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NEWSLETTER

Regulated Industry Contribution Bans at Issue in Illinois Fight Over Marijuana Money

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Indiana may have been "Mary Jane's" home state in Tom Petty's iconic song about cannabis, but the neighboring state of Illinois wanted to limit her political rights. In 2013, Illinois enacted a ban on campaign contributions from medical marijuana businesses. A federal district court judge recently ruled the ban was unconstitutional, and the state has appealed the decision. The fight to exclude Ms. Jane from Illinois state politics should remind both lawmakers and campaign donors of some important aspects of campaign finance law that are often overlooked.

Illinois legalized medicinal marijuana in 2013, but it kept the industry on a very tight leash. Under the pilot program, a maximum of 22 cultivation centers and 60 dispensaries are permitted, and both types of businesses are required to obtain permits from state regulatory agencies.

As part of the pilot program, the Illinois state law prohibited these businesses, as well as any of their political action committees (PACs), from contributing to any candidates for state office. Libertarian Party state candidates who wished to receive contributions from medical marijuana businesses challenged the law. In late March 2017, Judge John Z. Lee of the U.S. District Court for the Northern District of Illinois held that the contribution ban was overbroad and the state lacked sufficient justification for it.

Under the Supreme Court of the United States' long-standing framework for contribution laws, making campaign contributions is a constitutionally protected form of political association subject to "intermediate scrutiny." This means that contribution limits and prohibitions must further a "sufficiently important" governmental

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interest and be "closely drawn to avoid unnecessary abridgment of associational freedoms."

Judge Lee held that Illinois had failed to provide any justification for why the state's existing limits on contributions were insufficient to address the state's purported interest in preventing corruption related to the marijuana industry. The judge also questioned why lower limits on contributions from medical marijuana businesses would not be a narrower means of addressing the corruption concern than an outright ban on contributions.

While the judge did not apply the more stringent "strict scrutiny" standard of judicial review for laws that regulate speech on the basis of content, the judge held that Illinois' singling out of the medical marijuana industry undermined the state's purported interest under the intermediate scrutiny standard of review. The judge noted that other highly regulated industries in Illinois, such as liquor and riverboat gambling businesses, were not subject to contribution bans.

Similar to the ruling on the Illinois law, a federal judge in Missouri earlier this month also invalidated a ban on contributions to Missouri state PACs from certain "heavily regulated industries," including state-chartered bank and trust companies, loan and investment companies, development finance corporations, insurance companies, railroad corporations, telegraph and telephone companies, and rural electric cooperatives. Missouri voters enacted the ban last year as part of the "Amendment 2" constitutional initiative (***Election Law News, November 2016***). Applying the "intermediate scrutiny" standard of judicial review, Judge Ortrie D.

Smith held that the ban was not "closely drawn" to further a "sufficiently important interest" to prevent corruption because "[t]he heightened risk of a quid pro quo exchange simply does not exist in a contribution to a PAC that independently decides how to spend a contributor's funds." (Amendment 2 separately prohibited all corporations from making contributions directly to candidates – a prohibition which was not challenged in the litigation.) The judge stayed the decision for 45 days, however, to allow Missouri a chance to file an appeal.

The Illinois and Missouri rulings do not categorically prohibit these or other states from enacting special campaign contribution restrictions or prohibitions on certain industries. However, they should serve as reminders to lawmakers that such laws must respond to specific, demonstrable corruption associated with the particular industries that are being singled out for special treatment. Moreover, any mechanisms that are enacted must have a sufficiently close nexus to addressing the purported corruption.

Conversely, the cases also may provide a road map for challenges against similar laws in other jurisdictions where there is insufficient evidence of corruption, or where the laws are drawn in a manner that is insufficiently close to addressing corruption. In Illinois, the fact that the contribution ban was enacted simultaneously with the legalization of medical marijuana, and prior to the state having had any experience with legalized marijuana's purported corruptive effect on state politics, certainly did not help in the state's defense of the law.

For donors, the Illinois and Missouri cases also should serve as a reminder that it is not enough merely to ensure that one's contributions are within the generally applicable amount limitations and source prohibitions. Many states have additional laws that may impose special contribution restrictions on certain regulated industries. For example:

- Georgia prohibits contributions to candidates for state Executive branch offices from entities (and any persons or PACs acting on their behalf) that are licensed or regulated by an elected Executive branch official or a board under the jurisdiction of such an official;
- Louisiana prohibits contributions to state candidates and PACs supporting or opposing candidates from entities involved in the gaming industry and from certain affiliated individuals;
- Mississippi prohibits campaign contributions to state Public Service Commission candidates and employees from businesses regulated by the agency and from certain affiliated individuals;
- New Jersey broadly prohibits political contributions from companies involved in banking, railroad, telephone, gas, electric, canal, aqueduct, and casino businesses, among others, as well as from certain affiliated entities and individuals.
- New York prohibits public utilities from using "revenues received from the rendition of public service within the state" to make political contributions.

These special contribution restrictions that apply to certain regulated industries are sometimes confused with "pay-to-play" laws, which are even more ubiquitous and are another layer of restrictions that companies must watch out for. Pay-to-play laws apply to companies holding government contracts and, oftentimes, entities and individuals affiliated with those contractors. Similar to the laws that apply to regulated industries, pay-to-play laws may involve special prohibitions or limitations on contributions, as well as additional disclosure requirements.

Wiley Rein's Election Law practice group advises clients on the regulated industry and pay-to-play contribution laws that exist nationwide, and will continue to monitor and provide updates on how Illinois's "dance with Mary Jane" goes on appeal, as well as any further developments in the Missouri case.