wiley

NEWSLETTER

Corporations Score Partial Victory in Kentucky Contributions Case: Corporate Support for PACs Permitted, Corporate Contributions Still Prohibited

September 2016

Corporations recently scored a partial victory in federal court by securing the right to pay for the administrative costs of their Kentucky state PACs using corporate funds. However, the decision did not strike down altogether Kentucky's ban on corporations using their general treasury funds to make contributions directly to candidates for state office. Instead, the court ordered the ban on corporate contributions to be extended to unions and limited liability companies (LLCs) as well. The ruling, which reflected a settlement agreement between the plaintiff in the case and the Kentucky Registry of Election Finance (KREF), made permanent a preliminary injunction that had been issued in March of this year.

Corporate Contribution Ban Upheld; Corporate Support for PACs Clarified

The disposition of the case did not give Protect My Check, Inc., an incorporated 501(c)(4) advocacy group that brought the challenge, everything it was looking for. The primary relief the plaintiff sought was a ruling invalidating Kentucky's prohibition against corporate contributions as an unconstitutional infringement of corporations' First Amendment rights.

Joining several other federal courts that have ruled on this issue, Judge Gregory F. Van Tatenhove of the U.S. District Court for the Eastern District of Kentucky held that the Supreme Court's 2010 *Citizens United* decision did not invalidate the Supreme Court's 2003

Practice Areas

Election Law & Government Ethics

FEC v. Beaumont decision. According to Judge Van Tatenhove, *Beaumont* upheld the constitutionality of the federal ban on corporate contributions to federal candidates, provided that corporations are still allowed to administer a PAC and to contribute to candidates through such a PAC.

Judge Van Tatenhove acknowledged that *Citizens United* invalidated several of the rationales for the corporate contribution ban – namely, that such a ban prevents corporations from distorting the political process and protects shareholders. However, he reasoned that *Citizens United* did not disturb the corporate contribution ban as a permissible means of preventing "*quid pro quo* corruption."

While upholding Kentucky's corporate contribution ban, Judge Van Tatenhove's final order provided that corporations must be permitted "to administer a state PAC and contribute to state candidates through that PAC in a manner consistent with *[FEC] v. Beaumont*." As the KREF confirmed in a memo to the public issued on July 21, shortly after the judge's final order was entered, "Corporations may sponsor and administer a state Permanent Committee and pay the state PAC's administrative expenses from corporate funds," and unions and LLCs also "may sponsor and administer a state PAC, and pay the state PAC's administrative expenses from union or LLC Funds."

This clarifies the uncertain regulation of corporate support for state PACs that had existed previously under the Kentucky statute and KREF guidance – an ambiguity that was noted in the litigation. While the KREF represented in the case that, after the 2010 *Citizens United* decision, the agency no longer prohibited corporations from paying for their PACs' administrative costs, as recently as 2014, the KREF still maintained in an advisory opinion that a corporation's PAC must reimburse the corporation for administrative costs, and a PAC guidance manual that remains on the KREF's website took the same position.

Leveling the Playing Field: Disparate Treatment of Corporations and Unions Invalidated

In another partial victory for the plaintiff, which supports "right to work" laws that are anathema to unions, the final court order extends Kentucky's prohibition against corporate contributions to include also contributions made by unions and LLCs. The KREF had previously interpreted the law to permit contributions by unions and LLCs. Judge Van Tatenhove's decision held that such disparate treatment was unsupported by any evidence that political contributions from corporations pose any greater threat of corruption than contributions from unions and LLCs. According to the ruling, this "arbitrary" legal distinction violated corporations' right to equal protection of the laws under the Fourteenth Amendment.

In several recent campaign finance rulings, the Supreme Court has held that campaign finance laws may not be used to "level the playing field." Rather, it is the law itself that must be level and treat different persons and entities equally. For example:

- Candidates may not benefit from increased limits on the contributions they may accept if their opponents self-fund their campaigns (*Davis v. FEC*, 2008);
- A public funding scheme may not award state funds for candidates based on the amounts spent by their opponents and independent groups (*Arizona Free Enterprise Club v. Bennett*, 2011);

- Aggregate limits may not be imposed on top of base contribution limits to restrict how much individuals may give to all candidates, PACs, and party committees (*McCutcheon v. FEC*, 2014).

The Kentucky decision requiring unions and LLCs to be subject to the same contribution prohibition as corporations is consistent with this jurisprudence, which traces back to the beginnings of modern campaign finance law in the Supreme Court's 1976 *Buckley v. Valeo* decision. What is slightly unusual about the Kentucky decision is that this doctrine is typically used to remove legal burdens, rather than to impose additional legal burdens, as was done to unions and LLCs in this case.

The Big Picture

Slightly less than half of the states prohibit corporations from using their general treasury funds to make political contributions to candidates for state office, and only a handful of states purport to prohibit corporate contributions while permitting union contributions, as was the case in Kentucky. While the federal district court ruling in Kentucky is not binding on those other states where corporations and unions are treated differently, the outcome of this case may encourage similar litigation in those states and may serve as persuasive authority for ending such disparate treatment. As in Kentucky, however, it is unlikely that bans on corporate contributions in those states will be invalidated altogether.

Several other states with prohibitions against corporate contributions also purport to prohibit corporations from using their general treasury funds and resources to support their PACs' administrative costs. The Kentucky ruling also calls into question the constitutionality of those states' restrictions on corporate support for their PACs. In yet another permutation, at least one state permits corporate contributions, but treats corporations' administrative support for their PACs as contributions, subject to dollar amount limitations.