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THE HOWE & HUTTON REPORT

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TRENDING NOW

CASE NOTES ANTITRUST LIMITATIONS – A recent case decision from the U.S. Court of Appeals for the Seventh Circuit demonstrates that antitrust law prohibitions have notable limitations. A class of containerboard purchasers sued a group of manufacturers, claiming that they had conspired to increase prices and reduce output from 2004 to 2010. Most of the alleged violators settled with the plaintiffs, but two refused to settle. They convinced a district court and the Court of Appeals there wasn't even enough evidence presented by the plaintiffs to allow them a trial. Notably, no individual defendant had enough market power to violate the antitrust laws by themselves. The plaintiffs had to demonstrate the defendants colluded to violate the law. In the absence of anything that could be called an actual agreement to restrain trade, the plaintiffs failed to do so. Although the defendants frequently called and met with each other, there was no evidence that they ever discussed price-fixing or output restrictions. According to the Court of Appeals, the evidence presented did not exclude the possibility that the defendants acted independently to close mills and slow production, resulting in price increases. *Had the plaintiffs been able to prove the existence of discussions among the defendants regarding illegal price increases or output restrictions, even without any clear conspiracy, that might have been enough to win if prices were, in fact, going up. That's why attorneys for industry and professional organizations strongly discourage any talk about prices and other competitively sensitive matters at organizations' meetings.*

TRENDING (cont.)

GDPR TERRITORIAL GUIDELINES ISSUED – H&H Report Update -The European Data Protection Board has issued draft guidelines illustrating the intended territorial reach of the European General Data Protection Regulation (GDPR), which governs processing of personal data by those entities subject to the Regulation. The guidelines are intended to answer questions about application of the Regulation to entities not physically located in Europe. Generally, any entity “targeting” consumers in Europe and collecting personal information from them will be subject to the Regulation. *The draft guidelines have been open for public consultation and feedback, but, subject to amendment by the Board in response to such public feedback, they will go into effect soon.*

EU SETS STEEL IMPORT LIMITS – H&H Report Update – The European Union has set quotas on 26 steel product categories and levied a 25% duty on imports exceeding those limits. In addition, the EU imposed country quotas for its major suppliers, which do not include the U.S. The new limits replace provisional measures implemented last July. The EU limits are a response to unilateral tariffs imposed on steel imports to the U.S., as European countries fear that Chinese exports of steel will be redirected from the U.S. to Europe. *European steelmakers will be given some protection from such imports because of the newly imposed limits, but users of steel products in the EU, like the automotive industry, are facing increased costs. Will Chinese steel now flood back to the U.S. and trigger still higher U.S. tariffs? We’ll see.*

COURT TURNS BACK CHALLENGE TO MILITARY TRANSGENDER BAN – The Supreme Court of the United States, by a 5-4 vote, has allowed President Trump’s ban on most transgenders in the U.S. military to take effect while challenges to that policy are under consideration in the lower courts. Exceptions to the ban apply to several hundred transgenders already serving openly in the military and people willing to serve “in their biological sex.” *Trial judges around the country have issued injunctions against enforcement of the policy. But the latest vote by the Supreme Court vacated two such injunctions granted by district court judges in California and Washington State. Furthermore, the U.S. Court of Appeals for the District of Columbia Circuit vacated another such injunction January 4, that one issued by a judge in Washington, D.C.*

CONGRESS PASSES CRIMINAL JUSTICE SENTENCING REFORM – Congress has enacted a bipartisan criminal justice sentencing reform measure, the most sweeping reconsideration of federal sentencing in many years. The new law generally seeks to reduce sentences for nonviolent crimes under federal law and eliminate unreasonable disparities in sentencing guidelines, such as differences for crimes involving crack cocaine and powder cocaine. The new measure will affect only sentencing to federal prisons and not those sentenced to state and local jails and prisons, who make up by far the largest portion of incarcerated persons in the U.S. Several thousand federal inmates will become immediately eligible for release, and future defendants will receive less prison time. *Passage of the new law on a bi-partisan basis is being hailed as evidence of what Democrats and Republicans can do when they are willing to work together. The new measure was endorsed by President Trump and former President Obama.*

TRENDING (cont.)

INNOVATIVE DATA BREACH SAFE HARBOR LAW NOW EFFECTIVE – An innovative data breach safe harbor law adopted by the state of Ohio became effective in November. The law encourages adoption of written cybersecurity personal information protection programs by establishing a “safe harbor” affirmative defense available to entities adopting such programs in the event they are sued for data breaches. To be eligible for the defense, an entity must create, maintain and comply with a program based on federal or state law or industry-recognized standards that will (1) protect the security and confidentiality of information collected and stored, (2) protect against anticipated threats or hazards to the security or integrity of such information, and (3) protect against unauthorized access to and acquisition of the information that is likely to result in a material risk of identity theft or other fraud. *Adoption of cybersecurity protection programs is optional under the new Ohio law, but this “carrot” approach to encouraging adoption of such policies may work better than a “stick” approach, imposing penalties for failing to adopt such a policy.*

U.S. ENTERS TRADE TRUCE WITH CHINA – *H&H Report Update* - While attending a Group of 20 economic summit in Buenos Aires, President Trump met with Chinese President Xi Jinping and announced that the U.S. would postpone increasing tariffs on \$200 billion in Chinese goods from 10% to 25%. But the U.S. President set a deadline of about three months for the two countries to reach an agreement on several issues in order to prevent the tariff increase from taking effect. The issues include forced technology transfers for U.S. companies doing business in China, strengthening of intellectual property protection in China, cyber espionage by the Chinese, and barriers impeding U.S. access to Chinese markets. *The economic ceasefire came about because of concerns on both sides that tariffs were hurting their economies. Economic conditions in both countries will play a big part in determining whether the two countries will impose further tariffs and resolve any of the issues separating them.*

EMPLOYMENT

FLSA DOES NOT REQUIRE PAYMENT FOR ALL HOURS OF WORK – A federal Court of Appeals has affirmed a lower court’s dismissal of claims under the federal Fair Labor Standards Act by a group of current and former flight attendants for SkyWest Airlines. The class members alleged that SkyWest paid them only for their work in the air and not for required work they performed on the ground. But the U.S. Court of Appeals for the Seventh Circuit noted that a violation of the Act had to involve payment of less than the federal minimum wage over at least one workweek, and the class members in this case had not alleged even a single workweek in which they received less than the minimum wage. *SkyWest may not fully escape liability in this case, though, because the class members claimed violations of various state and local wage laws as a result of the airline’s “not on the ground” policy, and those claims have not been fully decided. The Court of Appeals ruled that federal law does not preclude such claims under state and local laws regulating the labor of their citizens and companies.*

EMPLOYMENT

TIMELY COMPLAINT TO EMPLOYER NECESSARY FOR SUIT A federal appeals court has affirmed a lower court's rejection of a sexual discrimination suit filed against a food company by a sales representative, finding that she never told her employer that she was offended by a workplace environment in which the person who hired her and other workers used certain nicknames she disliked in referring to her. Those workers also discussed the sexual activities of others in front of the representative and commented how another female employee dressed inappropriately. But, again, the representative never complained to her employer about such aspects of her workplace environment. The only thing she complained about to the employer was that another employee made sexual overtures to her during a business trip. The company investigated that complaint before deciding it wasn't necessary to discipline the other employee. Meanwhile, the representative was given two reviews, during which she was given instructions about improving her job performance with respect to punctuality and the use of company vehicles. Later, she was terminated. *Employees suing for sexual discrimination have a burden of proof to meet. Some of the facts in this case evidenced a less than ideal workplace environment. However, the worker's failure to make her displeasure with the situation known to her employer doomed her later attempt to sue the employer for sexual discrimination and retaliation under Title VII of the federal Civil Rights Act, as well as breach of contract.*

UNFULFILLED THREATS AREN'T PROHIBITED UNDER TITLE VII – A federal district court ruled against Lewis on his complaint under Title VII of the Civil Rights Act that his employer retaliated against him after he was terminated, complained to the Equal Employment Opportunity Commission and was reinstated to his former position. The U.S. Court of Appeals for the Seventh Circuit affirmed that decision. Lewis complained that, after reinstatement, his employer threatened him and he was the object of some “administrative errors” committed by his employer, which were subsequently corrected. The Court of Appeals concluded that none of the alleged retaliatory actions would dissuade a reasonable employee from engaging in activity protected by law, though they may have caused Lewis annoyance and frustration. “Nearly all” did not appear to be linked to the EEOC action. Further, the Court of Appeals found that isolated administrative errors subsequently corrected represented minor workplace grievances not covered under Title VII, and threats made against Lewis did not qualify as adverse actions prohibited by Title VII, because they were unfulfilled. *Employers should perhaps be careful in threatening employees, even if threats aren't carried out, despite the decision in this case. Some employees may resort to their own form of “retaliation,” without waiting to see if the employers will carry out their threats.*

ILLINOIS EQUAL PAY ACT CHANGES TAKE EFFECT – Changes to the Illinois Equal Pay Act take effect this year, prohibiting employers from paying African-American workers less than they pay others for performing the same or substantially similar work on jobs that require equal skill, effort and responsibility under similar working conditions. Essentially, these changes extend to African-American workers the same protections previously afforded to women under the Act. *The amended Act still recognizes the validity of wage differentials under a seniority system, merit system or any system that determines pay based on quantity or quality of production.*

EMPLOYMENT (cont.)

VOLUNTARY SEVEN-DAY WORKWEEK OKAYED – A federal district court judge has ruled that an employer in Illinois couldn't terminate a longtime practice of "allowing" employees to work seven days a week, which had been collectively bargained with a union, despite the state "One Day of Rest in Seven" Act. The court held that, although the Act says that employers "shall allow every employee" to take at least one day a week off, permitting employees to *voluntarily* work a seventh day during a week – particularly when the workers have been represented by a union – is lawful. *In this case, brought by the union, the employer was also found to be violating the collective bargaining agreement by refusing to allow workers a voluntary seventh day of work. So, the union could take the employer to arbitration and, ultimately, the court over the employer's termination of its previous practice.*

NON-PROFIT

TRUMP FOUNDATION TO DISSOLVE UNDER STATE SUPERVISION – The Donald J. Trump Foundation has agreed to dissolve under the supervision of the New York State Attorney General's Office. Assets will be distributed to charitable organizations approved by that office and a state court. Trump reportedly wanted to dissolve the Foundation when he was first elected President, but was unable to do so because of an ongoing investigation by the Attorney General's Office. Foundation fundraising has been shut down, owing to the Foundation's failure to register with the state Charities Bureau and file annual financial reports. In addition, a pending lawsuit by the Attorney General seeks \$2.8 million in restitution payments to the state, plus penalties and a 10-year prohibition on Trump or his adult children running charities in New York. *The Attorney General's Office has been giving special attention to the President's activities for a long time. However, nonprofits in New York are generally subject to more regulation than they would face in other states, which has caused many to move their incorporations elsewhere. New York doesn't let them gescape easily, though. Approval from the Secretary of State, the A.G.'s office, and other state agencies, such as the Department of Education and the Department of Taxation, may be required to change nonprofit states of incorporation from New York to any other state.*

SUPREME COURT WON'T LET STATES DEFUND PLANNED PARENTHOOD – The Supreme Court of the United States has voted to let stand lower court rulings that states could not ban Planned Parenthood from receiving Medicaid reimbursements when that organization provides medical treatment to low-income patients. A number of states prohibited such reimbursements after videos were circulated that purportedly showed Planned Parenthood illegally selling fetal tissue, though the group said it only accepted enough money from selling tissue to cover costs, which is legal. Planned Parenthood has also argued that restricting its Medicaid payments would jeopardize low-income patients' access to potentially life-saving services such as cancer screenings. *New Justice Brett Kavanaugh and Chief Justice John Roberts joined with Justices Kagan, Sotomayor, Breyer and Ginsburg in the Court's defense of Planned Parenthood.*

TAXATION

NEW DC RE-APPLICATION REQUIREMENTS TAKE EFFECT – The District of Columbia is now requiring that nonprofit organizations having an exemption from its taxes re-apply for that exemption every five years. As part of the re-application process, an Affirmation Letter must be obtained from the Internal Revenue Service, attesting to the organization’s continuing exempt status under federal income tax law, unless the organization can submit a copy of a previously obtained exemption letter from the IRS that is not more than four years old. The District of Columbia Office of Tax and Revenue has sent notices of this change to many affected nonprofits, but perhaps not all. *Obtaining an Affirmation Letter from the IRS may be more difficult because of the uncertainty of regular federal government activities. This could be true through tax filing season.*

OTHER

MUST STATE PAY INTEREST ON UNCLAIMED PROPERTY? – If you leave money in a bank account long enough and you do nothing with your account, you may find that it has “escheated” to the State of Illinois under the Illinois Disposition of Unclaimed Property Act, or to some other state under a similar state law. You can submit a claim to the state and get it back. But what about interest on that money? Recently, the U.S. Court of Appeals for the Seventh Circuit held that the interest should go to the previous owner of the “unclaimed” property once a claim is presented. But the court conceded that a state is “probably” not required to turn over earnings if the principal is so small that the cost of administering it is more than the interest it earns. *The issue arose in a case where a resident of Illinois is trying to get the state to pay interest on \$100.00. The state contended that it had no obligation to pay interest on any “escheated” property, and the Seventh Circuit flatly rejected that idea. But whether \$100.00 is so small an amount that payment of interest is not required is a question now before a lower court.*

REGULATORY

SUIT OVER CANDY BOXES TOSSED Do you place your products in packaging that isn’t completely full? A federal district court in Chicago dismissed an amended complaint alleging that a candy company violated the Illinois Consumer Fraud and Deceptive Business Practices Act by selling its candies in opaque boxes that were at least one-third empty. The court held that the federal Food, Drug and Cosmetic Act preempted the suit because it was based on a state law containing requirements “not identical” to those of federal law. The FD&C Act allows empty spaces or “slack-fill” in product containers if they are necessary to protect package contents or make packages large enough to include required information. According to the court, the allegations were not sufficient to preclude the possibility that the space in the candy company’s boxes was “functional” as required by federal law. *The plaintiff alleged that the candy company’s 7-ounce boxes and 14-ounce boxes of product should have contained, but didn’t contain, proportionate amounts of empty space or “slack-fill” if the space was functional and, therefore, had a legitimate purpose. But the judge found that argument “unpersuasive,” noting that federal regulations cautioned against using comparisons with different packages of the same or similar products in determining whether slack-fill is functional.*

HOWE & HUTTON NEWS AND EVENTS



Mike Deese will be co-presenting an accreditation workshop and moderating a panel discussion on the external executive director management model at the annual meeting of The AMC Institute in Austin, Texas from February 6-8.

Naomi Angel co-presented a product liability program on Deposition Tips and Tricks for trade association manufacturers in Phoenix, AZ.

She also delivered a report on legal trends to the Board of Directors of a trade association of manufacturers at its meeting in Fort Myers, FL.



Nathan Breen participated in a panel discussion titled “Cannabis and Events: A New Niche Market on a Risky Proposition?” at “The Special Event” held at the San Diego Convention Center.

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