wiley

NEWSLETTER

Ruling on New Jersey Regulated Industries Contribution Ban Raises Questions

July 14, 2021

A federal district court judge ruled last month that New Jersey's ban on political spending by certain regulated industries is unconstitutional with respect to independent expenditures. At the same time, the ruling upheld the ban for direct contributions to candidates and political parties. The ruling, which was issued in response to a challenge brought by the New Jersey Bankers Association (NJBA), raises two important questions: one for similar bans (including so-called "pay-to-play" laws) in other jurisdictions, and one for corporate PACs in New Jersey specifically.

As *Election Law News* has reported on previously, a number of states purport to ban political spending from persons and entities involved in certain regulated industries, such as marijuana and gambling. Since 1911, New Jersey has banned companies involved in banking, insurance, railroads, telephone service, public utilities, and other functions from "pay[ing] or contribut[ing] money" in connection with state elections. The state Attorney General's office has interpreted the provision very broadly to cover, for example, a car manufacturer with an auto financing division as "banking." The office also has applied the ban to corporate parents and affiliates of regulated entities.

In response to the NJBA's challenge to the law, U.S. District Court Judge Brian Martinotti held that New Jersey's ban is unconstitutional with respect to regulated industries making independent expenditures (i.e., independent political spending that is not given to or coordinated with candidates or political parties). The ruling included relatively little analysis on this issue, suggesting that the point was obvious. Martinotti cited to the U.S. Supreme Court's holding in *Citizens United* and a related lower court's holding in *SpeechNow.org* that, because "independent expenditures do not corrupt or give the

Authors

D. Mark Renaud
Partner
202.719.7405
mrenaud@wiley.law

Practice Areas

Election Law & Government Ethics
Federal & State Pay-to-Play Compliance

appearance of corruption as a matter of law … the government can have no anti-corruption interest in limiting" independent expenditures.

This holding regarding the application of New Jersey's ban to regulated industries' independent political spending raises questions for similar bans in other jurisdictions. Specifically, if independent expenditures are not corrupting as a matter of law, then how can any jurisdiction's ban on political spending by regulated industries or government contractors (so-called "pay-to-play" laws) be constitutional as to independent expenditures? Indeed, the U.S. Court of Appeals for the Second Circuit, for example, struck down Connecticut's state pay-to-play law with respect to independent expenditures in 2010, shortly after *Citizens United*.

Not all jurisdictions have followed this approach, however. For example, under the federal law's ban on political contributions by federal contractors, the Federal Election Commission (FEC) has continued to maintain that the ban applies to contributions to federal super PACs that only make independent expenditures.

As for the portion of Judge Martinotti's ruling upholding New Jersey's ban on regulated industries making direct contributions, the decision raises questions that could possibly favor PACs of covered corporations. Under the federal law, corporations are prohibited from making contributions in connection with federal elections but are permitted to pay for their PACs' establishment, administrative, and solicitation costs. In contrast, the New Jersey Attorney General's office has long maintained that the state law prohibits covered corporations from paying for their PACs' costs. Instead, if employees at covered corporations wish to form a PAC, they must pay for their PACs' costs themselves.

In upholding New Jersey's regulated industries ban with respect to direct contributions, Judge Martinotti reasoned that covered corporations still had an outlet for political participation in New Jersey through PACs. He appeared to draw an analogy between the federal law's treatment of corporate PACs and the New Jersey state law. However, as explained above, and as the NJBA pointed out in its litigation brief, the federal law and New Jersey law (as interpreted by the state Attorney General's office) are not comparable. Martinotti's reasoning throws into question whether the Attorney General's office should reevaluate how it applies the state's ban to corporate PACs. Alternatively, Martinotti's ruling on the contributions issue may be premised on a mistake.

As of the time of this article's publication, the ruling in *NJBA* has not been appealed.