

Presentation to The Summit of the States
June 1, 2006
Relationship Between State Law and Compacts¹

I will focus on four areas within the broad and fascinating field of Compact analysis.

Three of these involve examination of important legal issues; (1) under what circumstances can an authority, commission or other entity created by a compact entered into by or among multiple states (hereinafter, a “compact entity”) be required to comply with statutory or other enactments of one founder state; (2) if statutes or other enactments of a single founder state are deemed to govern a compact entity then (a) are such statutes deemed to “amend” the existing compact, and (b) what process is required for such amendment; (3) under what circumstances will a compact entity be entitled to protection under the 11th Amendment doctrine of sovereign immunity. The fourth topic, however, is both legal and pragmatic; (4) how do attorneys representing compact entities evaluate their choices (when there are choices²) as to which court would be the best location in which to litigate a particular case. I will start with this pragmatic issue then pass on to the important issues of legal analysis which have assumed center stage in the lives of several compact entities in the past few years.

¹ The material contained herein and expressed during our presentation represents my personal views and opinions and does not represent my “official” opinion or view in my role as General Counsel of the Delaware River Port Authority, nor does it represent the position of the DRPA. Nothing herein should be ascribed to Jeff Litwak, other than to the extent that he was kind enough to invite me to participate.

² As Jeff Litwak will tell you, the Columbia River Gorge Commission, by virtue of its Compact provisions, has no access to Federal Court for interpretation of its Compact, so Jeff does not need to consider this problem. He has plenty of other issues to occupy his day.

I. Choose Your Poison

State Courts versus Federal Courts in the Context of Litigation Involving a Compact Entity

One of the first decisions, if not the first decision, to confront counsel representing a compact entity following notice of a lawsuit, or in the rarer situation where such counsel is considering filing a lawsuit on behalf of the Compact entity, is whether the matter would be better addressed in Federal or state court. For some compact entities this may also involve choices among the courts of several founder states but I will avoid this contentious issue and focus on the State v Federal question which is amply contentious.

More often than not, the issue will arise when counsel for the compact authority has received notice of suit against her client, and attorneys refer to the decision being considered as “removal” as in, should the case be removed to federal court. Again, most litigation that compact authorities see is filed against them, and is most often filed in a state court. The factors that counsel will consider in evaluating the removal decision may include local issues such as the likelihood of a substantial jury award in state court, the received wisdom of the local bar regarding the composition and sympathies of state versus federal juries, and considerations related to the sensitive question of judicial standards.

In our local area the received wisdom³ presents a stark contrast: state juries (those sitting in Philadelphia or Camden) are perceived as ardently pro plaintiff and redistributionist, federal juries are composed of hardy farmers from rural areas who tend to favor defendants; state judges never grant dispositive motions so every case goes to the jury; federal judges evaluate motions based on legal principles so a defendant can often either avoid trial entirely or at least reduce the scope of trial through motion practice. The reality, of course, is more complex and will differ from jurisdiction to jurisdiction and from judge to judge but this type of thinking tends to underlie counsel's initial evaluation of the removal issue.

Because removal motions must be made promptly following notice of suit⁴ the decision to seek removal (or not to do so) must be made far in advance of any discovery. The standards governing the timing of removal require:

The notice of removal of a civil action or proceeding shall be filed within thirty days⁵ after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
28 U.S.C. § 1441 (b)

There are, as one might expect, numerous fascinating sub issues, such as how to you cope with cases where there are multiple defendants who are served on differing dates?

However these issues are beyond the scope of this article.

³ This summary is intended to be somewhat humorous, but it does reflect many years of discussions with trial counsel in Pennsylvania and New Jersey.

⁴ The rules governing what constitutes notice may differ from circuit to circuit so local counsel should be consulted.

⁵ And note, this [*3] thirty-day requirement "cannot be extended by consent of the parties or order of the court." Crompton v. Park Ward Motors, Inc., 477 F. Supp. 699, 700 (E.D.Pa. 1979).

Another point to be considered in deciding whether removal is available arises from the jurisdictional provisions of the removal statute:

Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter [[28 USCS §§ 1441](#) et seq.], the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. §1441

In most cases, compact entities find that jurisdiction is based upon the concept of “federal question” jurisdiction.

Because congressional consent transforms an interstate compact within [the Compact Clause] into a law of the United States ... the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question. Cuyler v Adams, 449 U.S. 433, 438 (1981).

Counsel must consider whether the case at issue does present any question requiring interpretation of the Compact, and if it does not, then some other source of jurisdiction must be found. For instance, compact agencies involved in the transportation trade see a lot of personal injury litigation. Most of this will have been filed by plaintiffs who reside in a founder state. In such cases there is little chance of keeping a case in federal court as there is no jurisdictional basis.

The implications of the language of Cuyler, quoted above, is that in interpreting a compact or issues that affect a compact, any court will have to determine matters of federal law, and it is well decided that state courts have full power to determine matters of federal law as federal courts have power to decide matters involving state law. Therefore, in deciding whether to remove, counsel must consider whether and how a state court will apply federal law in determining relevant issues that may arise in the subject litigation. Our experience has been that state courts begin by reciting the Cuyler quotation then rapidly move away from federal law concepts into the more familiar pasture of state decisions. Strategically, there could be situations where a compact entity would be well advised to stay in state court, but in practice the “received wisdom” set forth above tends to overwhelm such strategic niceties.

The next issue is whether or not you can ‘hold’ the removal; that is whether the Federal Court will retain the case or “remand” it back to state court. Courts in general, whether state or federal, are not fans of forum shopping and our federal courts are overloaded with litigation⁶ so they are often predisposed to remand the case to state court. Efforts to secure a remand might be based upon the lack of federal jurisdiction or due to a procedural error in seeking the removal in the first place⁷.

A single case with which I am painfully familiar illustrates a number of points central to this topic. In 1996 the DRPA was sued in New Jersey state court by the union

⁶ And State courts are even more overloaded.

⁷ The removal rules are beyond the scope of this paper, but note the subtle issues involved in cases where there are multiple defendants. See e.g. Pocono Springs Civic Assn. v Rich One, Inc. and David Petti, 2001 U.S. Dist. LEXIS 2667

representing our patrol officers. The union asserted that under the laws of both founder states (Pennsylvania and New Jersey) police and fire personnel represented by unions had a right to binding interest arbitration⁸. We discussed the removal issue with counsel in the context of the status of the law in each potential jurisdiction (New Jersey or the Federal Courts) on the question of what laws would bind a Compact Entity. At that moment the law on this topic broke down as follows: New Jersey appeared to adhere to the strict version of the rule, i.e. that the founder states could impose further duties on the Compact entity only if the founder states had enacted legislation that (i) specifically called for application to the compact entity, and (ii) that the legislation adopted in the two states was substantially similar or identical. The law in the federal courts was less clear because the issue had not arisen in our Circuit. We decided to allow the case to remain in the New Jersey state court system unaware that one of our fellow bi-states was already defending a case in the New Jersey courts that would dramatically alter the legal landscape. That case is International Union of Operating Engineers, Local 68 v Delaware River and Bay Authority. 147 N.J. 433; 688 A.2d 569; 1997 N.J. LEXIS 42

⁸ That is, arbitration to determine issues to be included in a forthcoming collective bargaining agreement such as wages and other terms of employment as opposed to standard arbitration which deals with disputes regarding an existing collective bargaining agreement.

II. A Matter of Interpretation; Standards for Judging Legislation

Jeff Litwak will have plenty to say on this topic, so I will focus my report on issues that have arisen among the many multistates in our area, specifically in Pennsylvania, New Jersey, New York and Delaware. But I would begin with a short historical note; one may wonder what led to the creation of compact entities in the first place, and how does that affect their powers and attributes. The majority of all compact clause entities, and there are a lot of these, have been created to attend to problems such as allocation and preservation of water or other natural resources where the natural resources in question exist in, or have an impact on, more than one state. However, in the case of the (predominantly eastern) transportation oriented compact entities a principle factor leading to the creation of such entities was the perception that the risk and cost of constructing the facilities being contemplated was beyond the capacity of private industry. Out of this concept flowed the idea that the new compact authority needed to have free rein in constructing the facility in order to reduce costs and increase efficiency. That factor gives rise to some of the concern that compact authorities are not controlled by any discernable regulations⁹. With that as a preamble, let's proceed to some specific legal issues.

Over the past several years I have often been asked to provide advice on legal issues that are directly impacted by the current anomalous state of compact entity jurisprudence in

⁹ Such main stream legislation as OSHA and NLRA does not cover interstate bridges, for instance.

our region. The resultant memoranda sound like the classical legal advice ... “on the one hand, on the other hand” but even worse. In fact, my memoranda state that if the matter at issue were to be litigated in the federal courts we believe the outcome would be X, but if the litigation takes place in the state courts of New Jersey, the outcome will likely be Y, and if the case is tried in the state courts of Pennsylvania, why then we are not so sure, but we lean toward X again. All in all, not the kind of advice a lawyer wants to give or a client wishes to receive.

Picking up where I left off in section I, as our case was in its infancy, DRBA v IUOE Local 68 was heading to the New Jersey Supreme Court and in February of 1997 the Supreme Court of New Jersey ruled that:

A bi-state agency, although subject to unilateral jurisdiction of a single creator state only when the compact recognizes the state's jurisdiction, "may be subject to complementary or parallel state legislation that does not intrude on the mission of the agency." *Ampro, supra, 127 N.J. at 610, 606 A.2d 1099*. Although a single state may not unilaterally impose its will on a bi-state agency, the creator states together may subject the agency to complementary or parallel state legislation. *Eastern, supra, 111 N.J. at 400-01, 545 A.2d 127*. Separate legislative acts are complementary or parallel if they are substantially similar in nature. *Id. at 401, 545 A.2d 127*. Legislation is substantially similar if the creator states evidence some showing of agreement in the laws involving and regulating a bi-state agency. *Id. at 402, 545 A.2d 127*.
IUOE Local 68 at 445 (emphasis added).

The case on which the Court relies for its conclusion that complementary and parallel means “substantially similar in nature” is Eastern Paralyzed Veterans Association v Camden, 111 N.J. 389; 545 A.2d 127 (“EPVA”) and the EPVA case, in turn, relies on Nardi v Delaware River Port Authority, Nardi v. Delaware River Port Authority, 88 Pa.

Commw. 558, 490 A.2d 949 (Pa. Commw. Ct. 1985)¹⁰. As discussed briefly in footnote 10, below, there is substantial reason to believe that Eastern and Nardi do not support the conclusion reached in Local 542, and that this decision is contrary to the federal law concepts which are to govern compact interpretation. But Local 542 remains the law in the state of New Jersey.

Our local federal courts have also been heard from in this regard. In a case that might also have been considered under Section I, above, DRPA decided in 2002 to seek a declaratory judgment in federal court holding that DRPA was not legally obligated to recognize FOP Local 30 as bargaining agent for a new unit of DRPA police supervisors. As summarized in the Circuit Court opinion on appeal in this Declaratory Judgment action,

The District Court granted the DRPA's motion for summary judgment, concluding that under federal constitutional and statutory law, the DRPA Compact can only be amended by legislation of both New Jersey and Pennsylvania that (1) "expressly applies" to the DRPA; and (2) is "substantially similar" in substance, imposing specific additional duties on the DRPA. *DRPA v. Fraternal Order of Police*, 135 F. Supp. 2d 596, 606-09 (E.D. Pa. 2001). Because neither legislature expressly applied their state's labor laws to the DRPA, the District Court ruled the DRPA was not obligated to comply with state laws regarding union recognition and collective bargaining for law enforcement officers.

DRPA v FOP Local 30, Superior Officers, 290 F.3d 567 at 570-571; 2002 U.S. App. LEXIS 9430.

¹⁰ In its IUOE Local 542 v DRJTBA opinion, the Third Circuit criticized the New Jersey Supreme Court position as follows, "... the New Jersey complementary or parallel standard appears to be based on a misinterpretation of compact law. The New Jersey Supreme Court based the complementary or parallel test articulated in Local 68 and Bunk on Eastern Paralyzed Veterans Association, Inc. v. Camden, 111 N.J. 389, 545 A.2d 127 (N.J. 1988) and Nardi v. Delaware River Port Authority, 88 Pa. Commw. 558, 490 A.2d 949 (Pa. Commw. Ct. 1985). See Local 68, 688 A.2d at 575; Bunk, 676 A.2d at 122. A closer reading of these two cases, however, reveals that neither stands for the proposition that express legislative intent is unnecessary. Rather, both cases lend further support to the New York express intent test governing the application of the "concurrent in" language, asking first whether the two states have passed legislation that expressly applies to the bi-state entity, and then whether that legislation is substantially similar. See Malverty, 524 N.E.2d at 422." IUOE Local 542, 311 F.3d 273; 2002 U.S. App. LEXIS 23787

However, the Circuit Court reversed because it concluded that the earlier New Jersey state court decision in FOP Local 30 v DRPA barred consideration of this matter based on the principle of issue preclusion.

This Circuit Court decision was seized upon by the New Jersey Supreme Court as evidence that their original view, expressed in IUOU Local 68, had been adopted by the United States Circuit Court¹¹. However, for now the United States Circuit Court has had the last word; in its subsequent decision in IOUE Local 542 v Delaware River Joint Toll Bridge Authority, the Third Circuit Court of Appeals carefully analyzed the very issues that form the substance of this paper, and concluded

We cannot subscribe to the view espoused by the New Jersey Supreme Court in Local 68 that the mere existence of similar public policies set forth in each state's collective bargaining laws is enough to imply an intent on the part of both states to amend the Compact and apply those laws to the Commission.

The Circuit Court explicitly adopted the rule established in a series of New York cases.

The Court's analysis is worth quoting at length,

The New York standard was most clearly articulated by the Court of Appeals of New York in Malverty v. Waterfront Commission of New York Harbor, 71 N.Y.2d 977, 524 N.E.2d 421, 422, 529 N.Y.S.2d 67 (N.Y. 1988). In Malverty, the petitioner sought to apply New York Corrections Law to the Waterfront Commission of New York Harbor, a bi-state agency established by New York and New Jersey and approved by Congress. 524 A.2d at 421. The compact creating the Waterfront Commission included authorization "to amend and supplement the Interstate Compact, to implement the purposes thereof, by legislative action of either State concurred in by legislative action of the other State." Id. at 422. The Malverty court found "the absence from the text and legislative history of [the Corrections Law] of any reference to the Waterfront Commission, coupled with the absence of an express statement that the Legislature was amending or

¹¹ In a footnote in the Court's decision in IOUE Local 542 v Delaware River Joint Toll Bridge Authority the Circuit Court stated, "Recently, the New Jersey Supreme Court characterized our ruling in Lodge 30 as having endorsed New Jersey's view that express statements are not required to modify bi-state compacts. Ballinger v. Del. River Port Auth., 172 N.J. 586, 800 A.2d 97, 102 (N.J. 2002). We do not read our ruling as having reached the merits issue.

supplementing the provisions of the 'Compact' and that [the Corrections Law] would take effect upon the enactment by New Jersey of legislation of identical effect," to indicate that the New York legislature had never intended the Corrections Law to apply to the Waterfront Commission. *Id.* The court noted, "That the two States have evinced the same, or similar, public policy regarding employment opportunities for former inmates by enacting similar 'antidiscrimination' laws is not sufficient under the express terms of the 'Compact' to render it properly amended or supplemented such that the Commission would be subject to the provisions of [New York's Corrections Law]." *Id.* (citations omitted). It thus viewed the "concurrent in" language to require an express statement to that effect. *Id.* at 277

In its conclusion, the Circuit Court finds, as one basis for affirming the District Court, that it is persuaded "...by the logic of the reasoning underpinning the New York express intent standard, which the District Court here found to be persuasive." *Id.* at 280

However, the decision in *IUOE Local 542* raises another distinction among Compact entities, or maybe not.

Judge Rendell points out in her opinion that Compacts differ in addressing the question of how they may be amended, if at all. Discussing the question of whether amendment of a compact by way of state legislation requires an express statement in the legislation to the effect that the statute is to apply to the compact entity in question, the Judge states,

This issue has been treated differently by different courts. In nearly every one of these cases, courts have been presented with a compact that addresses the issue of modification by including language enabling one state to modify the compact through legislation "concurrent in" by the other. See, e.g., Pa. Stat. Ann. tit. 36 § 3503, Art. IV(e) (West 2002) (Delaware River Port Authority); N.Y. Unconsol. Law § 6408, Art. VII (West 2002) (Port Authority of New York and New Jersey). Here, the Compact contains no "concurrent in" language.
IUOE Local v DRJTBA 542 F. 3d at 276

In sustaining the District Court's grant of Summary Judgment on behalf of the DRJTBA, the Circuit Court relied, at least in part, on this lack of "concurrent in" language and concluded,

"Having reviewed the state of the law on this issue, we agree with the District Court that, given the facts of this case and the unique nature of this Compact, New Jersey and Pennsylvania have not exhibited any express intent to amend the Compact or apply their collective bargaining laws to the Commission's employees. We are persuaded, first, by the fact that the Compact does not contain any provision enabling either state to modify it through legislation "concurrent in" by the other¹²..." Id at 279- 280.

III. AMENDING THE EXISTING COMPACT

The question of what process must be utilized in order to amend a compact has almost been lost in the rapid exchange of theories regarding the right of any one founder state to adopt laws that apply to a compact entity. Although much of the case law analysis of the latter issue has focused on the concept that by adopting such laws the founder state or states are, in effect, amending the compact, there has been little discussion of the implications arising from conceiving of the state action in that way.

We must begin with the clear language of the United States Constitution. Article I, Section 10, Clause 3 of the United States Constitution (the "Compact Clause") empowers states to enter into interstate compacts. The Compact Clause specifies that "[n]o State shall, without the consent of Congress . . . enter into any Agreement or Compact with another state. . . ." *U.S. Const.* art I, § 10, cl. 3. Returning again to those days of

¹² As noted above, the Court was also persuaded by the logic of the New York express intent standard.

yesteryear when the United States Constitution was being drafted in my home town, Philadelphia, the many questions regarding how the concept of federalism would work in practice occupied the lion's share to the debate in what is now Independence Hall and in nearby taverns. A group of fiercely independent states that had just secured their independence from England were little inclined to give up sovereignty without due assurances regarding the manner in which they would be governed under the new federal structure. See, e.g. Jack Rakove, Original Meanings, Knopf 1996. The corollary of the state concerns was a concern that absent some control of state actions the federal government might be eroded and sapped of authority through the creation of state compacts designed to avoid federal control. The Compact Clause is one of the devices intended to achieve the necessary balance.

Although the language of the Compact Clause seems plain enough, courts have interpreted it to mean that Congressional approval is required only in cases where the contemplated interstate agreement might impinge on the authority of the federal government. *Cuyler v. Adams*, 449 U.S. 433, 440, 101 S. Ct. 703, 707, 66 L. Ed. 2d 641, 649 (1981) (holding Compact Clause does not apply to agreements not "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States"); *Virginia v. Tennessee*, 148 U.S. 503, 519-21, 13 S. Ct. 728, 734-35, 37 L. Ed. 537, 543 (1893) (distinguishing those compacts not encroaching upon federal power from those that may encroach upon that power).

Referring back to the prior section, the opinion in DRJTBA contains an aside referring to the views on one member of the three judge panel,

We do not need to reach the issue of whether the presence of ‘concurring in’ language would be a sufficient demonstration of intent nor whether Congress would also have to consent to any modifications. Judge Roth is of the opinion that in the case of a bi-state compact that contains no provision for amendment, Congressional consent to any modification would be required.
DRJTBA 542 F. 3d at fn 7

Here we see Judge Roth using the term “modify”, in other places the word is “amend” and in some places courts and litigants have avoided the question by saying things such as “,, [the multistate authority] may be subject to ...” legislation of one state concurred in by the other(s). Let us put the question as baldly as possible; if we assume that a particular Compact is approved by the United States Congress in the first place, (with or without the ‘concurring in’ provision) then are we to assume that by doing so the Congress abdicated all authority to control subsequent changes (under whatever name they may be found) by the simple act of approval? I think that all of us could easily conjure up examples that would make plain that this cannot be the intent of the Compact Clause nor of Congress in approving a particular compact. As noted above, the DRJTBA Compact did not contain “concurring in” language and that explains the wording of the Circuit Court opinion, but one wonders whether this might be a distinction without a difference. Does Congress, by approving a compact that includes a procedure for amendment at the state level, thereby give up all authority and control over subsequent changes in the Compact? Again, that seems unlikely to have been the intent of Congress.

There is substantial case law dealing with when a particular state statute would be deemed to amend a Compact in a manner requiring state concurrence and Congressional approval. Henderson v Delaware River Joint Toll Bridge Commission dealt specifically with this point:

Congressional approval is not necessary to every step taken by a State in an effort to carry out a duly approved compact with another State. In Virginia v Tennessee, [cit. omit.] Mr. Justice Field, speaking for the Supreme Court, said, --'Looking at the clause [of the Constitution, Article I, Sec. 10, cl. 3] in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.

Henderson, 362 Pa. 475 at 487; 66 A.2d 843 (1949). See also, Stearns v Minnesota, 179 U.S. 223 at 246 (... "there are many matters as to which the different states might agree without formal consent of Congress.").

In Henderson, the Court concluded that the Pennsylvania legislation merely assisted the DRJTBC in carrying out the very mission established by the Congressionally approved Compact and therefore neither derogated from the contract into which Pennsylvania had entered nor expanded the political power of the States at the expense of the federal government, and therefore no Congressional approval was needed.

How then, would the distinction between compacts with or without 'concurred in' language apply to the analysis in Virginia v Tennessee, Stearns v Minnesota, and Henderson? I am not sure. Passing this nice question, and accepting the concept that some Compact changes will not require Congressional approval, and accepting also the basic point that some interstate agreements do not require congressional approval in the first place, we are left seeking some body of law that would establish one of Justice O'Connor's bright lines so that we may distinguish between those changes that rise to the

level of “amending” a Compact and that require Congressional approval and those changes that do not require such approval. My own view is that the analysis will be little affected by the question of whether or not the original Compact does or does not contain language authorizing amendment and establishing a process for amendment. I base this conclusion on my view that the inclusion of an amendatory process in a congressionally approved Compact would not be deemed a waiver of Congress’s Constitutional power to approve interstate agreements. The Supreme Court has stated that courts should not find a surrender of sovereignty unless it has been "expressed in terms too plain to be mistaken." Jefferson Branch Bank v. Skelly, 66 U.S. 436, 446, 17 L. Ed. 173 (1861). Although the entities potentially surrendering sovereignty in that case were states, the same principle must apply to the federal government itself.

Thus we are left with an understanding that there are some situations in which states can enact laws that will affect a Compact entity without Congressional approval (at least in cases where the subject Compact includes an amendment process) and there are other situations in which state laws affecting an existing Compact will require Congressional approval. We do not have much guidance as to how to distinguish between the two situations.

III. COMPACT ENTITIES and the Eleventh AMENDMENT

Another relatively obscure, but important, distinction among compact entities determines whether a particular entity is, or is not, subject to sovereign immunity under the 11th Amendment. The recent decision in Lizzi v. Alexander, 255 F.3d 128 establishes the principle that compact entities that are not “self supporting” will enjoy sovereign immunity while those that are “self supporting” (more about this below) will not. Quoting from the decision in Lizzi,

In Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 130 L. Ed. 2d 245, 115 S. Ct. 394 (1994), the Supreme Court held that the Port Authority Trans-Hudson, an interstate compact entity, could not claim sovereign immunity. See Hess, 513 U.S. at 52-53. But the Court in Hess relied heavily on the fact that the Port Authority did not receive any funding from any state. Instead, it was a "self-sustaining" agency. Id. at 50. Indeed, the Court in Hess specifically distinguished the Port Authority from WMATA because WMATA was not self-sufficient. Id. at 49-50. Thus, the conferral of Eleventh Amendment immunity on WMATA "is compatible" with the holding in Hess. Id. at 50 n.20.

The DRPA Compact includes explicit provisions for the prompt repayment of funds advanced by the founder states at the commencement of our existence (see, Compact Art. VI, 35 P.S. Sec. 3503 et seq.; NJSA 32:3-8), and also makes clear that

“Notwithstanding any provision of this agreement, the Commission shall have no power to pledge the credit of the Commonwealth of Pennsylvania or the credit of the State of New Jersey or the credit of any county, city, borough, village, township, or other municipality of the said Commonwealth or of the said State, or to create any debt of said Commonwealth or said State or of such municipality.” Id. at Art. VII.

I would like to suggest that although the rationale set forth in Lizzi has some logic, the decision as to whether or not an entity is “self sustaining” could have deeper implications.

Before doing so, however, I must acknowledge another and issue that distinguishes one compact entity from another. As noted in Lizzi, the WMATA Compact contained, as do most compacts, a “sue and be sued” provision. Although the WMATA Compact contains such a provision, it explicitly limited the extent to which WMATA waived its Eleventh Amendment sovereign immunity¹³. Few other Compacts contain such limited provisions.

The legal point I would make is simply that many Compacts now authorize the authority thereby created to engage in economic development activities within its geographical region. Various compact entities possess economic development authority conferred upon them by their founder states with the approval of Congress. These compact entities

have expended substantial amounts over the years on projects that benefit regional economies. Absent these investments by compact entities from whence would the funds have come to finance these projects? Of course the answer may be that some of these projects would not have advanced as planned or at all, but in cases the answer may be that the funds would have come from the states or local governments. Note also that by their nature such economic development activities sponsored by compact entities have a

¹³ A topic to be considered in drafting or amending a compact.

double benefit to the states; the states do not pay the costs, but the states (and local governments) reap the benefits in tax revenues¹⁴.

If the rationale behind the finding in *Lizzi* is that sovereign immunity protects states, as sovereigns, from the potential for an attack on their treasuries by protecting those entities such as WMATA, for which they retain economic responsibility in law, but does not protect entities for which the states bear no such legal responsibility, then I suggest that the courts might wish to analyze the real economic effect upon founder states of allowing costs to be assessed against “self sustaining” entities that provide substantial relief to state treasuries through their economic development activities.

¹⁴ In the case of transportation authorities, for instance, there may be some increase in revenues due to increases in economic activity.

