

BY-LINED ARTICLE

Keep Your Contributions to Yourself: Pa. General Assembly Abrogates Supreme Court Gaming

Decision

By Frank DiGiacomo and Vincent J. Nolan III

April 7, 2010

The Legal Intelligencer

Pennsylvania gaming industry licensees, principals and executives are once again restricted from making political contributions. Along with at least two other gaming states — New Jersey and Michigan — the commonwealth is clamping down on the industry's political largesse.

Section 1513 of the Pennsylvania Race Horse Development and Gaming Act, first signed into law on Nov. 1, 2006, bans all political contributions by certain individuals affiliated with licensed gaming in the commonwealth.

In April 2009, however, in its decision in *DePaul v. Commonwealth, Pennsylvania Gaming Control Board*, the Pennsylvania Supreme Court struck down Section 1513 as violating the state constitution. In conjunction with recent amendments to the act to legalize table games, the state Legislature took the opportunity to respond to the *DePaul* decision by amending the act to correct the constitutional infirmity.

That amendment was signed into law on Jan. 7. Thus, it appears that Section 1513 is again effective and its ban on political contributions by casino industry principals and others should be obeyed.

Section 1513 and its Penalties

For a defined class of people associated with gaming in Pennsylvania (including licensees in the commonwealth or other jurisdictions, manufacturers, principals and key employees, among others), Section 1513 imposes an absolute ban on political contributions to any candidate for public office, political party committee, or group or association organized in support of a candidate or political committee in the commonwealth. The act also prohibits those individuals from making political contributions to any organization that has been solicited by, or knowing that the contribution or a portion thereof will be contributed to, an elected official, executive-level public employee or candidate for nomination or election to a public office in the commonwealth.

Penalties for a violation of Section 1513 are steep. Depending on which class of persons has committed the violation and how many offenses have occurred, the penalties range from a minimum fine of \$100,000 up to loss of licensure.

The Constitutional Challenge to Section 1513

Peter DePaul, an investor in Philadelphia Entertainment and Development Partners, or PEDP — a partnership awarded one of the Pennsylvania gaming licenses whose casino was to be named after its best known partner, Foxwoods — challenged the constitutionality of Section 1513 after facing a fine for violating it. The case went to the Pennsylvania Supreme Court, which, with one justice dissenting, held that Section 1513 was unconstitutional. The court concluded that an outright ban on all political contributions violated the state constitution's guarantee of freedom of expression.

The court, however, based its decision on very narrow grounds. In Section 1102(11) the act stated that one of its objectives was "to prevent the actual or appearance of corruption that may result from large campaign contributions." In light of that expressed intent, the court held, "Banning all contributions is not a narrowly drawn means of furthering a policy of negating the corrupting effect and appearance of large contributions." According to the court, Section 1513 banned a protected form of political expression that was unrelated to the identified interest of the act in light of the availability of more narrowly tailored restrictions such as a limitation on the size of contributions, rather than an absolute prohibition.

This conflict between the expressed legislative intent of one of the act's policy goals and the language of Section 1513 was the sole basis for the court's decision that Section 1513 was unconstitutional. On this limited basis, the court enjoined enforcement of Section 1513.

The dissent described what Justice Seamus P. McCaffery saw as a flaw in the majority's opinion. According to McCaffery, the enactment of Section 1513's prohibition on political contributions by gaming industry principals was supported by several other policy goals stated in Section 1102.

The Legislature Abrogates the Decision

Rather than amending Section 1513 to set contribution limits as suggested by the majority opinion, the General Assembly took its cue from McCaffery and amended Section 1102(11) to remove the offending statement of legislative intent, "prevent[ing] the actual or appearance of corruption that may result from large campaign contributions," from Section 1513.

The General Assembly then added two new subsections to Section 1102, greatly broadening the statement of legislative intent with respect to political contributions. Those subsections provide:

- (10.1) The General Assembly has a compelling interest in protecting the integrity of both the electoral process and the legislative process by preventing corruption and the appearance of corruption which may arise through permitting any type of political campaign contributions by certain persons involved in the gaming industry and regulated under this part.
- (10.2) Banning all types of political campaign contributions by certain persons subject to this part is necessary to prevent corruption and the appearance of corruption that may arise when political campaign contributions and gaming regulated under this part are intermingled.

The Legislature did not set limits on the contributions or otherwise alter the prohibition on contributions in Section 1513(a) at all. In other words, since the Supreme Court's holding of unconstitutionality was based solely on the conclusion that the absolute ban on political contributions did not comport with the stated legislative intent, the General Assembly simply changed the statement of legislative intent.

The Status of Section 1513

The sole pillar supporting the DePaul case's reasoning has now been removed from the statutory scheme and replaced with a different statement of intent geared toward justifying the complete ban on political contributions. Although this is a somewhat unusual maneuver, it should result in Section 1513 being enforceable and valid, at least for the moment.

While technical arguments could be made that the Supreme Court enjoined enforcement of Section 1513 and that injunction is still in place absent subsequent action by the Supreme Court, it appears that the DePaul opinion itself has little prospective validity, leaving Section 1513 presumptively enforceable.

Of course, the ultimate fate of Section 1513 and the effect of the General Assembly's actions remains to be seen. Given the finding that Section 1513 was deemed unconstitutional because it conflicted with the stated legislative intent, the Supreme Court declined to address other constitutional challenges to Section 1513 raised by DePaul . Those challenges may be revived in subsequent litigation.

Nevertheless, those who fall within the ambit of Section 1513's prohibition would do well to conform their behavior to the mandates of that section until such time as the Supreme Court again rules on the constitutionality of Section 1513.

Frank A. DiGiacomo is a partner in the trial practice group of Duane Morris in Cherry Hill. He practices in the areas of gaming law, commercial litigation and general regulatory matters. DiGiacomo has experience representing casinos, casino holding companies, slot machine manufacturers, financial institutions, private investors, building contractors, casino vendors and other gaming and lottery related technology-based companies before the N.J. Casino Control Commission, Pennsylvania Gaming Control Board and other gaming regulatory bodies.

Vincent J. Nolan III is an associate in the firm's trial practice group in Cherry Hill. He practices in the area of complex commercial, financial services and construction litigation, with extensive experience handling appeals.

This article originally appeared in The Legal Intelligencer and is republished here with permission from law.com.