

National Nonprofits and State Dealership Laws After *Manitou Council v. Girl Scouts of the*

United States: Implications for Organizational Structure

A ruling by the Seventh Circuit Court of Appeals introduces new complexities into the organizational structure and governance of national nonprofit organizations with regional and local affiliates. In *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the United States of America, Inc.*, 646 F.3d 983 (Seventh Circuit 2011), the court held that a national nonprofit operating its regional and local affiliates as franchises may be held to state business practice laws of general applicability without threatening the organization's First Amendment liberties. The decision has a number of implications for national nonprofits who conduct local commercial activities, including a need for thorough consideration of alternative affiliate arrangements and uncertainty as to what other state laws may be implicated in the future.

Girl Scouts of the United States (GSUSA) is a national nonprofit youth group with over two hundred affiliate councils operating on a local level. These councils are not subsidiaries of GSUSA; rather, GSUSA licenses the local councils, authorizing them to raise funds by selling cookies and other products under the Girl Scouts trademark. In this respect, the councils relate to the national organization as franchisees to franchisor. In 2004, the national organization undertook a restructuring of its councils which would have disbanded the Manitou council (Manitou). Manitou sued under the Wisconsin Fair Dealership Law, which provides that "no [franchisor], directly or through any officer, agent or employee, may terminate, cancel, fail to renew or substantially change the competitive circumstances of a dealership agreement without good cause." Wis. Stat. § 135.03. GSUSA argued that the statute was inapplicable to nonprofits, and that enforcement would infringe on the organization's First Amendment rights.

The court recognized that the First Amendment prohibits the state from requiring a nonprofit organization to promote different values, *see e.g. Boy Scouts of America v. Dale*, 530 U.S. at 649 – in this case, promoting qualities of "truth, loyalty, helpfulness, friendliness, courtesy, [and] purity". However, it did not follow that the First Amendment exempts the organization from laws of general applicability "that have only a remote, hypothetical impact on the organization's message". Though GSUSA had argued that the purpose of realigning its local councils was to further its message by promoting the ethnic diversity of the realigned councils, the court found no evidence connecting the realignment with this goal. In fact, the original stated reason for the realignment was to improve GSUSA's marketing of Girl Scout cookies and exploit economies of scale, with the First Amendment argument playing only a small part in the District Court proceedings. The court explained that laws of general application with only indirect and unintentional impositions on an organization's efforts to communicate its message effectively cannot fail on First Amendment grounds – otherwise, GSUSA could conceivably challenge building codes on the ground that compliance costs the organization resources that could be used to promote its message. The court thus rejected GSUSA's First Amendment argument.

Though there was some question as to whether the applicability of the Wisconsin Fair Dealership Law was an issue preserved on appeal, the court nevertheless examined the purpose of dealer protection laws to determine if there was an implicit exception for nonprofit entities. The court observed that the primary difference between for- and nonprofit organizations is not whether the organization pursues commercial activities, but rather that nonprofits are subject to

the nondistribution constraint. This difference, in the court's opinion, did not alter the incentives of the people who run such organizations: a nonprofit university may compete just as zealously for students and grants as a for-profit university ("from a commercial standpoint," observed the court, "the Girl Scouts are not readily distinguishable from Dunkin' Donuts"). Because of the similar incentives between for- and nonprofit organizations conducting commercial activities, the court found that the motivations behind dealer protection laws – in short, preventing franchisors from appropriating good will created by its dealers – applied equally to each. The court thus declined to read into the Wisconsin law an exception for nonprofit organizations.

Commentators have identified a number of consequences and considerations stemming from this decision. Jack Siegel observes that nonprofits should devote serious consideration before extending affiliation to local entities, especially if the organization is engaging in significant commercial activity, as what is granted may not be so easy to revoke after this decision. Furthermore, organizations drafting license agreements must now consider laws specific to the state under consideration, and standard-form licensing agreements may need to be modified on a state-by-state basis to incorporate differences in state statutes. Jack Siegel, *The Seventh Circuit's Posner Offers a Decision That Should Be Read By Every National Organization With State and Local Affiliates*, <http://www.charitygovernance.com> (June 1, 2011).

The researchers at Nixon Peabody further observe that *Manitou* raises questions of how broadly the ruling will be construed; for example, it remains uncertain whether nonprofits such as GSUSA now must comply with Federal Trade Commission franchising rules. Michael Cooney, et al. *Seventh Circuit applies state franchise law to the Girl Scouts of the USA and its affiliates, raising potential issues regarding nonprofit structure and organization*, <http://www.nixonpeabody.com/118728> (June 8, 2011).

As these uncertainties are being worked out, national nonprofits should reexamine their affiliate structure and relevant state franchise laws to preserve their organizational flexibility and guard against costly fair dealership litigation.

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