THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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THE LAW FIRM FOR ASSOCIATIONS®

IN THIS ISSUE:

HAVE YOU RECEIVED OBAMACARE INSURANCE REBATES? — By August 1, health insurance companies were required by the Patient Protection and Affordable Care Act (a/k/a "Obamacare") to rebate premiums to policy owners if target percentages for amounts to be spent on medical care have not been met. Federal law requires that at least 80% of health insurance premiums paid to insurers be spent on medical care, with the target rising to 85% for employers' health insurance plans. *In 2012, the first year of the rebate program, $1.1 billion was reportedly refunded to nearly 13 million policyholders, with large employers receiving the most rebates because of the coverage they purchased for their employees. You may want to check with your insurance provider regarding this.*

IRS PUBLICATION 5093 PROVIDES ACA ONLINE RESOURCES — The Internal Revenue Service has provided a set of Patient Protection and Affordable Care Act online resources through IRS Publication 5093 (6-2013), catalog number 63920H. The various online resources provide useful information to individuals and their families such as "Health Care Coverage through the Marketplace," and to employers such as "Health Insurance Information," "Tax Benefits and Responsibilities" and "Legal Guidance – Labor Provisions," among the offerings. *Associations looking for basic information for themselves and their members should check out this online set of publications available on the IRS website for useful information on Obamacare.*

LOOK FOR OUR SPECIAL REPORT ON "CONCEALED CARRY" IN ILLINOIS — Illinois was the last state in the country to pass a "concealed carry" statute permitting licensed users to carry concealed weapons on their person for self-defense purposes. This statute has major implications for individuals and employers in Illinois, and for the hospitality industry and those planning meetings in Illinois. We have prepared a Special Report on this subject for our readers. *Many of you are on vacation this month so we will hold it until just after Labor Day when the summer hiatus is over and we are all focused on work again. Be sure to read it.*

GOOD READING … See you in September 2013

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NOT-FOR-PROFIT LAW DEVELOPMENTS

NEW YORK PASSES NONPROFIT DISCLOSURE REQUIREMENTS — The New York Attorney General's office has imposed new regulations on nonprofits subject to registration requirements in the state and not prohibited by federal law from engaging in political campaign activity. All such organizations (including groups promoting social welfare that are classified under Section §501(c)(4) of the Internal Revenue Code) will now be required to annually report to the office the percentage of their expenditures that are directed to federal, state and local election activity. Those spending more than $10,000 annually on state and local elections in New York will be required to file itemized schedules of expenditures exceeding $50, and all disclosures will not only be on file with the state, but will be released to the public. *Highly publicized election activities by §501(c)(4) organizations, which are not only legal but constitutionally protected, have drawn the interest of the public and of politicians (particularly, one suspects, those who don't have a lot of support from those groups). New York may be just one of many states toughening disclosure laws applying to those organizations.*

WOULD MR. ED AGREE WITH THIS TEXAS JURY? — A Texas jury has disagreed with the American Quarter Horse Association, and determined it was an antitrust violation for the association to refuse to accept cloned quarter horses for its list of acceptable quarter horses. That refusal meant cloned quarter horses and their offspring could not be registered, or participate in the association's various shows and competitions, thereby reducing likely prospective buyers and greatly reducing their value to their owners. The ruling is not the end of the story, because the relief to be granted to the successful plaintiffs will require additional hearings. One prospect is that the association will be forced to accept cloned animals for registration and listings. The association also has the option of appealing the jury verdict. *Other animal associations which have refused to accept cloned animals may also face antitrust challenges on similar grounds that they are monopolies and their anti-cloning rules restrain trade. The defense that private corporations such as associations should be permitted to determine their own rules did not pass muster here. Sometimes judges buy that position, but not always. Who would have anticipated cloning policies would be the subject of antitrust violation claims? Mr. Ed maybe.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

ASTM, OTHERS SUE OVER COPYRIGHT INFRINGEMENT OF STANDARDS — The American Society for Testing and Materials, the National Fire Protection Association, and the American Society of Heating, Refrigerating, and Air-Conditioning Engineers, all of which are nonprofit American National Standards Institute-accredited voluntary consensus standards developing organizations (SDOs), recently sued Public.Resource.Org, Inc. ("PRO") in federal district court for the District of Columbia for copyright infringement, trademark infringement, and unfair competition. According to the 51-page complaint, PRO posted on its website standards developed by the SDOs that have been incorporated by reference in state and federal regulations and encouraged the public to copy and disseminate them. The SDOs, which sell and also make their standards available for free online in read-only format, contend that they wouldn't be able to do the work necessary to develop, review and update standards without maintaining an exclusive copyright on each standard that allows them to recoup their costs. PRO argues that once the standards are referenced in state or federal regulations they should be available free to the public to copy and disseminate. *This case could have far-reaching implications for trade and professional associations involved in standard setting. As the complaint states, "[D]epriving Plaintiffs and other SDOs of this important, independent source of revenue would substantially diminish the quality of future standards, including those in the health and safety areas which are most suitable for use by government entities. To the extent that Plaintiffs were able to continue their stan-*

dards development activities without copyright revenues, they could be forced to rely on funding from interested parties, or to charge fees to participate in the process of developing the standards, which would inhibit the participation of small businesses, consumers, academics, and other important stakeholders in the standards development process." We will watch for and report on future developments in this important case.

THIS COULD BECOME A VALUABL E TOOL FOR CHECKING PATENTS — The U.S. Patent and Trademark Office ("PTO") has announced a new service, the PTO's Global Patent Search Network, intended to enable those searching for patents to track patents granted in multiple countries and languages. The initial offering is based on a collaborative effort between the PTO and SIPO, the State Intellectual Property Office of China, and covers patents granted, published patent applications, and utility models from 2008 through 2011 with additional materials to follow. The service permits searches in Chinese or English, and provides the original text in the native language and a machine language translation which may make for some awkward versions, but the essential information should be provided. The PTO intends to add other foreign language patent collections in the future. Patents have boomed around the world. *This should become a very useful service. It will not replace the need for using professional patent search services, given the start-up effort's limitations in period covered and available materials (plus translations), but it is a start for many others to begin their searches, and should become more useful as additional countries' collections are included.*

EMPLOYMENT LAW DEVELOPMENTS

WILL THIS BECOME ANOTHER BASIS FOR ADA CLAIMS? — The American Medical Association earlier this summer concluded that obesity is a disease, not a condition. One potential consequence is that employers may face Americans With Disability Act ("ADA") claims for rejecting overweight applicants, or not entering into discussions with employees claiming they need accommodations due to their obesity to perform their jobs. *If an applicant or employee is diagnosed as obese, does this constitute a disease under the ADA? While there is little prior law on this favoring employees, that was before the AMA concluded obesity is a disease. So far, plaintiffs' and defense attorneys are speculating what the courts (and Equal Employment Opportunity Commission) will decide. If obesity is defined as a body mass index ("BMI") of 30 or more, how is an employer supposed to know the applicant's or employee's BMI score? An employer's Mark 1 Eyeball may not be accurate at determining BMI scores. It is probably premature to speculate how this will turn out, but this might become a source of claims down the road.*

OBAMACARE EMPLOYER INSURANCE REQUIREMENT DELAYED — The Obama Administration has announced that it will delay by one year the implementation of the Patient Protection and Affordable Care Act requirement that employers with 50 or more full-time employees (or equivalents) provide their workers with federally defined "affordable" health insurance benefits or pay a fine. This employer mandate requirement will now take effect January 1, 2015. *So, some employers will be given an extra year to comply with this aspect of the law, the Administration will have an extra year to get health care insurance exchanges up and running, and any political mess created by implementation of this requirement will be postponed till after the mid-term elections in 2014. Other provisions of the law are already in place or will become effective October 1, so don't become complacent about compliance.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

EXCULPATORY CLAUSE IN CONTRACT PREVAILS — An Illinois appellate court has affirmed dismissal of a personal injury lawsuit filed by an injured member of a health and fitness center. The plaintiff was severely injured using one of the center's exercise machines. He sued, alleging the center breached a duty of ordinary care by failing to maintain and inspect its fitness equipment and instruct members on how to use its equipment. The center presented its membership contract, which included a boldface clause that exempted the center from all liability, including death or injury due to the center's active or passive negligence. The provision was sufficient to protect the center from its member's claims, according to the trial and appellate courts. *Moral of the story: read what you sign before you sign. And associations, don't be shy about using such provisions, prominently displayed, in your contracts when appropriate, such as for participation in various activities or when providing transportation.*

REGULATORY LAW DEVELOPMENTS

ARE YOU COMPLYING WITH FTC'S REINSTATED RED FLAGS RULE? — The Federal Trade Commission is now preparing to implement the "Red Flags Rule" after a dust-up with Congress that forced a narrowing of the definition of "creditors" covered by the Rule. Congress had required the FTC and several banking regulators to develop regulations requiring that financial institutions and "creditors" implement written identity theft protection programs. Under the current iteration of the Rule, a covered "creditor" is anyone who, in the ordinary course of business, regularly obtains and uses consumer reports in connection with a credit transaction; furnishes information to consumer reporting agencies in connection with such a transaction; or advances funds to or on behalf of someone, except for expenses incidental to a service provided to that person. Covered persons must develop and implement programs that (1) identify and detect "red flags" signaling possible identity theft in their operations, and (2) detail appropriate responses to any red flags detected in order to prevent and mitigate identity theft. Such programs must also provide that they will be updated periodically to reflect changes in risks from identity theft. *Many nonprofits accept credit card payments or otherwise extend credit (for meetings, conferences, trade shows, publications, etc.). Therefore, they may be required to comply with the Rule. Obtain competent advice in determining whether the Rule applies to your operations and implementing the required program.*

FTC AND GOOGLE SETTLE CHARGES OVER STANDARD-ESSENTIAL PATENTS — The Federal Trade Commission has finalized a settlement with Google over charges that the company's licensing practices stifled competition among manufacturers of electronic devices. Google is the holder of standard-essential patents needed to make devices such as smart phones, laptop and tablet computers, and gaming consoles. The final settlement requires Google to grant licenses under such patents on fair, reasonable and non-discriminatory terms. The FTC had alleged that Google reneged on commitments to license its patented technology and had pursued or threatened to pursue injunctions and exclusion orders against companies that were willing to obtain licenses on terms such as the FTC ordered. *Many associations and other nonprofits have members that hold patents for technology used in standards. The FTC order makes it clear that the government will not allow patent holders to prevent or reduce competition in the marketplace by withholding reasonable licensing of technology.*

TAX LAW DEVELOPMENTS

CONSERVATIVE GROUPS SUE OVER IRS TARGETING — *H&H Report Update* — Forty-one Tea Party and other conservative groups have joined to sue the Obama Administration, seeking damages in an amount to be determined, along with other relief, for delaying and obstructing their applications for IRS recognition of tax-exempt status under §501(c)(4) of the Internal Revenue Code. Their suit, filed in the federal district court for the District of Columbia, claims the IRS violated the First and Fifth Amendments to the U.S. Constitution, as well as federal statutory law and the IRS's own rules, by treating them in a disparate manner and imposing unlawful criteria on them in processing their applications. *Attorneys for the groups also say that their clients are rejecting a new IRS proposal for expedited processing of their applications if they agree to spend 60% or more of their time and money promoting social welfare while spending 40% or less of their time and money on political activity. This proposal, they say, is based on an arbitrary formula not supported by statutory law, resulting in am impermissible narrowing of legal requirements for a social welfare tax exemption.*

IRS ISSUES NEW RULES FOR "SUPPORTING ORGANIZATIONS" — The Internal Revenue Service has issued new regulations regarding the requirements for a tax-exempt entity to qualify as a "Type III supporting organization" and thereby escape the restrictive regulatory regime that applies to "private foundations." "Type III supporting organizations" are entities exempt from tax under §501(c)(3) of the Internal Revenue Code and qualifying to avoid private foundation status pursuant to Code §509(a)(3) because of their having a relationship to a tax-exempt "supported organization" sufficient to ensure that the "supported organization" is effectively supervising or paying close attention to their operations. *There are other ways for an organization to avoid the private foundation classification. But any nonprofit designated as a §509(a)(3) entity in its original exemption letter from the IRS or in subsequent correspondence from the IRS — or thinking about applying for such a designation — should contact experienced legal counsel to discuss how the new regulations may apply to it.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

UNSOLICITED FAX LAWSUIT DAMAGES MAY BE INSURABLE AFTER ALL — A recent decision by the Illinois Supreme Court may provide businesses that send faxes some relief. The Telephone Consumer Protection Act ("TCPA"), which was intended to ban unsolicited faxes usually sent in bulk to hundreds or even thousands of recipients, also provided an enforcement tool allowing recipients to sue for damages of $500 per unsolicited fax. Talk about a sledgehammer to whack a mole. Plaintiffs' attorneys quickly saw this as an easy win for single unsolicited faxes, but soon graduated to class actions so now a single mailing may expose the sender to damages running to six or seven figures. In this case, the fax sender's insurance company had declined to defend the lawsuit because it said the TCPA was penal in nature, and penalties are not insurable. (The insurer asserted other policy defenses as well.) The Illinois Supreme Court concluded that the $500 damage amount per fax constitutes a liquidated damages amount, not a penalty, and therefore may be covered by the sender's liability insurance, reversing the trial and appellate courts on that point, and sent the case back to the appellate court to decide the other policy defenses raised by the insurance company as to why it would not defend the lawsuit. *This is a departure from what other courts have decided, and both provides a deep pocket encouraging more such class actions and provides fax senders with some protection after all. The TCPA may be out of all proportion to a recipient's actual harm, but the possibility of class actions makes it a very potent club. Anticipate that insurers will probably insert a specific exclusion in future liability policies excluding TCPA claims from coverage. Check the coverage in your insurance policies and under your state's laws.*

MAINE JOINS MONTANA ON NO-TRACKING LAW — It may be coincidental timing following the Snowden disclosures on federal and other police authorities obtaining cell phone data from cell phone service providers, but the State of Maine legislature just passed legislation to bar warrantless cell phone tracking over the governor's veto. The legislation requires authorities in the state to obtain a search warrant before tracking cell phones or other GPS-enabled electronic devices. The legislation goes further, and requires the person whose cell phone is being tracked to be informed within three days of the tracking unless the authority applying for the warrant can establish that secrecy is necessary. The legislation also applies to historic data, i.e., where the cell phone was in the period before the warrant was applied for and granted. *Perhaps as people become more aware of the degree of surveillance they are under by federal, state and local authorities, and by Google and other social media tracking them for the purpose of selling such information, they will begin to push back. Montana previously passed such a law and other states have at least considered it. One option: turn your phone off when you are not using it, and the GPS chip is off too. (We know, sacrilege for some.)*

H & H Developments

In July. . .

Jonathan Howe presented "Managing Risk and Liability: A Belt and Suspenders Approach" at a convention for meeting professionals in Milwaukee, Wisconsin.

At the recent AMC Institute preconference program before the ASAE annual meeting in Atlanta, C. Michael Deese participated on a panel presentation regarding association management company best practices. He also began serving another term on ASAE's AMC Section Council.

Naomi R. Angel gave a presentation in Cleveland, Ohio on "Safeguarding Your Personal and Business Identity" to leaders of an engineering society.

Samuel J. Erkonen traveled to Nassau/Paradise Island and presented a session to meeting planners entitled "The Lawyer Is In," an interactive session in which planners raised their legal concerns.

Barbara F. Dunn presented a similar session, "The Lawyer Is In: What's On Your Mind?" in Las Vegas, Nevada for a destination management convention.

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Contributors to this issue…
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