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:

HOW MANY ACCIDENTS WILL IT TAKE? – Another major highway accident involving a pickup truck, two school buses and a tractor-trailer truck collision resulted in two deaths, the pickup truck driver and one of the students on a school bus, plus injuries to another 38 students. Federal investigators say the 19-year-old driver of the pickup truck was texting at the time of the collisions on an interstate highway in Missouri. *How many accidents, how many deaths will it take to convince drivers no message is worth dying for or killing or injuring others? The law of common sense buttressed by numerous state and local laws banning texting while driving are not enough, it seems, so far. A recent study by the National Highway Traffic Safety Administration states texting while driving increased 50% in 2010, and two of ten drivers in the study said they have sent text messages or emails while driving. And half of the drivers aged 18 to 24 have sent text messages while driving. You can see this every day on the highways. The National Traffic Safety Board is now calling for a national ban on using cell phones for talking, texting or emails while driving.*

"IF WE DON'T WIN THIS RACE…" – A recent article in *Newsweek* described the world's most powerful supercomputer, long a preserve of the U.S. but no more. The title passed to China, whose recently unveiled supercomputer is five times more powerful than anything in the U.S. Then Japan built an even larger machine. American scientists are working on an even larger machine. *So what you may well ask. First, this is a $25 billion-plus market, not one where we want to fall behind. Second, it demonstrates that America's hold on top place in the sciences is increasingly at risk. These machines are used for everything from modeling nuclear weapons to weather forecasting to designing jet engines. But as we slow investing in science, China and other nations are forging ahead. "If we don't win this race … we are in a world of hurt!" says a lead scientist at Livermore Laboratory, current home of America's largest supercomputer. Self-serving? Maybe. Accurate? More than maybe.*

GOOD READING … See you in January

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NEW YORK CAN EVICT CHURCH WORSHIP SERVICES FROM SCHOOLS – The U.S. Supreme Court has let stand a lower court ruling that allows New York City to evict dozens of churches and religious organizations from public schools, where they have been holding worship services for years. In 2001, the Supreme Court ruled that a public school district in Medford, NY could not prevent a religious youth group from using space in a public school for after-hours activities to the same extent as other community groups were permitted to use the space, even if the youth group's activities included prayer, Bible lessons and the memorization of Scripture. But the lower court in the most recent case held that officials could prohibit the Bronx Household of Faith from holding its worship services at a public school, which it had been doing since 2002, because its services were significantly different from the youth group activities permitted by the Supreme Court in 2001. According to the lower court, Bronx Household's services were an act of organized religion that tended to dominate and consecrate the place in which they were held, making it a church. Furthermore, the lower court noted that Bronx Household did not hold its services open to all members of the community, excluding the unbaptized and excommunicated, as well as those who "advocate the Islamic religion." *The legal requirement that church and state be kept separate imposes limits on use of public property for religious activities, while First Amendment freedom of religion places limits on government policies that might discourage religious worship or promote one over another. Nonprofit religious organizations sometimes get caught in a confusing web of rulings as courts try to establish where these limits lie.*

COURT UPHOLDS CRIMINAL CONVICTION OF NONPROFIT AND OFFICERS – The federal appellate court in New Orleans has upheld criminal conviction of the nonprofit Holy Land Foundation for Relief and Development and a number of its officers for providing material aid and support to a terrorist organization, namely, Hamas. Once calling itself the largest Muslim charitable organization in the U.S., the Foundation was charged with serving as a financing arm of an organization that was designated as a terrorist entity by the federal government in 1995. *Importantly for nonprofits working with organizations in other countries, the federal laws prohibiting material aid and support to terrorist groups restrict not only financial support, but also the providing of goods and services. Furthermore, it is not a defense to charges of providing such aid that the assistance was not intended to be used, and was not, in fact, used for terrorist activities. In this case, the appellate court noted that Hamas engages in legitimate charity, and some of the money Holy Land provided to Hamas may have been used for such activities. But, nevertheless, because Hamas has been designated as a terrorist entity, the defendants violated the law against providing material aid to such organizations. In supporting the legitimate charitable functions of Hamas, the court noted, the defendants facilitated Hamas's terrorist activity "by furthering its popularity among Palestinians and by providing a funding resource. This, in turn, allowed Hamas to concentrate its efforts on violent activity." Know the law and know your charity's other activities, especially these days.*

FIGHT OVER O'KEEFFE ART WINDING DOWN? – *H&H Report Update* – A Tennessee appeals court has provided the latest developments in the long-running legal battle for ownership and display rights of a Georgia O'Keeffe art collection, which has involved a number of nonprofits in contentious litigation. The state appeals court has provided significant support for Nashville-based Fisk University's plan to sell a half interest in its collection to the Crystal Bridges Museum in Bentonville, Arkansas. The proposal would help the cash-strapped university pay its bills and reduce its costs for display of the art collection that O'Keeffe donated to the school many years ago. But the fact that the plan requires display of some O'Keeffe art pieces at the out-of-state museum and the school on a rotating basis has upset some residents of Tennessee, as well as the Tennessee Attorney General, who have noted that O'Keeffe stipulated the collection must remain in the Nashville area. Now the deal may have edged a little closer to completion after the appeals court overturned a lower

ruling that Fisk, in order to consummate the transaction, would have to set aside two-thirds of the proceeds from the sale to ensure future upkeep of the collection in the event the school went bankrupt. The appeals court said there was no legal authority for such a set-aside requirement, but did direct Fisk to advise the appeals court concerning the school's plans for use of the sale proceeds, as well as a $1 million pledge made to the university by Walmart heiress Alice Walton, whose family spear-headed development of the Crystal Bridges Museum, and who intended her money to be used for upgrading of Fisk's space for displaying the collection. *We think donor intent should be realized whenever possible. But disputes like this have led some nonprofits to turn down donations with strings attached for fear of getting involved in legal fights, and they should give donors pause before they place too many restrictions on use of their donation. Fisk reports that it has mortgaged all of its buildings to make ends meet and is running a $2 million annual deficit. But it has been stuck in legal disputes over disposition of the O'Keeffe art collection for decades, and they are not over yet.*

Intellectual Property & Computer Law Developments

DESIGN'S UTILITY PATENTS TRUMP DESIGN TRADEMARKS – A federal appellate court in Chicago affirmed a trial court ruling that a functional patent on a product will take precedence over a design trademark for the same product. The parties were the respective manufacturers of Quilted Northern toilet paper and Cottonelle Ultra toilet paper. Georgia-Pacific contended its Quilted Northern toilet paper's quilted diamond design was protected against infringement by Cottonelle Ultra's lattice design based on registered trademarks for Quilted Northern. Kimberly-Clark defended on the basis that a trademark cannot be functional. Georgia-Pacific was unable to convince the court that its utility design patents related to the manufacturing process and not the product itself; that its product claims for its paper were mere puffery; that other designs could have been used by Kimberly-Clark that were less like Georgia-Pacific's quilted diamond design; and that the quilted diamond design did not affect product quality, an argument undercut by Georgia-Pacific's own advertising and patent claims. *The basic takeaway here is that trademark protection for a design may not be functional, and may be lost by also claiming patent utility protection which must be functional. Make sure your utility patents and trademarks do not conflict in this regard.*

Employment Law Developments

WAS MEETING LIMITED TO OLDER WORKERS DISCRIMINATORY? – A small employer held a meeting with workers age 49 and older to discuss retirement plans. During the meeting the employer commented as workers get older they tend to slow down, and workers intending to stay with the company would have to give 100%. He also asked what they expected for retirement benefits. Nine months later the employer began to lay off some workers due to a decline in business. One of those laid off was at the meeting, and sued for age discrimination based on the employer limiting the meeting to older employees and remarks made at the meeting. The court said the employee had failed to make a case of age discrimination based on the meeting or what was said there, and offering no other evidence of age discrimination. *But if there had been other evidence, or the layoffs were limited to older workers, the employee might have had enough to take her claim to a jury. In recessionary times employees have more incentive to file a claim of discrimination, hope it passes muster or has nuisance settlement value. Be careful what you say regarding age or other bases for discrimination. Why provide ammunition that might support a claim?*

JOB DISCRIMINATION CLAIMS WITH THE EEOC REACH AN ALL-TIME HIGH – The lagging economy has produced a record number of claims of job discrimination filed with the Equal Employment Opportunity Commission. Employees filed a record 99,922 discrimination claims with the EEOC based on race, gender, religion, age, etc., as well as sexual harassment, in 2010. To put this in perspective, claims have risen over 20 percent since 2007. Not surprisingly, as the number of claims goes up, the percentage of those that have been successful drops. In 2010, 19.2 % of complaints were resolved with outcomes favorable to complainants – down each year from a high of 22.2 % in 2007. *Now more than ever it appears that employees are willing to use the free administrative remedies available to them at the EEOC to try to get compensation out of their current and former employees. To protect themselves in these troubled times, organizations should take extra precaution to investigate and document claimed instances of potential discrimination to build a defense against a potential complaint or lawsuit.*

FTC CRACKS DOWN ON FACEBOOK OVER PRIVACY ISSUES – The Federal Trade Commission has entered into a settlement with Facebook over alleged privacy violations, following up on complaints filed by the Electronic Privacy Information Center ("EPIC"), a well-known privacy watchdog group, and some nine other nonprofit groups. The FTC claims Facebook has repeatedly promised its users the information they put on Facebook accounts can be kept private if users want it to be private, when in fact Facebook made some of users' data available to marketers and advertisers. Facebooks's settlement with the FTC calls for Facebook to not deceive users regarding privacy promises, and imposes a privacy audit requirement for 20 years on Facebook along with other specific changes in the ways Facebook deals with users' data. Facebook's CEO acknowledged the company "… has made a bunch of mistakes" but assures users Facebook has a good history of providing transparency and control over who can see what users put on their Facebook pages. *Perhaps the potential for fines up to $16,000 per day for future violations will deter Facebook, but don't bet on it. Facebook's willingness to enter into the settlement may reflect its interest in proceeding with an initial public offering of stock, estimated to be in the $100 billion range. Be careful what you post on Facebook and other social media.*

MANDATED SUMMARY OF BENEFITS AND COVERAGE DELAYED – The Departments of Health and Human Services ("HHS"), Labor and Treasury have jointly agreed to delay implementation of the Summary of Benefits and Coverage ("SBC") and Uniform Glossary regulations which required employers to provide written summaries of health plan benefits to employees by March 12, 2012. The regulations are intended to implement marketing aspects of the Affordable Care Act enacted a year ago. The regulations essentially require health plan coverage and benefits to be summarized along with a plain English glossary of the terms used in the health plans. Employers faced with this assignment are also wondering how to deal with uncertainties imposed by challenges to provisions of the Affordable Care Act, which will be reviewed by the U.S. Supreme Court in 2012. *The Departments have delayed implementation of the SBC requirements without selecting a new date for compliance. That lifts a burden from employers, but one would expect employers are already providing summaries of their health benefits to employees.*

TAX LAW DEVELOPMENTS

THE UNMENTIONED PART OF THE PAYROLL TAX EXTENSION BATTLE – What seems to be totally ignored in the Democratic and Republican jockeying for political gotcha points in the debate on extending the 2% "payroll tax cut" after December 31 is that the reduction and any extension further exacerbate the Social Security fund's shrinkage as payouts exceed payments in. *It will only get worse in the years ahead, but so what. That's then and now is now, and we have an election to win. The shortfalls will be noticed years from now and it will be someone else's problem. "Ask not for whom the bell tolls…."*

HOW MUCH LONGER BEFORE ONLINE SALES ARE TAXED? – With record-breaking sales on "Black Friday," and state and local governments desperate for new sources of revenue, how much longer can online sellers avoid having to collect sales taxes in states where they do not have a physical presence? Bricks and mortar retailers nationwide and their associations are renewing their complaints that it is simply unfair their online competitors do not have to collect and remit sales taxes. Some in Congress are listening, and legislation has been introduced in the House and Senate to require online retailers to collect sales taxes. *Watch S. 1832, the Marketplace Fairness Act, and H.R. 3179, the Marketplace Equity Act, which are being promoted in major print ad campaigns. The National Retail Federation and the International Council of Shopping Centers are among the supporting associations. One argument against taxing online sales, that the Internet is too new and online sales are too small and novel, is long gone. The other argument, the crazy patchwork of state, county and municipal sales taxes that vary all over the country in what is taxed and how taxes should be computed remains potent. The varying sales taxes in just the Chicago and suburban marketplace illustrate the problem. One proposal is to exempt online sellers doing less than $500,000 in business annually. One thing for sure: states and local governments need the money and those in Congress need votes. Associations need to follow this issue if they sell online.*

IRS SUSPENDS 990 E-FILINGS FOR TWO MONTHS – The Internal Revenue Service has announced that e-filing of Form 990, Form 990-EZ, Form 990-PF and Form 1120-POL information returns will not be available from January 1, 2012 through February 29, 2012 because of IRS system maintenance. To minimize the adverse impact of this suspension on filers, the IRS has extended until March 30, 2012 the filing deadlines for these forms that would otherwise have been January 17 or February 15, 2012, and further extensions of filing deadlines can be requested by filing Form 8868 with the IRS. Additionally, organizations not required to make filings for these forms electronically may choose to make paper filings up to the extended deadlines. The announced suspension of e-filing for the indicated forms will not impact Form 990-N e-postcards. *Readers should make allowances for the suspension, request extensions of time beyond March 30, 2012 as necessary, and make timely filings.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

FAA BELATEDLY CALLS FOR BETTER COORDINATION CHANGES – *H&H Report Update*—The Federal Aviation Administration has promised changes will be made before Christmas travel is upon us to address the lack of coordination among air traffic controllers, airlines and airports which led to the fiascos at Hartford's Bradley International Airport when 28 flights including seven large international flights were unexpectedly diverted to Bradley during the freak snowstorm which shut down or greatly hampered airports along the east coast, including Bradley. Passengers were stranded on planes for up to seven hours for a variety of reasons including lack of gates, airport and Customs and Border Protection ("CBP") personnel, and electrical power outages. The unexpected diversions overwhelmed Bradley and passengers paid the price. The immediate outcry was to demand fines for violating the three-hour and

four-hour tarmac delay rules. As much as any other fact, other than the weather, a failure of coordination among the all the parties was to blame for diverting so many flights to a medium-size airport that could not handle the volume at the best of times, much less the worst of times. *What seems so obvious in retrospect apparently was not at the time. Airports need to be brought into the discussions as well as air controllers telling airlines where to send diverted flights. A bad situation was made worse. Perhaps Bradley personnel could have, should have told the air controllers we can't handle the load early on and avoided or at least reduced the chaos. And CBP needs to be brought into the mix earlier too to better handle passengers on international flights that CBP insists only its personnel can allow off planes. So we'll see what happens when the next storm or other crisis erupts without warning.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

COURT PROHIBITS WISCONSIN FROM LIMITING PAC CONTRIBUTIONS – The federal appellate court in Chicago has struck down a Wisconsin statute prohibiting individuals from giving more than $10,000 annually to independent political action committees (those that do not coordinate expenditures with political candidates or parties). The court ruled that application of the Wisconsin law to such contributions violated the free speech provision of the First Amendment to the U.S. Constitution in that it "[N]ecessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration and the size of the audience reached…." by political speakers during a campaign. *The court's ruling did not impact state limits on the contributions individuals can make to political parties, candidates and political action committees that do coordinate their activities with candidates and parties. Wisconsin's law limits those contributions as well, and the court distinguished such restrictions from the expenditure limitations invalidated in the court's decision. Associations and other nonprofits with PACs will want to keep these points in mind during this heated election cycle.*

WANT TO INCREASE THE AMOUNT OF DONATIONS YOU RECEIVE? – A recent study ("Money for Good II") released by Hope Consulting in partnership with Guidestar shows that if nonprofits and information providers are able to provide donors, advisors, and foundation grantmakers with the information they want in an easy to read and readily accessible format, donors would consider shifting up to $15 billion in charitable dollars to higher-performing nonprofits. The study indicated that donor groups prefer (1) a broad range of information on organizations' impact, financials, and legitimacy, (2) data provided in transparent formats that provide several pieces of information simultaneously, as opposed to a basic rating, and (3) information from third-party portals that provide information on nonprofits. Above all, donors look for data that indicate how impactful and effective organizations are at using their donors' money to pursue their charitable purposes. *In an age where money earmarked for charities is scarce, you might consider updating the methods that you use to attract donors. Most research is done online and donor groups and advisors will not want to waste their time looking through your website to connect the dots. Do the connecting for them and make your data shine. More information on the study can be found at http://www.multivu.com/players/English/52621-guidestar-and-hope-consulting-money-for-good-II/.*

H & H DEVELOPMENTS

BEST WISHES FOR A HAPPY AND SAFE HOLIDAY SEASON AND A HEALTHY AND PROSPEROUS 2012

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