Wiley Rein LLP

Election Law News

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New Life for Corporate Speech—*Wisconsin Right to Life*

By Jan Witold Baran, Thomas W. Kirby and Caleb P. Burns

Political speech by corporations and labor unions during election periods received a major boost in the U.S. Supreme Court's June 25, 2007, decision in *FEC v. Wisconsin Right to Life, Inc.* Wiley Rein's *amicus curiae* brief on behalf of the U.S. Chamber of Commerce was mentioned by the controlling opinion as a sign of the importance of the case.

Corporations and unions still may not expressly advocate the election or defeat of clearly identified candidates or coordinate their ads with candidates. However, they now may refer to candidates while independently broadcasting issue ads during election periods, unless "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

The test is narrowly and strictly applied. It focuses on what is said, rather than the speaker's subjective intent or the likely effect of the speech. Advocacy cannot be forbidden solely because it addresses issues relevant to the election. The speech must be allowed if it has any reasonable meaning other than advocating a candidate vote. And if there is room

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House Passes Its Version of Lobbying Reform

By Jan Witold Baran and D. Mark Renaud

On May 24, 2007, the U.S. House of Representatives passed its version of lobbying reform in HR 2316.

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This bill is the companion piece to S1, which was passed by the U.S. Senate in January. (*See* www.wileyrein.com/electionlawnews_senatelobbybill.) Both bills are now headed towards conference.

Although there are several major differences between the two bills (as discussed further below), they also share many of the same types of reform proposals. Several of these are listed below:

- Increased civil penalties for violations of the Lobbying Disclosure Act (LDA) (although the proposed increase in the Senate is greater);
- Criminal penalties for certain violations of the LDA;
- A prohibition on gifts from lobbyists, lobbying firms, entities that employ in-house lobbyists, and employee-lobbyists to Members, officers and staffers of Congress if such gifts are prohibited by the relevant house of Congress;
- Quarterly LDA reports from lobbyists, lobbying firms, and entities that employ in-house lobbyists (as opposed to semiannual);
- A three-month window to analyze whether someone qualifies as a lobbyist (as opposed to the current six-month window);

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By Carol A. Laham and Andrew G. Woodson

Iowa Simplifies Verified Statement Requirements

Effective July 1, 2007, a Federal PAC making a contribution in Iowa is only required to file a "Verified Statement" with the Iowa Ethics and Campaign Disclosure Board. Previously, Iowa law required a Federal PAC to file a second copy of the Verified Statement with the treasurer of the committee receiving the contribution. A Federal PAC must file the Verified Statement with the Ethics and Campaign Disclosure Board within 15 days of making a contribution to an Iowa candidate or committee.

The new law was contained in former Senate File 39.

Oklahoma Amends Gift and Lobbying Rules

By virtue of legislation (former HB 2110) and action by the Oklahoma Ethics Commission, Oklahoma adopted several new gift and lobbying rules on July 1, 2007. The major changes were two fold. First, the state instituted a gift law aggregation requirement among a lobbyist, all of his or her principals, and all stockholders, employees, officers, etc. of all of the principals. Second, the state banned certain honorariums for elected officials. A copy of the amended ethics rules can be found at http://www.state.ok.us/~ethics/.

Vermont Governor Vetoes Contribution Limits; Legislature May Attempt to Override

On May 30, 2007, Vermont Governor Jim Douglas vetoed S. 164, which would have placed limits on contributions similar to the limits that the Supreme Court struck down as unconstitutional in 2006. The consequence of the governor's action is that Vermont elections will continue to be conducted under state campaign finance laws in effect before 1997. However, on July 11, 2007, the state legislature is planning an attempt to override the veto, which would require a two-thirds majority vote in both state houses.

The vetoed law would have capped contributions to gubernatorial candidates at $1,000 per election; to other state-wide candidates at $750; to state Senate candidates at $500; and to state House candidates at $250. It also would have limited any single source from contributing more than $20,000 in any two year general election cycle. According to the governor's veto message, the proposed limits placed improper obstacles before challengers and non-wealthy candidates, improperly failed to set any limits on PAC contributions, and was far too similar to the law that the Supreme Court has just recently overturned.

As we provided in our September 2006 newsletter (www.wileyrein.com/electionlawnews_vermont), Vermont law currently allows all non-political parties and political committees to contribute up to $1,000 per election to candidates or candidate committees and $2,000 per election cycle to political parties and political committees. Political committees may contribute up to $3,000 per election to candidates or candidate committees. Political parties may make unlimited contributions to candidates or candidate committees.

Virginia Changes Certain PAC Rules

Effective July 1, 2007, the Virginia General Assembly closed a loophole in state law that allowed non-Virginia politicians to create a Virginia in-state PAC for the purpose of avoiding the contribution limits of their home state. For example, according to published reports, former New York Governor George Pataki established a Virginia in-state PAC that received in excess of $500,000 from nine contributors during a two-month span earlier this year. If Pataki had established his PAC in New York, then his committee would not have been allowed to accept such large contributions from so few donors. Moreover, sponsors of the legislation, former H.B. 2852, also noted that contributions from these PACs overwhelmingly were given to candidates in other states rather than Virginia candidate or committees.

Under the new law, in order to register as a Virginia in-state PAC, a newly-formed committee must—at the time of registration—state that it

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Supreme Court Upholds State's Right to Limit Union's Use of Non-Member Fees for Political Purposes

By Jan Witold Baran and Andrew G. Woodson

On June 14, 2007, the United States Supreme Court unanimously upheld a Washington state law requiring public employee unions to obtain consent from non-members before using their fees for election-related activities in the case of *Davenport v. Washington Educational Association*, 2007 WL 1703022 (June 14, 2007).

Generally, states have the power to regulate the relationship between unions and public employees. Thus, states can enact laws requiring non-members to pay union fees because collective bargaining benefits both union members and non-members alike. The Washington state law at issue in *Davenport* prohibited unions from using non-member agency fees for election-related activities unless the non-member "affirmatively authorize[s]" it. The state of Washington and a group of non-union public school teachers sued the Washington Educational Association, a public school employees union, claiming that the union failed to obtain affirmative authorization prior to using the non-members' fees for election-related purposes. The union defended its actions on the grounds that the law violated its First Amendment right of political expression. The Supreme Court only addressed the validity of the law, not the union's compliance with it.

The state of Washington and the teachers appealed to the United States Supreme Court after the Supreme Court of Washington held that the law was unconstitutional. The opinion, authored by Justice Scalia, first pointed out that the state could limit the union's ability to collect fees from non-members to those used exclusively for collective bargaining or it could even prohibit the union from collecting fees from non-members altogether. Thus, the state's affirmative authorization requirement was "simply a condition on the union's exercise of this extraordinary power [whereby the government allows a private group to tax government employees]."

The Court's analysis then addressed two separate issues. First, the Court assessed the Supreme Court of Washington's interpretation of Supreme Court precedent. The Court faulted the Supreme Court of Washington, which had struck down the law as violating the First Amendment, with misinterpreting prior Supreme Court cases. While prior cases had focused on the validity of opt-out provisions, these cases set a floor, not a ceiling, and thus did not prohibit opt-in provisions. Since unions have no constitutional right to non-member fees, the state court had improperly "balanced the constitutional rights of unions and non-members."

Next, the Court turned to the union's First Amendment arguments. The Court held that the law did not violate the union's right to political advocacy under campaign finance law because, while the fees were lawfully in the union's possession, the law did not restrict the union's use of its own money, but its use of "*other people's* money."

The Court also rejected the union's argument that the law was an unconstitutional content-based restriction of speech. Acknowledging that the regulation was indeed content-based since it regulated only election-related expenditures, the Court nevertheless upheld the law. According to the Court, the government may discriminate on the basis of content when it is regulating speech that it could completely proscribe. The Court also noted that "no suppression of ideas is afoot, since the union remains as free as any other entity to participate in the electoral process with all available funds other than the state coerced agency fees lacking affirmative permission."

The Court's holding could limit the pool from which unions draw to finance political expenditures. While the ruling does not make it illegal for unions to generally collect fees from non-members or even for unions to collect fees from non-members and use them for election-related activities, it does permit states to limit unions' use of non-member funds for election-related activities.

In light of this opinion, more states may consider similar opt-in policies

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New Ethics and Campaign Finance Reforms Take Effect in New Mexico

By Carol A. Laham and Andrew G. Woodson

On June 15 and July 1 of this year, a number of changes to New Mexico's gift, ethics and campaign finance statutes became law. Most of the ethics changes were incorporated into former Senate Bill 931, which places single-gift and aggregate dollar limits on the gifts that candidates for state office, state officers and employees, and the families of these individuals may accept from outside sources. These provisions are designed to supplement an old and ambiguously-worded statute that placed few real restrictions on a covered official's ability to accept gifts.

Under the new law, state officers, employees, candidate's for state office, and their families are prohibited from accepting gifts from a "restricted donor" in excess of $250. There are exceptions to the gift limits for, among other things:

- Gifts based on a close personal/ family relationship;
- Reimbursement for certain out-of-pocket expenses when performing a service; and
- Expenses for certain bona fide educational programs related to official duties.

Separate from the gift limits applicable to restricted donors, a registered lobbyist, the lobbyist's employer or a government contractor may not donate gifts of an aggregate market value exceeding $1,000 in a calendar year to any one state officer or employee or to any one candidate for state office. The exceptions to the definition of gift that apply to the $250 "per gift" limit also apply to the $1,000 per year lobbyist, lobbyist employer and government contractor gift restrictions. The new law also restricts the ability of state officers and employees to solicit charitable contributions from businesses, including from corporations regulated by the official's or employee's agency.

Separate from these changes, the New Mexico legislature also passed former Senate Bill 1074, which prohibits prospective state contractors, their representatives, and members of their families from making campaign contributions or providing any "other thing of value" to certain officials and employees during the "pendency of the procurement process." The bill also requires prospective contractors to disclose certain campaign contributions made during the two years prior to the procurement process. ■

Union Fees

(*continued from page 3*)

for non-members. The Washington law was the only law in the country which placed the burden on the public employee union to obtain consent before using non-member fees for election related-purposes. (Prior to the Supreme Court's decision, Washington amended the law by limiting its application.) Laws in other states only require the union to allow non-members to opt-out, placing the burden on the non-member. States may now move to enact more restrictive policies.

The Court explicitly limited its holding to public employee unions, declining to address the validity of a law requiring affirmative authorization as applied to private-sector unions. ■

Upcoming Events

FEC v. Wisconsin Right to Life 2007: The Future of Campaign Advertising Restrictions (Audio Only Live Webcast)

Jan Witold Baran, Faculty

Practising Law Institute's Hot Topic Briefings

July 26, 2007 | 1:00 pm - 2:00 pm

For more information: www.pli.edu/product/webcast_detail.asp?ptid=505&stid=83&id=EN00000000040352

Campaign Fundraising Laws- Compliance when Supporting Future Legislators

Caleb P. Burns, Speaker

CBI's Bio/ Pharmaceutical and Medical Device Government Affairs and Lobbying Compliance Congress: Strategies to Communicate Important Industry Values to State and Federal Legislators in a Changing Environment

July 30-31, 2007 | Washington, DC

For more information: www.cbinet.com/show_conference.cfm?confCode=PC07052&field=summary

FEC Fines Company for Reimbursed PAC Contributions

By Kevin J. Plummer

On May 16, the Federal Election Commission (FEC) announced that Crop Production Services, Inc. (CPS) had agreed to pay a $17,000 fine for improperly reimbursing employee contributions to the Agriculture Retailers Association Political Action Committee (ARA PAC).

As reported in Matter Under Review (MUR) 5638, this action stemmed from annual fundraising auctions that ARA PAC held from 2001 through 2003. At each auction, CPS employees placed the winning bids on pieces of agricultural equipment, as well as made donations to the PAC. CPS reimbursed the employees for their contributions and took possession of the agricultural equipment, which it often traded back to the vendors who had provided the items for the auction. The reimbursements totaled roughly $30,000. According to the conciliation agreement, such reimbursements constituted improper corporate contributions. Under federal law, corporations may not reimburse their employees for their political contributions. ■

House Amends Charity Event Gift Rule

By Carol A. Laham and D. Mark Renaud

In Roll Call No. 416 on May 24, 2007, the House approved House Resolution 437, which, among other things, set the rules for the consideration of HR 2316, the House lobbying reform measure. The resolution also contained, as section 4, a provision that made the charity event exception applicable to lobbyists and entities that retain or employ lobbyists.

Subsequently, the House Committee on Standards of Official Conduct issued updated guidance about the entirety of the new gift rules, revising the section on the charity event exception. This June 14 memorandum can be found at http://www.house.gov/ethics/m_gift_rule_amendments_revised_06_07.htm. ■

Changes in the States (*continued from page 2*)

will make 50% or more of its overall contributions to Virginia registered campaigns and committees. If a committee cannot make such a statement, then it will not be allowed to register with the Virginia State Board of Elections as an in-state PAC. Importantly, this change does not affect Federal PACs (*i.e.*, the new law does not require a Federal PAC to make 50% or more of its contributions to Virginia candidates prior to being able to register with the State Board of Elections). ■

Summary of House Travel Rules*

* This chart was originally published in a memorandum from the Committee on Standards of Official Conduct regarding New Travel Rules for Officially-Connected Travel Paid for by a Private Source. *See* http://www.house.gov/ethics/m_travel_rules_paid_private_source.htm

	Permissible Sponsor	**Lobbyist Involvement in Planning, Organizing, Requesting or Arranging**	**Lobbyist and Foreign Agent Accompaniment**	**Certification, Committee Approval, and Post-travel Disclosure Required?**	**Notes**
One-day Event Trip	Any sponsor OTHER than a lobbyist or foreign agent	De minimis	Not permitted	Yes	Travel may be extended to a two-night stay when determined by the Committee to be practically required for traveler to participate in the one-day event
Trip Sponsored by an Institution of Higher Education	Private universities and colleges	Permitted	Permitted	Yes	
Multiple-day Event Trip	Any sponsor OTHER than a lobbyist, foreign agent, or private entity that retains or employs such an individual	Not permitted	Not permitted	Yes	
Government-sponsored Travel	Federal, state, and local governments, including a public university or college	Permitted	Permitted	No	
Foreign Government-sponsored Travel	Foreign government with a MECEA-approved trip or in-country foreign travel permitted under the FGDA	Permitted	Permitted	No	Special disclosure requirements for FGDA travel

Note: MECEA stands for Mutual Education and Cultural Exchange Act
FGDA stands for Foreign Gifts and Decorations Act

Upcoming Dates to Remember

July 15, 2007	Second Quarter FEC report due from candidates
July 20, 2007	July monthly FEC report due for federal PACs filing monthly
	July monthly IRS Form 8872 due for nonfederal PACs filing monthly*
July 31, 2007	Mid-year FEC report due for federal PACs filing quarterly/semiannually
	Mid-year IRS Form 8872 for nonfederal PACs filing quarterly/semiannually*
August 14, 2007	Lobbying Disclosure Act (LDA) report due
August 20, 2007	August monthly FEC report due for federal PACs filing monthly
	August monthly IRS Form 8872 due for nonfederal PACs filing monthly*

FEC and IRS deadlines are not extended if they fall on a weekend.

* ***Note:*** *Qualified state and local political organizations are not required to file Form 8872 with the IRS.*

House Reform Bill (***continued from page 1***)

- Mandatory electronic filing of LDA reports;
- Certification that gifts have not been provided to Members, officers, or employees of Congress in violation of the law;
- Additional reporting requirements for lobbyists, their employers and their PACs, including reporting of recipients of contributions, events to honor covered officials, payments to certain entities and for certain meetings and retreats, and payments to organizations established, financed, maintained or controlled by certain covered officials; and
- Reporting of "bundled contributions" by lobbyists, lobbying firms and entities that employ in-house lobbyists (although the bills vary greatly as to what constitutes "bundled" contributions and the House also includes "multicandidate political committees" as covered recipients of such bundling activity).

HR 2316 is not, however, a carbon copy of S1. Indeed, there are many provisions in HR 2316 that do not appear at all in S1, including, among other ideas, the following:

- A broad prohibition on lobbying by attorneys or law firms under contract to provide legal services to Members of Congress or Congressional committees or organizations;
- A "reverse revolving door" prohibition on persons entering government service from the private sector; and
- Reports of donations to 527 political organizations by lobbyists, lobbying firms, and entities that employ in-house lobbyists.

HR 2316 also would remove the blanket exception in the House gift rules for gifts and travel provided to House Members and staffers from state and local governments.

HR 2316 does not contain, among other things, the following proposals found in S1:

- Amendments to the private aircraft reimbursement rules for campaign travel;
- Expansion of the scope and length of certain post-employment "cooling off" periods for former Members and staffers; or
- Specific disclosure of certain fundraising events. ■

Supreme Court (*continued from page 1*)

for debate "the tie is resolved in favor of protecting speech."

Chief Justice Roberts wrote the controlling opinion, joined by Justice Alito. Justices Scalia, Kennedy, and Thomas joined in a concurring opinion that wanted to go even further to overrule previously sustained limits on corporate speech. Significantly, Justice Alito indicated he would be willing to go along if the present holding proves unworkable. The remaining four justices dissented.

In the 2003 *McConnell v. FEC* decision, five justices (including the four current dissenters) held that a new statutory limit on corporate and labor union broadcasts that mentioned candidates in the months before elections—"electioneering communications"—was not invalid on its face. The new decision does not squarely overrule that holding. Instead, it establishes that the facially valid standard may not constitutionally be applied to speech that has any meaning other than a call to vote for or against a specific candidate. But the dissenters explained that the practical effect of the new "as applied" standard is to reinstate the "express advocacy" test Congress sought to replace by enacting the "electioneering communication" provision. This, Justice Scalia noted in his concurring opinion, "effectively overrules *McConnell* without saying so."

How exactly advertisers should apply this new standard—"the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate"—in light of the opinions by Justice Souter and Scalia is not immediately apparent. Press reports indicate that the FEC is currently studying its options which may include rulemaking proceedings to provide clearer guidance.

One lesson of the new case is that corporations charged with improper electoral speech should carefully consider an "as applied" challenge to whatever standard is being applied. Also, in an appropriate case, consideration should be given to squarely challenging existing restrictive precedent that slights the First Amendment. ■

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