THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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IN THIS ISSUE:

COURT TOSSES SUIT ALLEGING PRICE-FIXING AT ASSOCIATION MEETINGS — The U.S. Court of Appeals for the Ninth Circuit has affirmed a lower court's dismissal of a class action lawsuit accusing a trade association and five large guitar manufacturers of price-fixing in the musical instrument industry. The complaint in the case charged that the defendants set minimum guitar and amplifier prices at the association's meetings. But the Court of Appeals found that the complainants had failed to show that the manufacturers' conduct was any more consistent with an illegal agreement than with "rational and competitive business strategies independently adopted by firms acting within an interdependent market." *This case is the most recent restatement of the very important "no more consistent with an illegal agreement than with legal competitive conduct" test. The association had settled with the Federal Trade Commission by way of a consent decree in 2007 after an FTC investigation of price-fixing in the musical instrument industry. The key to the Court of Appeals decision is that the complainants, who had the burden of proof, failed to demonstrate that the competing manufacturers were collectively setting prices rather than doing so independently. But readers should nonetheless be aware that statements made at meetings can be taken as evidence of collusive behavior. Be careful what you say out there. And be very careful what your association minutes state, as they are admissible in evidence as the official business record of the meeting under the rules of evidence applicable in most federal and state courts. Minutes should always be reviewed with association legal counsel. Those who are not careful as to their conduct and statements at meetings may find themselves "facing the music" not only with the FTC, but also possibly in a federal court less forgiving than the Ninth Circuit was in this case.*

JUSTICE DEPARTMENT MEMO TARGETS WHITE COLLAR CRIMINALS — U.S. Justice Department officials have issued a memo to prosecutors urging that they not consider organizations to have cooperated in Department investigations of their activities unless they turn over information about which of their officers and employees may have engaged in illegal acts. The Department has received much criticism recently, including from Presidential candidate Hillary Clinton, that the Department treats executive wrongdoing too lightly. *The Department memo isn't binding on federal prosecutors and only codifies remarks that Department representatives have previously made in speeches. But it may signal a greater emphasis on prosecuting and punishing individual lawbreakers rather than just the organizations with which they are connected.*

GOOD READING … See you in November

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COURT LETS FOIA SUIT ON EXEMPTION PROCESSING CONTINUE — A federal district court has refused to fully rule on whether the IRS improperly processed a Freedom of Information Act request from a citizens group seeking disclosure of certain correspondence between the IRS and two New Hampshire politicians regarding tax exemption applications from nonprofits, though the court did find that the Service's refusal to disclose certain specified documents was justified because they involved "return information." Such information is exempted from FOIA disclosure under very broad statutory language that encompasses "any…data…with respect to the determination of the existence …of liability…for any tax…." In this case, the Service missed a deadline imposed by the Act and then missed its own self-imposed deadline to respond to the request. The citizens group was trying to get the court to rule that the delay in processing the request was illegal and that the IRS conducted an inadequate search for responsive records. The delay allowed the IRS to release no documents ahead of the November 2014 elections, and the citizens group found that circumstance prejudicial to its efforts to show voters that politicians were instrumental in pressuring the Service on exemption application processing. Based on the evidence presented to the district court, the court was unwilling to rule for either the citizens group or the IRS with regard to the illegality of the delay and the adequacy of the IRS search for documents, ordering further proceedings on both of those issues. *It's unusual to have a trial on the facts in a FOIA case, but that's what may be coming up. What's not at all unusual is for politicians to ask the IRS for assistance in speedily processing some favored constituent's tax exemption application. So far, that appears to be what the correspondence denied disclosure under the FOIA in this case was primarily about.*

"MORAL PHILOSOPHY" ENTITLES GROUP TO ACA ACCOMMODATION — A federal judge has ruled that a nonprofit anti-abortion group with no religious connections or beliefs is entitled to the same accommodations from compliance with the Affordable Care Act as are granted by the federal government to religious groups. The Obama Administration has allowed churches and religious organizations accommodations in providing contraceptive coverage to their employees under the ACA, though some argue the efficacy of those accommodations. Now, the judge has said that the nonprofit in this case has a moral philosophy about the sanctity of human life, and not allowing it the same accommodations from ACA compliance as are granted to religious groups "is nothing more than regulatory favoritism." *The Obama Administration had contended in the case that religious organizations require protections under the First Amendment to the U.S. Constitution that do not have to be granted to other entities. Certainly, this decision, indicating that the government must treat "moral philosophies" in the same manner as religious beliefs, is an unusual one, and will make some important new law if it isn't reversed on appeal.*

SEPARATING USES IMPORTANT FOR HOSPITAL PROPERTY TAX EXEMPTION — In an important property tax exemption case, the Tax Court of New Jersey has considered whether an exemption should be allowed for any portion of hospital property used not only for nonprofit activities, but also by private physicians for their for-profit business. The Tax Court denied any exemption for the property, saying that it was unable to distinguish where nonprofit activity ended on the property and for-profit activity began, since doctors operating their for-profit businesses at the hospital were not restricted to particular areas and, in fact, used the entire facility. *The general rule is that a taxpayer must prove it satisfies criteria for an exemption. Failure of the hospital to show how the nonprofit and for-profit activities at the facility could be "separately stated and accounted for" caused loss of exemption in this case.*

Intellectual Property & Computer Law Developments

ACADEMY LOSES DOMAIN NAME SUIT — A federal district court judge in California has ruled that the Academy of Motion Picture Arts and Sciences has no legal remedy against GoDaddy Inc. for letting customers purchase 293 domain names suggestive of the Academy's "Oscar" award, "park" their pages on the Internet, and share in advertising revenue from those pages. In a dispute that has lasted five years, the Academy had sued for $29 million. But the judge ruled that the Academy couldn't sue GoDaddy for cybersquatting because GoDaddy wasn't acting in bad faith when it allowed customers to purchase names like academy-awards.net and oscarsredcarpet.com via automated processes, having "reasonably relied" on user representations that domain registrations didn't infringe any trademark. Key to the court's decision was evidence that GoDaddy always reassigned domains to advertising-free templates after trademark holders filed takedown requests, sometimes within minutes. *We wonder if GoDaddy could have escaped a damages award if it hadn't been using "automated processes" for registrations. Is this a new and valid legal defense? "We didn't do it. Our computers did it!"*

Regulatory Law Developments

NEW SAFETY RULES PROMPT THREATS OF RAILROAD SHUTDOWN — The complexity and cost of new federal safety rules has prompted Union Pacific Railroad and BNSF Railway, two of the nation's biggest railroads, to warn that they will stop running rather than take the chance of operating illegally, and incurring fines of $25,000 a day, after December 31, when the rules take effect. The regulations require railroads to have a new "Positive Train Control" safety system in place by that date, and most railroads say they won't be able to comply, even though they have spent billions of dollars in an effort to do so and plan to spend billions more. *Congress could extend the compliance deadline. If not, a railroad shutdown looms that could have an enormous effect on the flow of goods and passengers around the country. In the Chicago area, for example, that would include Metra trains, carrying more than 169,000 passengers a day, since Union Pacific and BNSF operate Metra lines under contract. Metra officials say it will not operate after the December 31 deadline if there is no compliance extension.*

IRAN DEAL CONTAINS SURPRISE FOR "U.S. PERSONS" — Whatever the overall good or bad of the "Iran deal" negotiated and approved by the Obama Administration, China, France, Russia, the United Kingdom and the European Union, one would have thought that it might promote trade, educational and cultural exchanges of the sort that nonprofits engage in, and other interactions between Americans and Iranians that have been hindered by American sanctions imposed on Iran. But the actual terms of the agreement, as now being reported, may be surprising in one major respect. The lifting of sanctions on transactions with Iran, provided Iran meets all conditions imposed by the agreement, largely will apply only to "non-U.S. persons" (defined as including those owned or controlled by "U.S. persons"). But, according to the agreement's terms, the U.S. government's rather serious prohibitions on *Americans* having "transactions" with Iranians, as well as "facilitating" or "approving" such "transactions," are not affected by the agreement and will not necessarily be lifted…unless, of course, the Americans can manage to engage in such activities through owned or controlled "non-U.S. persons"! *So, the other countries negotiating this deal with Iran, and all the other "non-U.S. persons" out there, will now be interacting with Iran all they like, while the U.S. government generally hasn't agreed to lift sanctions on its own "persons." At least, we can now clearly see who wanted sanctions on Iran in the first place. We think it wasn't those "non-U.S. persons."*

TAX LAW DEVELOPMENTS

SUIT FILED AGAINST CHICAGO INTERNET TAXES — *H&H Report Update* — A lawsuit has been filed in Cook County Circuit Court to prevent implementation of new City of Chicago Internet taxes. The taxes were announced in June by the City's Finance Department, which said that the City would be extending the current 9% amusement tax to cover paid subscriptions for music, movies, video productions and games, while also extending personal property lease taxes to professional services such as the electronic property databases used by real estate agents. The lawsuit, filed by the nonprofit Liberty Justice Center, contends that the tax extensions are illegal because they were never voted upon by the Chicago City Council and that the extensions violate federal law because they tax Internet-based streaming media at a higher rate than similar services not delivered via the Internet. *City officials say the tax extensions will bring in about $12 million annually to help the City with its current budget problems. Readers that provide or purchase Internet services will want to keep an eye on this litigation.*

"CADILLAC TAX" REPEAL GAINS SUPPORT — Legislation in Congress to repeal the so-called "Cadillac tax" provision of the federal Affordable Care Act continues to gain support from lawmakers, and it received more impetus recently when Democratic Presidential candidate Hillary Clinton announced that she would like to revisit the tax as a possible "fix" to Obamacare. The 40% tax on high cost, high benefit health insurance plans was intended to slow the rise in healthcare spending, and, unless repealed, it will take effect in 2018. However, at least 118 Democrats in Congress have joined Republicans in a repeal effort. *One obstacle to abolishing the tax is that it would require the federal government to forgo an estimated $87 billion in revenue over the first ten years of its life. Surveys show that health plans with the highest enrollment at 51% of businesses would be hit by the tax as early as 2020.*

EMPLOYMENT LAW DEVELOPMENTS

FEDS HIT MISCLASSIFICATION OF EMPLOYEES — The U.S. Department of Labor has declared that misclassification of employees as independent contractors is one of the most serious problems in the workplace, impacting payment of minimum wages, overtime compensation, unemployment insurance and workers' compensation. In a new "administrative interpretation" targeting the problem, the Department noted that numerous factors can impact whether an individual is an employee or an independent contractor, though it acknowledged that whether a worker is economically dependent on an employer (and therefore an employee) or truly in business for himself or herself (and therefore an independent contractor) was the key inquiry. Factors the Department said it would examine when considering worker misclassification included: (1) the extent to which the work performed is an integral part of the employer's business, (2) the worker's opportunity for profit or loss depending on his managerial skill, (3) the extent of the relative investments of the employer and the worker, (4) whether the work performed requires special skills and initiative, (5) the permanency or indefiniteness of the worker-employer relationship, and (6) the degree of control exercised or retained by the employer. *Given this new "administrative interpretation," readers should reexamine whether workers in their place of business are properly classified.*

FEDERAL CONTRACTORS' EMPLOYEES GET PAID SICK LEAVE — President Obama has signed an executive order requiring companies contracting with the federal government to offer seven days of paid sick leave to their employees each year. Estimates are that around 300,000 employees may be affected. *Many employers already offer paid sick leave to workers, but the White House says 40% of private sector employees aren't provided with that benefit. The Administration, in addition to the executive order, is urging Congress to mandate paid family and medical leave programs for all privately employed workers.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

TOUGHER TRAIN SECURITY MEASURES COMING — Responding to the recent terrorist attack on an Amsterdam to Paris train, European officials have been conferring on how to increase train security measures. Ideas floated include strengthened ID and bag checking procedures, having train tickets printed with passenger names on them (not required everywhere), letting train police consult intelligence databases, making better use of criminal records, mixing patrols of international police teams on cross-border runs, increased use of closed-circuit cameras on trains and in stations, more metal detectors at entrances, and full-body scanning of people who try to board at the last minute. *Greater American security measures are probably in the offing as well.*

HOTEL FEES INCREASING — A recently released study shows that hotels are increasing fees for "extra" services at a record-setting pace. Fees for things like leaving bags with the bellman, checking in early, canceling reservations, receiving faxes, and using an in-room safe Are projected to reach $2.47 million this year, according to a report by a professor at New York University School of Professional Studies, Tisch Center for Hospitality and Tourism Mandatory "resort fees" are also still around for use of a gym or swimming pool (whether a traveler wants to use them or not). *Travelers need to investigate these extra charges before booking. They can greatly increase the cost of a room, and you may have to ask the right questions or wade through some fine print to learn about them.*

WILL AIRPORT SMOKING ROOMS BE SNUFFED OUT? — The Surgeon General of the United States has joined anti-smoking groups in urging that airport smoking rooms be eliminated. There are free public smoking areas in a number of major U.S. airports, and others have areas where smokers can light up if they pay an entrance fee or make purchases (food at an adjoining restaurant, for example). But a recent study shows that space immediately outside airport smoking areas may contain secondhand smoke levels five times higher than in totally smoke-free airports, and Surgeon General and Vice Admiral Vivek Murthy has gone online to try and eliminate smoking rooms, saying that secondhand smoke kills and that closing airport smoking areas could help prevent 31,000 deaths in the U.S. each year. *With the Surgeon General against them, such areas in U.S. airports could soon be vanishing in a puff of smoke.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

NEW GOVERNMENT SURVEILLANCE RULES ANNOUNCED — *H&H Report Update* **—** The U.S. Justice Department has announced new rules to govern its surveillance of Americans, in response to criticism that innocent people have been victimized by government data collection efforts, including the use of "Stingray" devices that steal cell phone messages and information and can operate through the walls of any building. Among other things, the new rules require agents of the Justice Department to obtain a warrant from a judge before using such equipment and, at least once day, delete from their databases information collected on innocent Americans. The new rules do not apply to the Department of Homeland Security, which is said to be working on similar rules, and they don't apply to federal government operations outside the U.S. In addition, they do not prevent the federal government from continuing a previous covert practice of making Stingrays and similar surveillance equipment available to agents of state and local governments, which would not be bound by the new Justice Department rules, though the Justice Department says it will no longer demand that state and local governments keep their use of such equipment a secret. *We think this is a step in the right direction, assuming the Justice Department will do what it says it is going to do. But the question of who watches the watchers will still be with us*.

IRS WILL SEND TAXPAYERS INFO ON HACKING — The Internal Revenue Service, advising that as many as 334,000 of its taxpayer accounts have been accessed by hackers, will be sending notices to taxpayers whose information may have been taken by identity thieves. The hackers used an IRS application called "Get Transcript," which allowed them to view return information and tax payment records. The application, shut down in May, requires users to correctly answer multiple identity verification questions, but hackers used information they gathered from other sources in order to correctly answer the questions. It is not known if hackers actually took and used information from all of the IRS accounts they accessed. But, just in case, the Service will be mailing affected taxpayers information about free credit protection and Identity Protection PINs. *Of course, all of us taxpayers will be paying for the IRS mailings. So, we have all been affected by this data breach.*

COURT RULES SUIT AGAINST ACA CAN PROCEED — A federal judge has ruled that a lawsuit filed by House Republicans that challenges certain provisions of the Affordable Care Act could not be dismissed entirely on the ground that House members had no standing to bring the suit, but that one challenge to the ACA in the lawsuit was properly dismissed. That portion of the suit surviving a procedural challenge by the Obama Administration was a contention that the Administration violated the U.S. Constitution by paying billions of dollars for discounts on insurance deductibles for very-low-income insureds when Congress never appropriated money for such an expenditure. On the other hand, the judge ruled that Congress had no standing to bring claims that the Administration lacked the authority to delay implementation of the employer insurance mandate under the Act. *The difference that saved the challenge to expenditures for insurance deductibles was the fact that it was based on the Administration's expenditure of funds not appropriated by Congress. The judge found that Congress has a core constitutional interest in protecting its role in authorizing the expenditure of public money, but no particular constitutional interest of its own in whether the employer insurance mandate went into effect at a particular time. The President enforces laws, or doesn't, because enforcement of law is a power given to the President by the Constitution. But the Constitution specifically gives Congress the power to appropriate money for the federal government, and the President is not supposed to spend money that Congress hasn't appropriated.*

H & H DEVELOPMENTS

Mike Deese participated on a panel leading an AMC Institute workshop on association management company accreditation hosted by Howe & Hutton in the firm's Chicago office.

Naomi Angel presented Legal Report on Trends & Developments of Interest for a trade association of manufacturers at its Semi-Annual Meeting in Cleveland, Legal Report on Trends & Developments of Interest for a professional society of engineers at its Annual Conference in Cincinnati, Legal Report on Trends & Developments of Interest for a trade association of manufacturers at its Strategic Planning Meeting in Dallas and "An Antitrust Refresher Seminar — What It's Really All About" for Association Management Company Executives.

Samuel Erkonen presented a legislative update to the Chicago Bar Association; and "Protecting your Client in a Seller's Market" to a small market meeting conference in Little Rock, Arkansas.

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Contributors to this issue…

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