



Deciphering super PAC double-speak

Published: Sunday, May 27, 2012, 9:09 AM



By **Star-Ledger Guest Columnist**

By **Frank Askin**

As we enter the final stages of the 2012 presidential election, the campaign finance landscape has changed considerably from past elections. While a few of the rules remain the same, the opportunity for the very wealthy — including corporations and labor unions — to play a dominant role has increased exponentially.

Individuals are still limited to donating \$2,500 per election, and corporations and unions are still forbidden to donate directly to candidates (although that prohibition may well be the next shoe the Supreme Court drops).

Unions and corporations can still sponsor political action committees, which can accept contributions up to \$5,000 a year from a union's members or a corporation's shareholders

and executives. And those PACs can still donate a maximum of \$5,000 to a candidate in each election cycle. But those PACs are now totally overshadowed as political funders in the post-Citizens United era.

The landscape has changed in two fundamental ways.

First, the U.S. Supreme Court's Citizens United ruling now allows corporations and labor unions to spend money from their treasuries to urge voters to support or oppose specific candidates. This may actually benefit unions more, since many corporations do not want to offend customers who disagree with their choices.

However, corporations, which have far more cash than unions (as well as publicity-reticent millionaires), can conceal their contributions to the new super PACs by sending funds through nonprofit groups with innocent-sounding names.

Second, there are the super PACs themselves. Super PACs result from the marriage of Citizens United with an appeals court decision called SpeechNow, abetted by two Federal Election Commission advisory opinions. Here, it gets a bit complicated.

Even before the 2010 Citizens United ruling, individuals were allowed to spend money for or against candidates so long as they didn't coordinate with a candidate or a campaign. That rule actually existed since 1974. However, few millionaires took advantage of that rule, partly because they didn't have the infrastructure needed to engage in electioneering, and partly because PAC rules limited donations to \$5,000. The wealthy were more likely to run for office themselves and self-finance their campaigns.

Citizens United opened the floodgates. Since independent, uncoordinated expenditures weren't a corrupting influence, the Supreme Court — which voted 5 to 4 on Citizens United — said there was nothing to prevent corporations from doing the same. The Court of Appeals then took the logical next step and said there was nothing to stop the millionaires (corporate or otherwise) from pooling their contributions. Thus, the super PACs were born; and as long as they weren't making direct contributions to campaigns, they were free to vacuum up all the multimillion-dollar donations they could and spend them to elect (or defeat) the candidates of their choice.

This new campaign reality is helped by a 3-3 partisan split in the Federal Election Commission, whose lax rules allow most anything to count as independent and uncoordinated. Thus, a candidate's chief of staff can resign from the campaign and set up a super PAC with the sole aim of electing the former boss. And the candidate can urge supporters who have already given



Getty Images

Super PACs are playing an unprecedented role in the presidential race between Democratic President Obama and Republican Mitt Romney.

the max to transfer their generosity to the super PAC.

The new, crucial role being played by tax-exempt nonprofit corporations is helped by another Supreme Court decision, together with procrastination by the Internal Revenue Service. The nonprofits being used as funnels to the super PACs may not have electioneering as their primary purpose; at least half their spending must be used for social welfare purposes. But the nonprofits have taken advantage of the court's ruling that, as long as a broadcast message doesn't specifically advocate voting for or against a candidate, it counts as "issue advocacy," not electioneering. So if an ad merely denounces a candidate as a tax-and-spend liberal, but doesn't say "vote against him," it doesn't count. Thus, nonprofits can list issue advertising as social welfare activity, when it is really disguised electioneering.

They appear to be getting away with this charade. The IRS has shown little stomach to challenge this accounting sleight-of-hand. Welcome to the world of double-speak.

Frank Askin is a Distinguished Professor of Law and director of the Constitutional Litigation Clinic at Rutgers School of Law-Newark.