

# THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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## THE LAW FIRM FOR ASSOCIATIONS®

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It Was Bound To Come, Sooner or Later

**ENSURE YOUR ELECTRONICALLY FILED TAX RETURN IS IN FACT FILED** – A recent experience provided a reminder that if you or your tax preparer files your federal tax return electronically, you or the tax preparer should check to ensure it was in fact delivered to and received by the Internal Revenue Service. *That letter in the mail from the IRS saying we have a credit to your name for tax payments but no tax return was filed is probably not the way you want to start your day. With the push on to file more and more returns electronically, some will not be received and the sender may not know that until a letter arrives from the IRS. "Trust but verify" by asking your tax preparer for a copy of a notice from the IRS saying your return is accepted.*

**TRILLION DOLLAR DEFICITS FOUR YEARS IN A ROW** – The Congressional Budget Office sees a fourth year in a row of budget deficits over a trillion dollars. Not to be outdone, Governor Quinn in Illinois has proposed new additional spending and tax cuts in his State of the State address without any spending cuts or revenue increases while the state is some \$200 billion in debt. But at the federal level and state level there is little stomach in the executive or legislative branches, especially in an election year, to make any meaningful changes to increase revenue or cut spending. *And we keep electing the same people and expect different results? What fools we! Any not-for-profit leader who proposed this sort of fiscal insanity would soon be unemployed.*

**HERE'S AN IDEA FOR ASSOCIATIONS TO CONSIDER** – Reaching out to members can be difficult at times, particularly as groups grow larger or are more dispersed geographically. Hold announced telemeetings of a webinar type, where members can hear presentations and send in their questions and comments. This might be used to discuss a new promotion, bylaws changes, an annual plan or strategic outlook change, or a myriad of other topics. *It provides a way to connect, allows immediate feedback, and can be done cost-effectively, especially for groups that only get together once or twice annually. Think about it.*

GOOD READING ... See you in March

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## NOT-FOR-PROFIT LAW DEVELOPMENTS

**PROPOSED NEW YORK STATE BUDGET TARGETS NONPROFITS** – New York Governor Andrew Cuomo has proposed a state budget that tries to limit annual state reimbursements for staff salaries at nonprofits to \$199,000. The proposal follows a *New York Times* report on compensation practices at organizations providing Medicaid-financed services to the developmentally disabled. *Increasingly, states seem to be stealing the thunder from the Internal Revenue Service when it comes to monitoring and regulating executive and director compensation paid by nonprofits. The Massachusetts Attorney General made headlines with her efforts in that regard last year. Similar regulatory efforts can probably be expected in other states.*

**EGYPT’S CRACKDOWN EXTENDS TO NGO STAFFERS** – *H&H Report Update* – The crackdown on nongovernmental organizations (“NGOs”) promoting democracy in Egypt has not let up, according to recent news reports. In the most recent developments, Egypt’s military and civilian leadership has denied exit permits to six staffers from two of the three American-funded NGOs, turning them back at Cairo’s airport, including the son of Obama Cabinet member Ray LaHood, U.S. Secretary of Transportation. Now three of the staffers including young LaHood have taken refuge in the U.S. Embassy after being advised by their Egyptian lawyer they were subject to arrest. *We appear to have been unduly optimistic that the Egyptian government would cease scapegoating the NGOs as the fomenters of demonstrations against the continuing military takeover of the Egyptian government. This also appears to be a sop to some anti-American hardliners who have come to power following the toppling of former President Mubarak. We repeat the comment from January’s Report: NGOs and their staffers operating internationally can lose whatever foreign governments want to take from them, including their freedom.*

**HOSPITAL MUST PAY FOR BREACHING AGREEMENT ON USE OF DONATION** – An Oklahoma jury awarded country singer Garth Brooks a \$1 million verdict in his suit against a hospital for allegedly breaching an oral agreement as to how a contribution to the hospital should be used. Brooks said the hospital had agreed that his \$500,000 contribution would be used to construct a women’s health center in honor of his late mother. The hospital said Brooks did not “accurately remember” his negotiations with the hospital concerning use of the donation, that there was no such agreement, and that the hospital was not restricted as to how the contribution should be spent. But the jury sided with Brooks, requiring the hospital to refund the donation and pay him another \$500,000 as punitive damages. *Maybe nobody should consider a legal fight with a country music icon in Oklahoma, or maybe, to avoid such disputes there should have been a written agreement as to how the contribution was to be used. We always say, “Get it in writing!”*

## INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

**FROM MASS FAX VIOLATIONS TO MASS COPYRIGHT LITIGATION** – After years of potential liability and outsize damages for sending faxes to businesses or individuals who had not given permission to the sender, there is a new and opposite twist on potential liability for violators, this time for unauthorized downloads of a single copyrighted work, usually a movie or video of some sort, by individuals who may be all over the country. The plaintiffs’ attorneys file against a class of “John Doe” defendants and seek subpoenas against their ISPs to obtain the identities of the “John Doe” defendants. Individuals thus identified find themselves subjected to copyright litigation in a faraway jurisdiction and exposed to draconian copyright statutory damages and attorneys’ fees, and pressure to settle for a few thousand dollars. *Unauthorized fax violations involve one defendant and potentially hundreds or thousands of claims for a single fax message. Here hundreds or thousands of defendants face draconian damages and legal fees, plus public identification regarding what they downloaded, for a single violation. Defendants are often persuaded to quickly settle. Even single copyright violations can be expensive!*

## EMPLOYMENT LAW DEVELOPMENTS

**EDUCATION, CHILDREN OUT OF WEDLOCK, STRUCTURAL UNEMPLOYMENT** – A pair of recent reports may illustrate a connection between the pair. One report said a majority of births to women under 30 in the U.S. are now occurring outside marriage, which many experts say result in lower economic, social, behavioral and cognitive outcomes for mothers and children. The other report noted states with more four-year universities and higher concentrations of skilled workers and professionals had lower unemployment numbers. *Putting the two together you can theorize the long-term consequences of the former may be detrimental to the latter both short and long-term. Where are today's and tomorrow's new workers to come from for this global economy we are in?*

**COURT UPHOLDS “MINISTERIAL EXCEPTION” TO EMPLOYMENT LAWS** – The U.S. Supreme Court has ruled unanimously that the First Amendment to the U.S. Constitution bars the filing of employment discrimination suits by or on behalf of a minister against the minister's church. In so doing, the Court rejected a suit brought by the Equal Employment Opportunity Commission alleging a violation of the Americans with Disabilities Act by a Lutheran church and school for terminating a minister/teacher. The EEOC alleged the minister/teacher was fired because she had narcolepsy, a condition that causes excessive daytime drowsiness. But the Supreme Court said if the individual was a minister, then a “ministerial exception” to the employment discrimination laws applied, even if the EEOC's allegations were true. Further, the federal appellate court had concluded the individual in question was not a minister for purposes of any ministerial exception because she spent more time teaching secular subjects than religious ones and because there were lay persons at her school performing the same duties. However, the Supreme Court said the appellate court erred because it wrongly disregarded other factors that should have led to the conclusion that the individual was covered by the ministerial exception, including the church's formally commissioning her and holding her out as a minister with a role distinct from that of most of its members. Also, her title represented a significant degree of religious training, the individual held herself out as a minister by accepting the formal call to religious service, her job duties reflected a role in conveying the church's message and carrying out its mission, and the individual played an important role in transmitting the Lutheran faith. *Interestingly, the Supreme Court emphasized that it was ruling only on the constitutionality of employment discrimination suits brought by or on behalf of ministers against their churches, stating that it expressed no view on whether the “ministerial exception” bars other types of suits, such as actions for breach of contract by religious employers. Said the Court, “There will be time enough to address the applicability of the exception to other circumstances if and when they arise.”*

## REGULATORY LAW DEVELOPMENTS

**YOU HAVE TO LOVE THE TERM – THE UNINTENDED CONSEQUENCES FEE** – Take that, U.S. Department of Transportation! Spirit Airlines has announced a \$2 one-way fee on each flight in response to the new fare rules imposed in late January on U.S. airlines, calling it the “DOTUC” fee or “Department of Transportation Unintended Consequences” fee. Spirit objects in particular to having to hold a reservation for 24 hours before a customer is obliged to pay, saying this means airlines have to take seats out of inventory which may not be sold if customers change their mind. *You have to admire the logic of the position. Should every new regulation (or airline screw-up too?) be offset by an unintended consequences fee? Talk about open-ended fees. They could really balloon over time. Would Spirit offer an unintended consequences credit if it loses your bag, mismanages your reservation, etc.? Probably not.*

**TAX YEAR 2011 REFUNDS MAY BE DELAYED A BIT** – The Internal Revenue Service is warning taxpayers that due to increased identity theft and antifraud safeguards their 2011 tax refunds may be delayed a week or more. The IRS has touted electronic filing of tax returns to enable refunds in as little as seven days up to 21 days. But the fraud and detection steps added this year to refund processing may result in slightly slower refunds on half to nearly three-quarters of refunds. From some of the initial online responses to this, one would think the IRS is somewhere between incompetent to doing this deliberately. But electronic filing has also permitted security breaches and identity thefts enabling diversion of refunds. The IRS has been criticized in the past for not having better protections built into the refund process. *Which would you prefer in an imperfect world, waiting a week or two longer for your refund or trying to persuade the IRS that you are a victim of identity theft and your refund was fraudulently diverted so the refund process must be done all over?*

**SUPREME COURT WON'T CONSIDER POLITICAL ACTIVITY BAN CHALLENGE** – The U.S. Supreme Court has refused to hear a legal challenge to the Internal Revenue Code's prohibition on partisan political activity by organizations exempt from federal income tax under Section 501(c)(3) of the Code. Catholic Answers, Inc. had filed a suit for a refund of excise taxes imposed by the Internal Revenue Service on the organization's alleged campaign intervention expenditures, hoping to obtain a court ruling that the ban is unconstitutional. But the IRS then refunded the taxes to the organization, which led the Court to conclude that the case was no longer appropriate for judicial review. *The is an example of how the IRS can prevent court scrutiny of its activities by simply giving a tax refund to any organization challenging the legality of IRS actions or by otherwise taking steps that eliminate any reviewable legal controversy with that particular organization. Doing so can leave the IRS free to engage in the same enforcement activities with respect to other organizations unless they too file a legal objection to the way the IRS is treating them. But this approach by the IRS also undercuts the threat to church groups and other Section 501(c)(3) organizations that their exemptions may be revoked for engaging in prohibited political activities.*

**INCOMPLETE WRITTEN ACKNOWLEDGMENT COSTS DONORS A DEDUCTION** – The U.S. Tax Court has upheld a decision by the Internal Revenue Service to deny a charitable donation tax deduction in a case involving a purported bargain sale to a charity of rights of first refusal for a Martha's Vineyard property in exchange for some lots, leases, beach access rights and other valuable consideration. The Tax Court noted that a contemporaneous written acknowledgment from the charity is required by the Internal Revenue Code for deductions involving gifts worth \$250 or more, and the acknowledgment must include a complete and accurate description and good faith estimate of the value of all goods or services received in exchange for the gift. But the court found the acknowledgment provided by the charity in this case did not reflect all of the consideration given to the alleged donors by the charity. As a result, the Tax Court sustained the complete disallowance of deductions claimed for any donation component of the transaction. *It didn't help the donors in this case that the court thought the record strongly suggested the donors and the charity made a conscious decision to exclude certain information from the acknowledgment as well as the donors' income tax returns. However, even in cases where such a record is not going to be a problem, charities and donors should make sure that acknowledgments are totally complete and accurate in order to ensure that a deduction will be allowed.*

## MEETINGS & TRAVEL LAW DEVELOPMENTS

**ARE YOU FAMILIAR WITH “CHIP AND PIN”?** – If not, you soon will be as your credit card and bank card issuers introduce this technology widely used around the world, especially in Europe. “Chip and pin” is the term for EMV technology used in “smart cards” which feature an embedded microchip (“chip”) for identification purposes when coupled with a four-digit personal identification number (“PIN”). This is regarded as more secure against fraud than the traditional magnetic strip on the back of credit and bank cards used in the U.S. Cards with the magnetic strip are easier for thieves to duplicate or to forge the signature required on the backs of such cards. The U.S. credit and banking industries have resisted going to the newer technology, citing cost considerations. *Well, they are being pushed by some of their best corporate and high income users to make the switch because the magnetic strip cards are less likely to be accepted overseas by many merchants, and that does not make for happy business or high income travelers. Visa, Wells Fargo and Bank of America are testing the new technology, with Visa announcing an October 1, 2012 rollout. International travelers, take note. If you run into problems overseas with your old technology cards, pressure your bank to change.*

**A DIFFERENT TAKE ON THE NEW AIRLINE TICKET PRICING REGULATIONS** – *H&H Report Update* – At the end of January, over their vehement protests airlines were ordered by the U.S. Department of Transportation to include all *mandatory* fees and taxes in their advertised ticket prices. The regulators claim this will clarify the real price of a ticket to the flier. Not so fast, say Spirit, Southwest and Allegiant who are suing to block the new rules. They argue that the new regulations are intended to hide the impact of federal taxes and fees on airline ticket prices, among other bases for blocking the new rules. *Most commentators disagree with that argument. And airlines can still add on their many optional fees for checking baggage, preferred boarding and seating and all the other extras that can bump up the price of a ticket. “You bet your money and you takes your chances,” especially for air travel these days.*

**PIZZA ALERT! – UNAUTHORIZED DISTRIBUTION OF PIZZA FLYERS** – Local hotels and the Central Florida Hotel & Lodging Association are working with local and state law enforcement to eliminate the unauthorized distribution of pizza flyers that may be slid under hotel guestroom doors. The flyers do not have the pizza companies’ addresses, indicating that the pizza establishments may not abide by regulations of the Health Department. *Additionally, this has all the markings of an identity theft waiting to happen. You call in your order, give your credit card number, and .... In room food delivery is an attractive alternative to going out again when you’re tired, you don’t have a car, or you’ve arrived too late for room service. Don’t make the call without checking with the front desk to make sure the establishment is legitimate and recommended. You may also want to suggest you will meet the delivery in the lobby and pay cash rather than providing a credit card number, the same as you might do when home. Road warriors beware –and not just in Florida!*

## OTHER ISSUES, TRENDS & DEVELOPMENTS

**FBI SAYS WATCH OUT FOR NEW BANKING SCAM** – The FBI is urging bank account holders to avoid responding to a new online spam attack attempting to induce recipients to provide personal bank account information. Emails purporting to be from the National Automated Clearing House Association, the FDIC and other federal authorities ask for your account information in order to resolve some made-up

problem. *The FBI warns that banks and regulators don't send you emails asking for such information. Do not respond. Once you click on the message, the scammer takes over your computer, breaches your firewall and passwords to go after your accounts. Don't help!*

**ENCRYPTED CONTENTS ON SUSPECT'S COMPUTER SUBJECT TO INSPECTION** – A federal judge in Colorado has ordered a woman suspected of mortgage fraud to provide documents on her computer to federal prosecutors. She had claimed a constitutional right against self-incrimination, saying she should not have to give prosecutors the password to her encrypted computer files. The judge rejected her Fifth Amendment claim. *The order is not novel. Prosecutors had seized the computer but were unable to access its contents. One of the first items typically listed on a search warrant in a business case is the suspect's computer(s). This just takes that a step farther by requiring access to the encrypted contents.*

**IT WAS BOUND TO COME SOONER OR LATER** – Honda is exporting its compact Fit car model to Canada from a plant in China. Previously the Fit was exported to Canada from a plant in Japan, but the rising value of the Japanese yen makes the profit greater on cars brought in from China. Honda says this is part of an overall strategy to build more cars in domestic markets coupled with maximizing production from its various plants around the world. *Maybe so, but the underlying message for U.S. and Canadian auto makers and workers is that car products from China are coming to North America. Chinese auto plants have access to the very best auto technology from their U.S., Canadian, Japanese and European "partners" as a condition of doing business there. How significant are the wage differentials there and here? We may soon find out.*

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## H & H DEVELOPMENTS

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In February,

Jonathan Howe presented the webinar “Unrequited Love - Contracts, Valentines, and Dear Jon Letters/What do you do when things go wrong?”

C. Michael Deese presented a session entitled “Legal Issues for Association Management Companies and their Clients” at the February annual meeting of The AMC Institute in Rancho Mirage, California. He also spoke on a panel addressing Association Management Company Accreditation at the same meeting.

Barbara Dunn presented sessions on contracts, risk identification and risk management at a meeting professionals industry conference in National Harbor, Maryland.

### Contributors to this issue...

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