Independent Expenditures and Election Influence

By Jonathan W. Hugg / Oct 03, 2014

It's election time, and our business clients should view this as an opportunity. Nowadays, any mundane business issue—from land development and taxation to product packaging and worker benefits—can mean dealing with local government, which usually means coping with predatory local politics.

For a corporation needing to influence inflexible municipal decision-making and attitudes, the options historically have been unsatisfactory. There is the hard power approach of coercive litigation. It feels strong and righteous. However, zero-sum lawsuits are expensive and uncertain and the ultimate destroyer of goodwill over the long term.

Then there is the soft power strategy of more gentle persuasion and lobbying. This seems constructive and logical. In reality, however, this is usually the slow slide to appeasement, as local politicians exploit the situation to demand costly concessions that may have nothing to do with the requested relief, but which the business feels it has no choice but to allow.

If corporations were people, they would simply "vote the bums out" and give money to elect new, more sympathetic officials. Despite populist rhetoric to the contrary, corporations still are not people, and they still cannot vote, but as of August, it is now legal in Pennsylvania for corporations (and unincorporated associations, including labor unions) to make political contributions to political committees making "independent expenditures" to influence local and state elections.

The case was General Majority PAC v. Aichele, 2014 U.S. LEXIS 111905 (M.D. Pa. 2014). Considering the usual partisan alignments in the recent debates over campaign finance reform, it is somewhat ironic that the sole purpose of the plaintiff, General Majority PAC, was to influence state legislative elections by making independent expenditures in support of Democratic candidates.

Under Pennsylvania's Election Code, an independent expenditure is spending intended to influence an election, but made without (hence, independent of) coordination, cooperation, collaboration or consultation with a candidate or his or her political committee.

In Citizens United v. Federal Election Commission, 558 U.S. 310 (U.S. 2010), the U.S. Supreme Court held that it was unconstitutional for Congress to restrict independent expenditures by corporations on the ground that corporations have the same free speech rights as individuals, and "no sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations."

However, Pennsylvania's Election Code broadly bans giving and spending by banks, corporations and unincorporated associations "for any political purpose whatever," and likewise bars candidates and political committees from accepting corporate funds. There is no exception for independent expenditures.

General Majority sought confirmation from the Pennsylvania Department of State that, in view of Citizens United, the state would no longer enforce the prohibitions in the Election Code on the receipt of corporate funds, as to political committees created for the sole purpose of making independent expenditures. The department refused. Nevertheless, when General Majority sued and sought an injunction, the department conceded that its position was constitutionally untenable.

The district court therefore held that, as applied to political organizations making independent expenditures, Pennsylvania's prohibition against political committees accepting or receiving contributions from corporations or unincorporated associations, and against corporations and unincorporated associations making political contributions, was unconstitutional. The court permanently enjoined the state from enforcing them.

General Majority opens the door wide for businesses with a political stake in Pennsylvania to contribute to political committees that will in turn use independent expenditures to pursue corporate interests in local and state elections. Pennsylvania does not limit the amount of campaign contributions. Indeed, the U.S. Supreme Court recently struck down aggregate individual caps on federal campaign contributions, and suggested that in the future it would carefully scrutinize base limits on individual giving, in McCutcheon v. Federal Election Commission, 134 S. Ct. 1434 (U.S. 2014).

Thus, under General Majority, there are no limits to donations by a corporation (or an unincorporated association or labor union) to political committees making independent expenditures. Especially at the municipal level, a relatively modest investment may result in a dramatic impact on election results and prove far more efficient and faster than litigation or negotiation with intractable local potentates.

The constraints on this strategy are primarily administrative and bureaucratic. A business must find or even create a credible, well-managed political committee to assist it in a fully compliant manner, so attempted independent expenditures do not backfire and create expensive and embarrassing legal problems. Furthermore, the Pennsylvania Department of State has emphasized that General Majority still requires proper registration and reporting by political committees; in fact, the department's discomfort with the decision will probably result in more stringent review. Political committees making independent expenditures must also commit to being truly autonomous from the candidates they support. A committee must file a statement with the Department of State declaring that it will not contribute to or coordinate expenditures on behalf of any candidate or political committee controlled by a candidate or political party. The department will refer to this new type of political committee as an "independent expenditure committee." The department requires periodic reporting of independent expenditures, including the purpose of the spending. Recipients of public contracts and public companies may also have separate regulatory obligations to disclose their political giving as well.
Adverse publicity may chill corporate enthusiasm for political participation. Political activists will likely attempt to thwart what they deem to be corporate meddling in elections by scrutinizing alleged links between candidates, independent expenditure committees and businesses that may fund them. Candidates and partisans will probably charge that independent expenditures are not really independent, but are instead de facto contributions to their opponents, and that businesses are merely using corporate cash to "buy an election" or engage in "pay-to-play."

However, the rejoinder is that independent expenditures are a constitutionally protected means available to any business to make itself heard on a matter of public importance. Moreover, if a friendly candidate wins, then the public relations sting of an accusation by a losing opponent will quickly pass. After General Majority, now more than ever, corporate clients in Pennsylvania should feel empowered to assert their First Amendment rights and look to the electoral process as a means of resetting their relations with local government.

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