

# THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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**A SAD BUT REVEALING COMMENTARY** — In a recent Gallup poll Americans named the government as the most important American problem for the fourth straight month, ahead of jobs, the economy overall, immigration, healthcare, wars in Afghanistan and Iraq, ISIS and other concerns. Note that the other top concerns are all related to the government's dysfunctional state. *It's a sad but revealing commentary, but we are the ones electing and reelecting the same politicians at federal and state levels. Insanity is sometimes defined as doing the same thing over and over and expecting a different outcome.*

**TRAVELERS TAKE NOTE: ALL SIGNS INDICATE RISING PRICES** — If the predictions in the business press and other travel media are to be believed, travelers and especially business travelers can expect steadily rising prices for hotel rooms and airline fares in the next year or two. International travel costs will go up even faster. *You better factor that into your travel budgets, and become creative on ways to hold down costs or swallow the increases. Associations, this means your convention, meeting and trade show attendees will be looking at higher costs to attend, and will be more likely to query the value provided versus the cost, that basic cost-benefit analysis in a nutshell. Be ready.*

**WHO WOULD HAVE GUESSED IT?** — A financial consulting company estimates a typical smoker in the U.S. spends more than \$1 million over a lifetime on cigarettes and paraphernalia, when coupled with avoidable healthcare costs, insurance, workplace bias against smokers, and so on. *You can see why it's an estimate, and the estimates vary considerably from state to state, e.g., Alaska is about twice as much as South Carolina. But who would have guessed at those numbers? Employers, take note. Promote wellness in your work force.*

**WHO WOULD HAVE EXPECTED CONGRESSMAN ISSA TO BE FUNNY?** — Rep. Darrell Issa (R. CA), the ex-chairman of the House Oversight and Government Reform Committee, is renowned for many things, especially lots of investigations of the Obama administration while he was committee chairman, but not for his sense of humor. But he recently appended his name to a bill he intends to introduce shortly which he says will modernize the process of regulatory reporting and enhance transparency throughout federal agencies. The bill is entitled Making All Data Open For Financial Transparency Act, or MADOFF for short. *Without getting into the nine federal agencies the bill targets and its details, only in America do we commemorate one of the biggest crooks in American financial history by naming a piece of federal legislation invoking him by name. Way to go, Rep. Issa.*

GOOD READING ... See you in May

## NOT-FOR-PROFIT LAW DEVELOPMENTS

**“IT AIN’T OVER ‘TIL IT’S OVER”** — *H&H Report Update* — The American Quarter Horse Association is still in court on the cloned horse ban antitrust lawsuit as the plaintiffs who initially won at trial and lost on appeal seek a rehearing of their appeal before the full 15-judge circuit panel. Meanwhile, some other animal breeding groups have filed briefs supporting the AQHA position on rejecting cloned animals for registration. *Groups vary on accepting cloned animals for registration or participation in group events but in general bans are the norm. Most appeals to an entire circuit panel are turned down so this appeal is a long shot.*

**FEDERAL COURT ENJOINS MUNICIPAL SOLICITATION ORDINANCE** — A federal district court in Washington State has preliminarily enjoined enforcement of a municipal ordinance that restricted charitable solicitations in the City of Mercer Island on First Amendment grounds. The ordinance prohibited charitable organizations, among others, from soliciting door to door between 7 p.m. and 10 a.m. on weeknights, and it was challenged by a religious group that wanted to solicit until 8 p.m. The injunction gives the City a chance to justify its ordinance in further proceedings, though the court found it was unlikely to do so. *Maybe this whole suit could have been avoided if the City had responded adequately to numerous efforts made by the religious group to contact the City Attorney and negotiate a settlement of the dispute. According to the court, the City failed to do that, not even returning some of the nonprofit group’s messages. But sometimes you can successfully “fight City Hall” if you are determined enough and you live in the right city. A lesson for city officials everywhere: it’s not wise to simply ignore pesky nonprofits and assume they will go away quietly!*

**COURT AFFIRMS DAMAGES AWARD AGAINST NONPROFIT LEADERS** — A federal appellate court in Philadelphia has affirmed large damages awards against former officers and directors of the Lemington (PA) Home for the Aged, finding that officers of the Home breached duties of care and loyalty to the nonprofit through financial mismanagement, and the directors of the Home helped officers defraud its creditors by concealing from them a decision to close the Home, while also failing to remove the officers when they should have. The Home had a history of financial troubles, though it stayed afloat largely because of assistance it received from the City of Pittsburgh. The court affirmed a damages award of \$2,250,000 against most of the directors collectively, as well as punitive awards of \$1 million and \$750,000, respectively, against the Home’s former CEO and CFO. *Failing to fulfill fiduciary duties to a nonprofit is a good way for organization leaders to get into big trouble, but ticking off its creditors can be dangerous as well, particularly when one of them is a governmental entity. Interestingly, one of the CEO’s failings cited by the court was taking a full-time salary while only working part-time. Keep that in mind, CEOs.*

## REGULATORY LAW DEVELOPMENTS

**WHOM DO YOU TRUST WHEN YOU CANNOT TRUST TRUSTEE?** — The Federal Trade Commission has entered a final order against TRUSTe, Inc. resolving the FTC’s Complaint against TRUSTe for deceiving consumers about its privacy seal program, and for misrepresenting its status as a nonprofit entity. The FTC Complaint charged TRUSTe with failing to make good on its pledge to annually recertify companies participating in its privacy seal program more than a thousand times between 2006 and 2013. TRUSTe is prohibited from making misrepresentations about its certification process, its corporate status or whether an entity participates in its privacy seal program, and must pay a fine of \$200,000. There were other provisions in the FTC’s order requiring annual reports to the FTC for 10 years. *It’s foolish to imperil your major selling point, public trust, by taking shortcuts. And misrepresenting your nonprofit status is a good way to become unprofitable if word gets around. Whom to trust?*

**SIGNIFICANT U.S. SUPREME COURT RULING ON ADMINISTRATIVE AGENCY RULE INTERPRETATIONS** — The U.S. Supreme Court has ruled unanimously that federal administrative agencies may change their interpretations of agency rules without providing an opportunity for public review and comment on the changes. The Court reversed a 1997 federal appellate decision which provided the opposite. The decision stemmed from a U.S. Department of Labor interpretive ruling in 2010 regarding the status of mortgage loan officers, saying the loan officers did not qualify as exempt administrative employees under the federal Fair Labor Standards Act (“FLSA”) governing overtime pay. The revised interpretation overturned earlier interpretations in 1999, 2001 and 2006, all issued without review and comment opportunities. The Court said interpretative rulings do not have the force and effect of law. *Tell that to someone who must defend against a revised interpretation by a federal agency in a proceeding before an agency’s administrative judge. And what becomes of actions taken in reliance on a former interpretation? Are they now subject to renewed challenge and back penalties? Three concurring opinions called for the Supreme Court to reconsider a 1945 precedent in which the Court held deference to agency interpretations of agency rules should be the norm. The three cited Section 706 of the Administrative Procedures Act, which says courts shall interpret constitutional and statutory provisions to determine the meaning and applicability of agency action, but the Court and lower courts have all drifted away from that sort of review. So beware: the federal agency rule interpretation on which you relied is now subject to reinterpretation and change without notice.*

## TAX LAW DEVELOPMENTS

**FEDERAL DISTRICT COURT DISMISSES SUIT AGAINST LOIS LERNER** — *H&H Report Update* — A federal district court in Dallas, Texas has dismissed a suit filed by nonprofit Freedom Path, Inc. against former IRS official Lois Lerner over alleged targeting of conservative organizations for adverse treatment in the processing of applications for IRS recognition of tax-exempt status. The dismissal was based on the court’s lack of personal jurisdiction over Lerner (she had no personal contacts with Dallas, Texas, except for her being the supervisor of the IRS Office of Exempt Organizations, which had an Examinations unit in Dallas, and her sending a single email directed there). On procedural grounds, the court also dismissed claims against the IRS and the U.S. government based on the same alleged IRS activities though the court allowed the nonprofit a month to replead some of those claims to correct errors the court identified. *So, she sent only one email to a unit over which she was the supervisor for years? That seems unlikely in this day and age. It’s one more strange development in the whole saga.*

## EMPLOYMENT LAW DEVELOPMENTS

**ASSUME OR INFER NOTHING IN CONTRACTS** — A unanimous U.S. Supreme Court ruled that retirees’ medical benefits were subject to adjustment by their employer. The employer had amended a collective bargaining plan to require retirees to contribute to their healthcare benefits. Their union sued to enjoin the amendment. The Court, reversing decisions by a federal trial court and federal appellate court, ruled “[W]hen a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits for life.” *Employers and employees should keep this logic in mind. Do not assume anything in a contract is of indefinite duration if the contract does not so state.*

**AN INTERESTING TORTIOUS INTERFERENCE DEFENSE** — The Supreme Court of Minnesota recently issued an opinion upholding “reasonable reliance” on the advice of outside counsel as a defense to a claim of tortious interference resulting from an employee breaching a no-compete agreement by taking a job with a competitor. The plaintiff employer sued its former employee for breach of his employment agreement, and sued the competitor for tortious interference with contract. The competitor relied on the advice of experienced outside counsel that the no-compete was overbroad and not enforceable. The Minnesota Supreme Court affirmed the rulings of two lower courts that the competitor was justified in its reliance on that advice. The court said the justification defense is a matter of law to be decided by a court. The competitor had given its counsel all the agreements between the employee and the plaintiff corporation, the lawyer had reviewed the no-compete and advised the competitor it was not enforceable. The paper trail and time expended by the lawyer supported the trial court’s finding that the competitor had made a “reasonable inquiry.” *What is interesting here in addition to its “reasonable reliance on the advice of outside counsel” is that the competitor could do so even if the legal advice was erroneous. The court also noted the plaintiff employer had prevailed on its breach of contract claim against its former employee and would recover some \$158,000 in damages from him (which would be paid by the competitor as part of its employment agreement with the employee). An open question is whether the “reasonable reliance on the advice of counsel” defense will apply outside the employment contract context.*

## INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

**CHICK-FIL-A LOSES TRADEMARK FIGHT ON “EAT MORE KALE”** — Chick-fil-A has been attempting for years to bar an activist artist from using the term “Eat More Kale” on bumper stickers and T-shirts, and other products, claiming the term infringes Chick-fil-A’s registered trademark “Eat Mor Chikin” because consumers might think Chick-fil-A had expanded its products and services beyond chicken at its fast food restaurant outlets. The fight heated up when the promoter attempted to register “Eat More Kale” with the Patent and Trademark Office (“PTO”). Chick-fil-A claimed 31 other companies wanting to use “Eat More” with a product had backed down when faced with Chick-fil-A’s opposition, but not this small artist entrepreneur in Vermont. The PTO initially ruled against him in 2013 but reversed itself in December 2014 and ruled he can register “Eat More Kale” as a trademark and use it on bumper stickers and t-shirts, among other products. *It seems a stretch that any use of “Eat More” with a product would be deemed to cause consumers to relate such a term to “Eat Mor Chikin.” Didn’t we all hear “eat more vegetables” from our mothers when we were younger? And nutritionists still tell us to do so. No one confuses that with Chick-fil-A’s ad campaign.*

## MEETINGS & TRAVEL LAW DEVELOPMENTS

**UNDISCLOSED RESORT FEES TARGETED IN CALIFORNIA CLASS ACTION** — A class action lawsuit has been filed against a Las Vegas casino. The plaintiff alleged he used a booking website to book a three-night stay at the casino hotel and was quoted a fee plus taxes but found a mandatory resort fee of \$28 per night on his bill when he checked out. His class action lawsuit claims the failure to disclose the resort fee constitutes false and misleading advertising. The Federal Trade Commission warned against failure to disclose resort fees three years ago but the practice still goes on in some venues. *A few more such class action lawsuits and hotels may be less inclined to not disclose their resort fees. You cannot negotiate them if you are unaware of them till checkout. And if you use one of the hotel booking sites, perhaps they should be aware or be prepared to defend such lawsuits for failure to disclose what goes into the hotel price quote.*

**“THE PROOF’S IN THE PUDDING”** — The U.S. Department of Commerce and Department of Homeland Security have jointly announced a plan to improve the international arrivals process for international travelers coming to the U.S. The plan focuses on improving the arrivals process at 17 major U.S. airports accounting for

almost 75% of international travelers to the U.S. Among the improvements will be an additional 340 automated passport control kiosks to speed up traveler processing. The goal is to “[P]rovide a best-in-class international arrivals experience, as compared to our global competitors....” *We have a long way to go in that regard. Any improvement in processing international travelers, and especially those business travelers who make up about 15% of arriving travelers, will be welcome. Convention and trade show planners, take note. But any time you have two government agencies coordinate a major undertaking, expect delays and confusion.*

**ILLINOIS AMONG STATES LAGGING ON “REAL ID” COMPLIANCE** — Back in 2005 when the nation was still coming to grips with new airport security measures after 9/11, Congress passed the Real ID Act which mandated that states’ drivers licenses and identification cards had to comply with minimum federal standards if they were to be acceptable proof of identity for TSA acceptance at U.S. airports. Well, of course there was a cost to making the changes necessary and many states balked at that, and there are ongoing debates about invasions of privacy and whether the changes would deter or prevent terrorists from boarding flights. One feature of the new licenses is verification of birth certificates, which will go into a state and federal data bank, making sharing and tracking easier for government authorities (and hackers?). Illinois has had two extensions, and the current extension expires in October. The choices facing Illinois are to get another extension, comply despite the cost and pass the cost on to taxpayers or to drivers, or have Illinois license or identity card holders produce a passport or other acceptable form of identification meeting TSA requirements or go through a time-consuming secondary screening before getting through security. The cost to comply with the new licenses is estimated to raise the current license fee from \$30 to \$75. *Twenty-two states are compliant with the federal license requirements, 27 states are on extensions like Illinois, and seven states are not compliant. So, if you fly much, think about acceptable alternatives to using your Illinois driver’s license, such as a passport, a passport card, a GOES or NEXUS or SENTRI trusted traveler card. Not from Illinois? Check to see if your state’s driver’s license qualifies.*

**OUR FEES ARE GOOD BUT THEIR FEES ARE BAD** — You have to admire the airlines and their association for trying to have it both ways. Airlines oppose raising the cap on Passenger Facility Charges from \$4.50 to \$8.00 per flight segment, and up to \$18.00 for a connecting roundtrip ticket, saying it will deter passengers from flying. But the same airlines are busy finding new fees to tack on to the cost of flying by those same passengers, for checking bags (or carry-ons by some carriers), seat selections, more room, talking to an agent by phone or in person, and so on. And don’t forget the fuel surcharges added when fuel prices were much higher than now. They are still there under another name. *If the airlines collect the fees, they do not deter passengers flying, but if the government imposes a fee, it’s just the opposite. That’s chutzpah.*

**UNITED AND AMERICAN ARE “REBANKING” FLIGHTS AT O’HARE** — Flyers should be aware that United and American are “rebanking” their flights at Chicago’s O’Hare Airport, typically the nation’s busiest or second busiest airport. “Rebanking” means the airlines are grouping their flights into tighter time windows periodically through the day, more characteristic of O’Hare as a hub airport. One immediate consequence is tighter connections, which has its positives and negatives for flyers. Many like it because the delays between connecting flights are shorter, but that can cut the other way if flights are late arriving. This also means more people are crowded into security areas, baggage areas, airport restaurants, etc., for periods of time instead of their being spread out more evenly throughout the day, so TSA, baggage handlers, retail outlets, etc., all have to staff accordingly to handle passenger peaks. *Bear in mind they are the two biggest carriers at O’Hare, so their rebanking has repercussions for all the other airlines, such as they may face more competition for take-off and landing slots at peak times, and their passengers may be affected by longer lines in security, restaurants, and other retail areas, not just those flying on United and American, although this may vary between terminals. Plan accordingly.*

## OTHER ISSUES, TRENDS & DEVELOPMENTS

**ANOTHER INSTRUCTIVE RULING ON PERSONAL JURISDICTION** — A Wisconsin appellate court has provided a useful analysis of a court’s assertion of personal jurisdiction over a defendant based on Internet and telephone contacts between the plaintiff and defendant. A car buyer in Wisconsin saw an advertisement on a general retail website for a car at an Illinois dealer. He called the dealer, learned some particulars, the dealer followed up with a return call, and the car buyer went to Illinois (about a 30-mile trip) and bought the car. He allegedly instructed the dealer to change the oil as part of the purchase deal. The dealer agreed to do so and said it had done so. Months later the car malfunctioned and a mechanic told the car buyer the oil had not been changed for tens of thousands of miles. He sued in Wisconsin, and the Illinois-based defendant moved to dismiss for lack of personal jurisdiction, asserting it had no business contacts in Wisconsin, had no physical presence there, did not direct advertising there, and had no sales there. A trial court dismissed the lawsuit for lack of personal jurisdiction, and the appellate court affirmed. It cited the minimal contacts alleged by the plaintiff, two cell phone calls initiated by the plaintiff lasting five minutes, ads on fourteen websites (accessible by anyone with an Internet connection) and defendant’s own website, but nothing specifically targeting Wisconsin buyers. *The appellate court cited other federal and state law precedents that isolated sales transactions and advertising on Internet sites were insufficient for personal jurisdiction. This sort of precedent may help an association sued over some very limited contact in another state where the association does not have a physical presence and very few other contacts, including an Internet presence which is not targeted directly at potential members or customers in that state. But the more Internet contacts or other contacts the association has with another state, the more likely it will create personal jurisdiction there.*

## H & H DEVELOPMENTS

Jonathan Howe will present “Meetings Mean Business” for the South Florida Celebrates North America Meetings Industry Day in Ft. Lauderdale, FL and a meetings and conventions webinar entitled “A Deep Dive Into Attrition and Cancellation.” He also presented “Contracts and Negotiations: What You Don’t Pay Attention To – But Should” at the ASAE Springtime EXPO in Washington D.C.

Naomi Angel is presenting a program on business identity theft at the IDA Expo (International Door Association) in Indianapolis, IN. She is presenting “Current Legal Trends and Issues” for three separate groups: the National Association of Graphic and Production Identification Manufacturers, Inc. (GPI) at its annual meeting in Phoenix, the Society for Maintenance and Reliability Professionals (SMRP) in Washington, D.C., and the National Coil Coating Association (NCCA) in Tucson, AZ. She also presented “Are Your Attendees Packin’? What You Can Do To Minimize Liabilities” to the Society of Government Meeting Planners (SGMP) at its national education conference in Minneapolis.

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### **Contributors to this issue...**

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