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:

SOMETIMES IT'S BETTER TO JUST SAY NOTHING! – Japanese Finance Minister Taro Aso recently announced that the elderly should hurry up and die in order to reduce government medical spending. *One can only imagine the reaction in this country if the Secretary of the Treasury came out with such a pronouncement. He later backtracked a bit and said it was his personal view, not the government's view. Maybe he should keep his personal views to himself. Good advice for all of us.*

CALM DOWN, IT'S NOT GONNA HAPPEN – Following the decision of Secretary of Defense Panetta to allow women to serve in combat, opening hundreds of thousands of potential positions to women (think infantry for starters), there was an immediate hue and cry about registering for the draft. If every 18-year-old man is supposed to register for the draft, what about 18-year-old women? Why should they get a pass? When Congress renewed draft registration in 1980, women were excluded because they were not allowed to serve in combat. Now they can. *First, the draft ended in 1973 with the end of the Vietnam War. Second, before getting into draft registration issues, there will be a political firestorm and court challenges. So, relax, it's not gonna happen. By the way, women have been serving* ***in combat*** *in Iraq and Afghanistan since 2003 in case nobody has noticed. Ask Congresswoman Tammy Duckworth (D. IL) who lost both legs when the helicopter she was piloting was shot down.*

DOES YOUR ASSOCIATION RELATE TO THIS TREND? – U.S. census figures project that California's Hispanic population will outnumber California's white population next year, becoming the third U.S. state in which whites are not a plurality. Hawaii and New Mexico are the other two. *But in mainstream association circles, for the most part, one does not encounter such diversity, and in association management circles, such diversity remains rare. When will that change?*

GOOD READING … See you in March 2013

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CONDO ASSOCIATION BOARDS TAKE NOTE – An Illinois appellate court has issued a ruling that should be reviewed by condominium association boards, their advisors and management companies. A condo board sued one of the condo owners seeking unpaid assessments, attorneys' fees and to take possession of the owner's unit. The owner defended claiming the association board had allowed the common elements roof and exterior walls to fall into disrepair, which resulted in extensive water damage to her unit that the board refused to repair, justifying her refusal to pay assessments. She also counterclaimed for damages. A trial court rejected her affirmative defense, awarded the association possession of her unit, damages and attorneys' fees, and said her counterclaim was not germane to the issue of possession under the (IL) Forcible Entry and Detainer Act, so her counterclaim claim would have to be brought in a separate lawsuit. The appellate court affirmed in part and reversed in part. The most important part of its ruling is the condo owner's claim the board had not performed its duties ***with respect to the common elements*** was a viable affirmative defense to the association's lawsuit for unpaid assessments and possession of the owner's unit, assuming the breach of duties was sufficiently material. The appellate court affirmed that the counterclaim should be a separate lawsuit because it was not germane to the association's possession claim held, but the destruction to the owner's unit could be evidence in the owner's affirmative defense to that claim. *This does not open the door to an affirmative defense every time a condo owner refuses to pay assessments because the board has failed to do something demanded by a unit owner. This newly recognized affirmative defense is limited to material breaches related to the common elements, not to damage to a specific unit although damage to a specific unit may be evidence of a breach related to upkeep of the common elements. With more condo unit owners defaulting on assessments, boards seeking to take possession of units need to be attuned to such developments.*

A STORY BEHIND THE STORY? – It is all over the news that the Boy Scouts of America ("BSA") is reconsidering its long-standing national policy, imposed on local scout units, that the Boy Scouts do not accept gay scouts or gay troop leaders. This policy has come under fire in recent decades from all sorts of groups, school, church, civic organizations and local governments, that have made their facilities available to scouting at low or no rent, while many within the scouting community have remained adamant that the policy be upheld. Even the President has weighed in on the policy, urging an end to the ban. Recently, the BSA leadership planned to conduct an intensive but quiet session to review the policy, and possibly change and make the policy a matter of local scout troop option. That session has now been delayed until May at the BSA's national meeting. *What the leadership hoped would be a thorough vetting of the policy in private is now to be conducted in the klieg lights of the news media, with church groups weighing in on both sides, politicians shouting from the sidelines and threats of boycotts and departures and funding cuts. It appears the policy reconsideration was leaked to the media so now there will be a media circus. Leaks can happen in politics or when big-stakes issues are under consideration and partisan board members of not-for-profit groups believe their fiduciary duty of confidentiality is outweighed by their support for one side or the other of an issue. It looks like a lose-lose result no matter what the BSA leadership decides. Will the leakers care about that?*

NONPROFITS ONCE AGAIN VICTIMIZED BY EMBEZZLERS – Nonprofits in West Virginia are among the organizations most recently found to have been victimized by embezzlers. Earlier this year, people who handled money for Charleston's Multifest cultural festival pled guilty to charges of embezzling more than $300,000 from the organization between 2005 and 2010. In other proceedings, a former treasurer for both the Institute Volunteer Fire Department and the West Virginia State University Alumni Association pled guilty to stealing $25,000 from the former group and $33,000 from the latter. *Nonprofits seem to be prime targets for this type of criminal activity, sometimes, it seems, because other volunteer leaders and staff of the victimized*

groups haven't exercised the same watchful care for the nonprofits' financial matters as they would for their own. If you serve as a leader of any nonprofit, you need to keep an eye out for embezzlers and promptly report them to the appropriate authorities. Otherwise, you may also find yourself in legal trouble for having failed in your duty of care to the organization. "Trust but verify!"

Intellectual Property & Computer Law Developments

NAOOA SUES COMPANY ALLEGING FALSE LABELING – The North American Olive Oil Association ("NAOOA") sued a manufacturer in federal court in New York City, challenging the manufacturer's labeling of its product as olive oil. The NAOOA alleged Kangadis Food's product is a fat produced from left-over olive skins and pits, and does not meet any standard anywhere in the world for olive oil. The lawsuit seeks to compel the product be properly labeled, and that supermarket customers be notified the product is falsely labeled. The product is much less expensive to produce than olive oil, and sells for much less, although it is called olive oil. *Olive oil is frequently mislabeled, and often the subject of complaints by competitors, trade associations and regulators. This is an example of an association playing hardball with a manufacturer the association deems to be engaging in false advertising to bolster its market position, and hurting the image of the association's member manufacturers of properly manufactured and labeled products. In an industry troubled with adulterated products, this is a welcome action.*

Employment Law Developments

POLICE CLAIM FOR OVERTIME ILLUSTRATES A TRAP FOR EMPLOYERS – A lawsuit in a federal trial court in Chicago illustrates a potential trap for employers who send emails to nonexempt employees outside of regular work hours. A police officer claims that he and others are expected to read and respond to emails sent to their cell phones provided to the officers by the Chicago Police Department, but are discouraged from filing for overtime. As many as 200 other officers may join the lawsuit. The police department denies it discourages officers' claims for overtime in such circumstances. A magistrate judge said the officer has provided enough evidence to proceed for now. *Are your employees expected to read and respond to emails or answer their cell phones on work-related matters after-hours? If yes, you may be laying the foundation for a nonexempt employee to seek overtime pay for time spent responding to such emails or phone calls. Understand the rules and get competent advice to avoid such potential claims.*

"BUT BEFORE I GO…" – Senator Tom Harkin (D. IA), Chairman of the Senate Committee on Health, Education, Labor and Pensions, said he plans to reintroduce the Healthy Families Act, which would require employers to provide paid sick leave to employees, accrued at the rate of one hour of paid sick leave for every 30 hours worked. The paid leave could be used to recover from short-term illness, for care for a sick family member, or for time off to see a doctor. The Family Medical Leave Act ("FMLA"), which applies to employers of 50 or more full-time employees, is inadequate, according to Harkin, because too many workers cannot afford unpaid sick leave provided under the FMLA, and workers at small companies do not even have FMLA benefits. *Harkin has announced he is not running for reelection, so getting this bill through Congress would be a major feather in his cap. But given the continuing resistance to and financial uncertainties resulting from the Affordable Care Act, and a still shaky economic recovery, Harkin's bill seems like a real stretch, the same as it was last time.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

HOTEL EXECS WARN PRICE HIKES TO CONTINUE – If you encountered rising hotel room rates in 2012 or resistance on give-backs and concessions, don't expect relief in 2013, or even in the following three years after that. Hotel executives speaking on and off the record say they expect the recent trend of rising room rates to continue, noting demand is exceeding supply, and rates are returning to the peak rates before the Great Recession hit the industry with a bang. *Negotiate carefully. Decide what is most important to your attendees. Expect fewer concessions, as hotels look at their profit and loss numbers on services and amenities. Food prices will also climb because hotels are not immune to what is happening in that marketplace, and rising food costs will be another pass-through. More than ever, groups need to be ready to look at the whole picture when planning and negotiating a meeting. We are moving from a buyers' market to a sellers' market. Adjust accordingly.*

REGULATORY LAW DEVELOPMENTS

D.C. FEDERAL APPELLATE COURT THROWS A CURVEBALL – A federal appellate court in the District of Columbia has thrown a curveball that may well put the executive and legislative branches of government into contention, with the judicial branch having to sort out what it all means short and long-term. The court declared President Barack Obama's recess appointments to the National Labor Relations Board ("NLRB") back in early 2012 violated the U.S. Constitution because the Congress was not really in recess when three appointees were named to the NLRB. Since the appointments were made, the NLRB and its General Counsel have adopted a markedly pro-union bias in the opinion of many in the business community. The court's opinion calls into question the NLRB's numerous rulings the past twelve months, especially on unfair labor practices and union certification, and whether some 29 other Obama administration recess appointments are also subject to challenge. *Recess appointments are not all that uncommon. Both Presidents Bill Clinton and George W. Bush made such appointments without causing a constitutional law confrontation. With Republican filibuster threats preventing up and down votes on many senior executive and administrative appointees and judges over the past four years, recess appointments became one way to get around the threat of filibusters to thwart votes on appointees, thereby undermining the very purpose of the advise and consent power of the Senate. So now we have an issue that may have to go to the U.S. Supreme Court to resolve, namely when is Congress really in recess, leaving many such recess appointments and regulatory rulings in uncertainty while the judicial process slowly grinds along. One large question to be answered is whether the decision is retroactive to the first recess appointment or only looking forward. The Supreme Court passed on its first opportunity to consider the issue when it did not agree to hear an appeal from a company contesting an NLRB order because of the makeup of the commissioners. The Court may be waiting for the U.S. Justice Department to appeal the appellate court decision on behalf of the NLRB. This could drag on into 2014. The uncertainty regarding recess appointments illustrates the need to reform the current filibuster rules of the U.S. Senate. Is this any way to run a government?*

TAX LAW DEVELOPMENTS

SOME OTHER TAX CODE CHANGES TO KEEP IN MIND FOR 2013 – While attention was focused on the fiscal cliff negotiations and income tax rates at year-end, some other tax code changes, which will impact many in the not-for-profit community, slipped by with less notoriety. The Social Security wage base maximum increased from $110,100 to $113,700, which will affect many executives and affect higher income independent contractors even more, especially when coupled with employees' 2% payroll tax reduction from 6.2% to 4.2% over the past few years not being extended after December 31, 2012. Roth (post income tax) and traditional (pretax) IRA contribution maximums were increased from $5,000 to $5,500 per year, with the catch-up provision for those over age 50 staying at $1,000. Qualified defined contribution and defined benefit plan limitations were both increased along with 401(k) deferral limits. Standard deductions for those married and filing jointly, and for singles and heads of households were all increased by small amounts, and the personal exemption went up $100 to $3,900. *Nothing Congress does to the Internal Revenue Code is ever simple, so be sure to meet with your tax advisors and payroll services to get the proper withholding, payroll tax, various contributions and other benefits changes in place immediately.*

"I'M FROM THE IRS AND I'M HERE TO HELP YOU" – The Internal Revenue Service gets a bad rap for its efforts to provide service as well as collect the revenues necessary for our government to function, but on occasion, recognition of useful service seems warranted. Tooting its own horn, the IRS posted a notice of ten ways to get help from the IRS. Among the ten are 24/7 access to IRS tax forms and instructions, and an Interactive Tax Assistant that provides online answers to many questions. The IRS recommends using IRS e-file as the safest and easiest way for taxpayers and tax preparers to file complete and accurate tax returns, and to speed tax refunds within 21 days. Another helpful service is the capability to track the progress of your tax refund using the "Where's My Refund?" tool. The IRS recommends using the IRS Withholding Calculator to determine if you withheld the correct amount, not too much and not too little. *Go to the IRS website, www.irs.gov, for a wealth of information, including these tools and many forms, instructions and notices for the not-for-profit community.*

IRS TO UPDATE EXEMPTION REVOCATION LIST MORE RAPIDLY – The Internal Revenue Service has announced that it will now be providing more current information on its website list of organizations that have automatically lost their tax-exempt status for failing to make annual filings with the IRS. The IRS says that it will now be including nonprofits on its website list within a month of their exemption revocations. Previously, organizations were added to the list six months after revocation. *Exempt status can be regained after revocation, but it's a hassle. Nonprofits should make every effort to submit timely annual filings to the IRS on the 990 series of forms, and they should check the IRS website revocation list periodically if they think there is any chance they may have lost their exemptions automatically for failing to file.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

THERE'S NO FREE LUNCH – Governor Rick Snyder (R. MI) has asked the Michigan Supreme Court for an advisory opinion on the legality of the legislation at the end of the post-election lame-duck state legislative session making Michigan the 24th right to work state, which means state employees will now have the option of not paying union dues as a condition of employment by the state. The governor said he is trying to avoid a series of prospective federal and state lawsuits by the United Auto Workers ("UAW"), who

bargain on behalf of state employees, and by others, which can only delay enforcement of the legislation and inject more uncertainty into the bargaining process going forward. *The Michigan Supreme Court may not want to take on this battle, and let it percolate in the lower courts first. As one looks at Michigan's sad finances, one might ask why the UAW, which did such yeoman work helping GM and Chrysler into bankruptcy now represents state employees. We will watch and report on how this one plays out.*

SATURDAY MAIL DELIVERY TO BE CURTAILED – The United States Postal Service has announced it will end Saturday delivery of mail effective next August 1. Package deliveries will still be made and post offices currently open on Saturday will continue to remain open. The move is expected to save some $2 billion annually in costs. It seems unlikely that most associations will be affected as most are closed on weekends and most offices do not receive Saturday deliveries of mail, hence the piles of mail Monday morning. First class mail volume has declined some 25% in the past five years. *But anticipate the usual hue and cry that this will hurt business, etc., etc. Business will be hurt a lot more if the USPS continues to run huge deficits, some $16 billion the past year on revenues of $65 billion, and eventually goes bankrupt if it is again prevented by Congress from cutting some services to reduce its costs or is forced to raise rates so high that even more current users desert it in droves*.

H & H DEVELOPMENTS

In February . . .

Jonathan Howe co-presented two sessions (from the view point of associations) in Minnesota entitled, "Point-Counterpoint: The Lawyers Debate on Contracting"), one session was to the local chapter of an international meeting professionals association and the other to a business travel association. He also presented "BYOD and Mobile Device Management Policies - The Legal Issues" to an association forum in Chicago. He also addressed legal concerns for hotel general managers in today's environment at a meeting in Las Vegas.

John Peterson provided an update on antitrust developments to a survey group.

C. Michael Deese attended and spoke at the annual meeting of The AMC Institute. He was on a panel for a session entitled "Split Loyalty Dilemmas for AMC Staff," and also presented a session entitled "Legal Issues for Association Management Companies and Their Clients."

Naomi Angel presented two workshops, entitled, "Managing Risk in Uncertain Times" and "Ask the Experts! Top Industry Attorneys Take Your Questions," at an annual conference & expo for meeting professionals in northern California held in San Francisco: Additionally, she delivered a legal trends update at the annual meetings of the leading trade association of fence, deck and railing manufacturers and contractors.

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Contributors to this issue…
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