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New Jersey: Federal Appeals Court Opens Door for Some Regulated Industry Contributions

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As avid *Election Law News* readers likely know, New Jersey has long prohibited many "regulated" corporations from contributing to state candidates and political parties and making independent expenditures (IEs) on their behalf. But a recent decision from the U.S. Court of Appeals for the Third Circuit may open the door to contributions and IEs from these entities' trade associations.

New Jersey law prohibits corporations involved in a wide variety of regulated industries – including banking, insurance, and utilities – from paying or contributing funds to "aid or promote the nomination or election of any person [or] political party." In 2018, the New Jersey Bankers Association (NJBA) sued the New Jersey Attorney General, arguing that (1) the statute's prohibition on independent expenditures violated the association's First Amendment rights and (2) the total ban on contributions by regulated corporations exceeded the state's interest in preventing *quid pro quo* corruption. In a 2021 decision, a federal district court judge held that the statute's prohibition against independent expenditures violated the First Amendment. But the district court upheld the contribution prohibition, noting that 18 other states have laws somewhat similar in scope and concluding that utilizing monetary limits and/or requiring additional disclosures would not be nearly as effective in preventing corruption.

The New Jersey Attorney General and NJBA cross-appealed this decision to the Third Circuit, which took a different analytical path. The three-judge court re-focused on the statutory text in their generally unanimous decision. It concluded that the prohibition only applies – as relevant here – to entities that are actually "carrying on

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the business of a bank." In the court's view, since the NJBA did not "receive, lend, and transmit money, [or] issue notes which are used as money," neither the IE nor the contribution prohibition applied to it. The appellate court recognized that this decision conflicted with a 2001 New Jersey Attorney General's interpretation but concluded that the plain statutory language had to control. In particular, the court pushed back against the argument that its interpretation would lead to an "absurd" result and specifically explained that a trade association like NJBA is "less likely to pose a risk of *quid pro quo* corruption because their member banks have varying interests, whereas individual banks have uniform interests. . . . What one [multi-state bank, community bank, or credit union] member bank considers to be favorable legislation may be harmful to another member bank. It follows that the member banks are unlikely to seek a uniform *quid pro quo* from political actors." As a result of its statutory interpretation, the appellate court declined to consider the First Amendment issues.

This decision provides relief to the NJBA, but there are some questions over whether the opinion *de facto* extends to trade associations in other industries. For example, the phrase "of banks" and similar terms abound throughout the opinion, and the decision technically applies only to "trade associations of banks." But the principles underlying the court's decision seemingly apply equal force to almost any other trade association. So this decision may well open a path for many trade associations. That said, before non-banking associations start making contributions or IEs, we recommend obtaining guidance from the Attorney General's Office to confirm that it will not apply the prohibition to your particular trade association.