congressman and now Sen. Chris Van Hollen of Maryland challenged the FEC's implementation of the electioneering communication law. Specifically, the FEC's regulations generally only require sponsors of electioneering communications to disclose the donors of funds earmarked "for the purpose of furthering electioneering communications." Van Hollen alleged this donor disclosure requirement was impermissibly narrow in not requiring more disclosure. After two groups, one of which was represented by Wiley Rein's Election Law & Government Ethics Practice, intervened to defend the FEC's donor privacy-favorable disclosure rule, the U.S. Court of Appeals for the D.C. Circuit upheld the FEC's rule last year. (*Election Law News*, Nov. 2016)

Nonetheless, the Independence Institute objected to filing these reports altogether. The Institute contended that its communications were genuine issue ads, for which the governmental interest

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Supreme Court Passes on Judicial Review of Campaign Finance Reporting Laws *continued from page 2*

in disclosure of election-related campaign spending did not justify the reporting burdens on the Institute.

Under the Supreme Court's long-standing jurisprudence dating back to the 1958 *NAACP v. Alabama* case (for disclosure requirements generally) and the 1976 *Buckley v. Valeo* case (for campaign finance disclosure requirements), disclosure laws are subject to the "exacting scrutiny" standard of judicial review. As the Court explained in the 2010 *Citizens United* decision, this standard "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."

However, according to the "jurisdictional statement" the Independence Institute filed with the Supreme Court, many of the lower courts—including the D.C. Circuit in the Institute's case—"routinely uphold[] virtually any disclosure regime" without properly applying this rigorous standard of review. Rather, courts have applied a standard akin to the far more permissive "rational basis" test. Thus, the significance of the Independence Institute's challenge concerned not only the federal electioneering communication law, but also potentially all campaign finance and lobbying disclosure laws across the nation, and even so-called "pay-to-play" laws that impose additional disclosure requirements for political contributions by government contractors and their covered directors, officers, personnel, and other related individuals.

In other words, had the Supreme Court agreed to hear the Independence Institute's challenge and given more teeth to the "exacting scrutiny" test, all of these other disclosure laws could have come under renewed scrutiny, and some may not have withstood the more rigorous standard of judicial review. Instead, the Supreme Court, without issuing any written opinion, summarily affirmed the D.C. Circuit's decision upholding the application of the electioneering communication law to the Independence Institute.

Wiley Rein's Election Law & Government Ethics Practice, which filed an *amicus* brief on behalf of the U.S. Chamber of Commerce in the Independence Institute case, counsels clients on all federal and state campaign finance, lobbying, and pay-to-play disclosure laws, and also represents clients in litigation challenging these laws. ■

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Heavy Penalties Loom for Unregistered Lobbyists in Chicago
$90,000 for One Email *continued from page 1*

to conclude that they engaged in lobbying and similarly failed to register. It also issued a notice to one registered lobbyist who failed to disclose reportable lobbying activity on a quarterly report. Each of these individuals has until March 13 to rebut the Board's findings. If they are unable to do so, the individuals will be subject to fines for failing to comply with the city's lobbying ordinance.

Chicago's Governmental Ethics Ordinance covers any person who acts to influence legislative or administrative action as part of his or her job duties, regardless of whether the person is formally designated as a lobbyist by his or her employer. An individual must register as a lobbyist within five business days following the first lobbying communication. The structure of the ordinance makes Chicago a "zero threshold" jurisdiction, meaning that an individual who makes even a single phone call—or writes a single email—to attempt to influence covered government action must register and report as a lobbyist.

The penalty for failing to register is steep: $1,000 for each violation, with "each day that a violation continues [constituting] a separate and distinct offense." Thus, the fine for failing to register is $1,000 per day, starting on the sixth day after the first communication. This fine is assessed against the individual lobbyist, who bears the responsibility to register in Chicago. The lobbyist's employer is also subject to a fine of up to $2,000, for employing a lobbyist who then fails to register.

The Board of Ethics' recent enforcement activity makes clear that it takes the registration requirement and the penalties seriously and will not treat violators with leniency. In the case of David Plouffe, the Board found that he triggered registration by sending a single email on November 20, 2015, but did not register until April 13, 2016. This left "a total of 95 business days between the date of lobbying and the date of registration." Chicago Bd. of Ethics, Final Determination of Lobbying Violations, Case No. 17005.LOB. The Board thus fined him $90,000 ($1,000 per day for each day after the five-day registration window expired, as directed by the ordinance). The Board noted it would have imposed the same fine whether Mr. Plouffe had lobbied every day until registering on April 13, or whether the November 20 email was his only communication. "[H]ow many times one lobbies while unregistered is irrelevant to the violation or to the calculation of the fine." *Id.*

Any penalties to be assessed against the five individuals who received notices from the Board are likely to be determined at the Board's next meeting on March 15.

The penalties in Chicago serve as a timely reminder of the potential consequences of ignoring state and local lobbying laws. Many localities across the country now have lobbying ordinances, which vary widely in their requirements, registration windows, and penalties for violations. We regularly advise clients on compliance with these lobbying laws and are available to discuss any concerns about your organization's activities. ■

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New Jersey Pay-to-Play Law Ensnares Another Contractor: Business Loses $7 Million in Contracts Over $500 'Inadvertent' Contribution *continued from page 1*

not running for reelection that year.) The contribution check was deposited into the local political party's bank account, and Della Pello reported the contribution on its next pay-to-play contribution report.

It wasn't until Della Pello received a letter from the New Jersey Department of Transportation notifying the company that it was rescinding a recently awarded $3 million paving contract that Della Pello realized the error. According to the opinion, the company had intended to support the candidate committee, which would have been legal. Della Pello sought reconsideration, but the Department of Transportation, State Treasurer, and eventually a state appellate court, found their arguments unpersuasive. (During the appeal process, the Department of Transportation rescinded a second paving contract worth approximately $4 million.)

Although New Jersey's pay-to-play law provides a safe harbor for such "inadvertent" contributions, it requires that the donor request and receive a refund of the contributions within 30 days of when the contribution was made. Della Pello promptly requested and received a refund once it learned of its error, but because this was done more than a year after the contribution was made, the safe harbor wasn't available to the company.

Della Pello isn't the only contractor to recently become ensnared by New Jersey's pay-to-play laws. As we previously reported, the CEO of a state contractor was sentenced to four years in prison for his role in a scheme to evade New Jersey's pay-to-play laws by reimbursing employees for their contributions.

As these cases demonstrate, New Jersey's pay-to-play laws leave no room for error. Wiley Rein's Election Law and Government Ethics Practice has extensive experience assisting companies seeking or holding state contracts in complying with New Jersey's state and local pay-to-play laws. ■

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South Dakota Reverses Course on Campaign Finance and Ethics Overhaul

By Caleb P. Burns and Stephen J. Kenny

Last November, South Dakota voters approved Initiated Measure 22 (IM-22), an ambitious overhaul of the state's campaign finance and ethics laws. Among the changes were significant decreases in contribution limits, enhanced disclosure for groups running pre-election advertisements, and a new limit on gifts from lobbyists and lobbyist employers to public officials.

Soon after IM-22's approval, however, a number of state legislators brought a lawsuit in state court seeking to enjoin the law. The court agreed with the legislators that several portions of IM-22 were likely unconstitutional and preliminarily enjoined its enforcement until the court could rule on the merits. The court further held that the potentially unconstitutional portions could not be severed from the constitutional ones, so the law would stand or fall together.

Now the courts will not get a chance to weigh in on the constitutionality of IM-22. The state legislature recently passed, and Governor Dennis Daugaard signed, legislation that repealed IM-22. The legislation included an emergency clause, which meant that it took effect immediately and could not be repealed by voters in a future referendum. At the same time, a number of bills relating to campaign finance and ethics reform have been circulating the legislature. The state House of Representatives, for example, approved a bill that limits the amounts out-of-state persons may contribute to ballot question committees.

The Governor also recently signed legislation that reinstates limits on gifts from lobbyists and lobbyist employers to public officials, although with more exceptions than contained in IM-22. Like the provision in IM-22, the recent legislation allows an official to accept gifts from a lobbyist or lobbyist employer with a value of up to $100 annually. Unlike IM-22, however, this legislation permits the limit to be adjusted for inflation, does not apply the limit to staff members, and exempts food and beverages provided for immediate consumption under $75.

Wiley Rein is closely monitoring the developments in South Dakota and is prepared to help clients navigate campaign finance and ethics laws there and across the country. ■

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FEC Commissioner Ann M. Ravel Resigns from Agency, Others May Soon Follow

By Michael E. Toner and Andrew G. Woodson

On March 1, Democratic Federal Election Commission (FEC or Commission) Commissioner Ann M. Ravel resigned from the agency where she had served since October 2013. While Commissioner Ravel's departure still leaves the Commission with five of its six members in place, the terms of the remaining commissioners have already expired, leading some insiders to predict that President Trump will appoint a whole new set of commissioners by this time next year.

As she departed the agency, Commissioner Ravel received praise in some quarters for her willingness to use her position to publicly call out her Republican colleagues for—in her view—failing to faithfully enforce the law, particularly in the area of donor disclosure by 501(c) organizations. Ravel's critics, on the other hand, including *The Wall Street Journal*, criticized her partisanship and push to regulate free political postings on the Internet.

Setting these issues aside, however, Commissioner Ravel's tenure was noteworthy for several instances where she actually teamed up with her Republican colleagues. For example, in October 2014, Commissioner Ravel broke a long-standing stalemate by voting with the FEC's three Republican Commissioners to conform the agency's regulations to the Supreme Court's 2010 and 2014 decisions in *Citizens United v. FEC* and *McCutcheon v. FEC*, respectfully. (Other FEC Democratic commissioners had balked at updating the FEC's own regulations to reflect these decisions unless new disclosure rules for nonprofits were included as part of the final deal.) Ravel also voted with the FEC's Republicans to dismiss an enforcement matter against Wal-Mart, approving a 2-for-1 charitable matching program the company had set up to incentivize PAC contributions by company employees. During their time together, Commissioner Ravel and Republican Commissioner Lee E. Goodman also teamed up to work on redesigning the FEC's website, a project that is scheduled to debut later this year.

According to various news reports, Commissioner Ravel intends to teach an ethics course at the University of California-Berkeley in the coming months, and she also will serve on various boards and remain active in this area of law.

Apart from Commissioner Ravel's departure, published reports suggest that several other commissioners may be looking to leave the agency later this year. For example, in an interview with *The Hill* posted earlier this month, Commissioner Goodman announced that he is looking to leave the FEC sometime in 2017.

Given that former Republican FEC Commissioner Don McGahn is now President Trump's White House counsel, it is likely that the views of any future Republicans appointed by the President to the FEC will be consistent with those of the three current Republican Commissioners (who either served with or are ideologically close to Mr. McGahn). Nevertheless, anytime that new appointees are added to a federal agency, there is some chance that their views on substantive and/or procedural issues will differ from those of their predecessors. So the changing personnel at the Commission is worth keeping an eye on in the months ahead to see what impact the new lineup will have on the interests of the business, nonprofit, and campaign communities. ■

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2017-2018 Contribution Limits

The chart below outlines federal contribution limits for individuals and PACs for the 2017-2018 election cycle. The chart reflects adjustments to certain contribution limits for inflation made by the Federal Election Commission.

	RECIPIENT						
	Senate Campaign Committee	House Campaign Committee	National Party Committee National Committee (RNC/DNC)	National Party Committee Congressional Committee (NRSC/DSCC/ NRCC/DCCC)	State, District and Local Party Committees (Federal Accounts)	Traditional	Super PAC
DONOR Individual	$2,700 per election	$2,700 per election	$33,900 per year (main account) $101,700/year (convention) $101,700/year (bldg. account) $101,700/year (legal account)	$33,900 per year (main account) $101,700/year (bldg. account) $101,700/year (legal account)	$10,000 per year combined	$5,000 per year	Unlimited
DONOR Multicandidate PAC	$5,000 per election	$5,000 per election	$15,000 per year (main account) $45,000/year (convention) $45,000/year (bldg. account) $45,000/year (legal account)	$15,000 per year (main account) $45,000/year (bldg. account) $45,000/year (legal account)	$5,000 per year combined	$5,000 per year	Unlimited

SPEECHES/UPCOMING EVENTS

Real Time Challenges, Real Time Answers
Carol A. Laham, Speaker
State Government Affairs Council 2017 National Summit
March 30, 2017 | New Orleans, LA

Corporate Political Activities 2017: Complying with Campaign Finance, Lobbying and Ethics Laws
Jan Witold Baran, Co-Chair
Caleb P. Burns, Speaker
Practising Law Institute
September 7-8, 2017 | Washington, DC

Plan Ahead: Annual New Jersey Pay-to-Play Filing Due March 30!

Business entities that in 2016 received $50,000 or more in contracts with state or local government agencies in New Jersey must file an annual disclosure statement of political contributions with the New Jersey Election Law Enforcement Commission by March 30, 2017.

This "Business Entity Annual Statement" (Form BE) requires electronic reporting of cash contributions of any amount and non-cash contributions in excess of $300 to a long list of campaign, party, and political committees. Reportable contributions include those made by the business entity, the owners of more than 10% of the business entity; principals, partners, officers, directors, and trustees of the business entity (and their spouses); subsidiaries directly or indirectly controlled by the business entity; and a continuing political committee that is directly or indirectly controlled by the business entity.

Reports are due even if no reportable contributions have been made. For more information, see the New Jersey Election Law Enforcement Commission website. Wiley Rein has extensive experience with this annual report as well as with the labyrinth of other pay-to-play laws in New Jersey and elsewhere around the country. ■

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