THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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USAA WARNS ABOUT ID THEFT FROM CHILDREN — Insurance and financial services giant USAA recently issued a warning to be on the lookout for identity theft from children. Many parents (A/K/A taxpayers) routinely apply for Social Security numbers (or federal tax numbers) for their youngsters soon after birth if for no other reason than for use on income tax returns. Those numbers may turn up in medical and school records, among other places. Thieves like them because they amount to a blank slate for opening credit, filing for tax refunds, and other nefarious activities, and parents may not suspect a thing until a child is old enough pay taxes or apply for credit. *If a parent has any reason to suspect something amiss, don't ignore the signs. Investigate immediately with the credit bureaus or IRS. And it might be prudent to do so about the time a youngster turns 16, just in case. Sounds like good advice from USAA.*

WHAT DO THESE HEADLINES HAVE IN COMMON? — A series of headlines illustrate a growing concern. "Teens Texting and Driving;" "Driving While Interrogated," "Whirling Dervish Drivers," and "In Study, Texting Lifts Crash Risk By Large Margin." What it adds up to is the growing danger, recognized and ignored, by drivers of all ages, and to some extent by car manufacturers, of the problems caused by "Multitasking in the Car." State and local laws banning the use of handheld cell phones for calls and texting are ignored. *Numerous studies show multitasking, but especially texting, is the equivalent of drunk driving. Yet drivers young and old do it. And the car manufacturers competing on the variety of functions their "infotainment centers" can provide in cars are contributing to the problem. GPS is a wonderful device but paying attention to GPS video displays while driving means taking your eyes off the road. Should this be an issue for liability insurers?*

WILL INSURERS BALK AT CONCEALED CARRY LAWS? — A recent *New York Times* headline says some insurers are balking at school administrators and teachers carrying guns in schools, and considering higher premiums or dropping coverage for schools that allow such access to guns in states allowing concealed carry. All states now allow concealed carry. *What does your association do in this regard? You had better review your insurance policies to see if this is an issue in your workplace. In short, can you bar weapons there?*

GOOD READING … See you in August 2013

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Not-For-Profit Law Developments

NEW OREGON LAW AIMED AT CHARITIES — A new law has been passed in Oregon that permits the state Attorney General to disqualify nonprofits from receiving contributions that are deductible for state income tax purposes unless 30% or more of their annual expenses are for "program services." Such organizations would also lose their state income tax exemptions beginning with the year following disqualification. Many nonprofits would be exempted from disqualification, including private foundations, organizations not in existence for at least four years, and entities receiving less than 50% of their annual revenues from contributions and grants. Disqualified nonprofits can regain qualification by demonstrating to the Attorney General that program services have reached the 30% level. *Many lawmakers and other officials have been voicing concern about the amount of public benefit provided by charities and other tax-exempt organizations compared to tax revenue foregone by government. More restrictions on exemptions and deductions may be in the offing.*

FUNDRAISER FOR CLOSED CHARITY ORDERED TO PAY RESTITUTION — A New York court has ordered a fundraising company for a now-shuttered charity to pay $3.1 million in restitution to contributors who were found to have been duped by a fraudulent money-raising scheme. Evidence showed the nonprofit Coalition Against Breast Cancer, utilizing several fundraisers, raised $10 million for breast cancer research from 2005 to 2011 but spent only 4% of that money for its supposedly charitable purposes, while the fundraisers and former directors of the charity pocketed the rest. The nonprofit was shut down in April, and three former directors were ordered to pay donors $1.6 million in restitution, while agreeing to never again run a charity in the state. Fundraiser Campaign Center Inc. has now been ordered to pay additional restitution to donors after raising $4.9 million on behalf of the charity and keeping $3.9 million of that money for itself. *New York's Attorney General was behind prosecution of these enterprising folks, who seemed to think that if a little charity went a long way, even less would go further. A number of state attorneys general are leading similar efforts to reclaim contributions from those who would defraud charitable donors. It's about time some attention was paid to the amount of moneys raised by charities that is actually expended for charitable purposes rather than on insiders and their aiders and abettors.*

Intellectual Property & Computer Law Developments

ANOTHER "BRANDING" ISSUE FOR THE U.S. AIR-AMERICAN MERGER — So which bank gets to provide the airline credit card to be offered by the post-merger U.S. Air-American Airline? U.S. Air uses Barclays Plc and American uses Citigroup (A/K/A Citicorp and Citicard and AAdvanatge) for credit card programs. Frequent flyers are attached to their current cards which they use to rack up frequent flyer points. Will one of the current banks retain the business of the post-merger airline, or will the post-merger airline use multiple banks as some consultants are recommending? A decision is not likely to be made public until after the merger is approved, which is anticipated sometime this fall. *Either way, a lot is at stake for current frequent flyers using the two airlines' credit cards and the banks and credit card providers. Flyers would be very unhappy to lose their current points and benefits, as executives at the two airlines and banks and card providers are acutely aware. When the decision is made regarding the new program, there will be a very hasty promotional program to acquaint cardholders with their new deal(s). Talk about instant branding! It should be interesting as an intellectual property undertaking. Trademarks, copyrights, all will be in feverish play.*

CONVICTION FOR COPYRIGHT INFRINGEMENT OF STANDARDS — IN CHINA! — A Chinese court in Zhejiang Province recently convicted a man of copyright infringement and sentenced him to one year in prison and heavy fines. Additionally, he was required to return all illegal profits related to his actions. He was accused of illegally downloading from the Internet between November 2009 and February 2011 more than 1,500 voluntary consensus standards documents developed by the International Organization for Standardization (ISO), ASTM International (a member of the American National Standards Institute (ANSI), and other

standards developers. He then sold the documents on his personal websites for a substantial profit. *Standards documents, like movies, recordings, books, and other media, are protected by U.S. copyright laws. The ruling shows that China may becoming more inclined to deal with copyright infringement within its borders. Let's hope this is real progress and not a one-time decision.*

EMPLOYMENT LAW DEVELOPMENTS

SUPREME COURT DEFINES "SUPERVISOR" FOR TITLE VII PURPOSES — One of the U.S. Supreme Court's final decisions of its 2012-2013 term provided an important clarification of the term "supervisor" in connection with Title VII of the Civil Rights Act of 1964 workplace discrimination claims. The Court took the Vance v. Ball State University appeal to resolve a split among appellate decisions regarding the term supervisor. In a 5-4 decision, the Court ruled a supervisor is one who can take tangible employment actions against an employee, i.e., "[A] significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." The Court expressly rejected a broader, less specific definition used by the Equal Employment Opportunity Commission and adopted by some federal appellate courts that a supervisor was an employee who could "significantly direct" another employee. The Court said that was too vague a definition and would require a case-by-case determination to decide if an employee was a supervisor while the definition approved by the Court was more precise and could be determined very early in an investigation or in the regulatory or litigation process. *The Court's decision is regarded as a significant win for business, reducing the field of strict liability claims, enabling investigations and litigation to be resolved much earlier in the process, and bringing clarity to the definition of supervisor. But employers may still be sued for "vicarious liability" for failing to take reasonable steps to prevent on-the-job harassment, whether by supervisors or nonsupervisory personnel.*

WHAT IMPACT WILL "BLACK SWAN" DECISION HAVE ON INTERNS? — A federal district court in New York City issued a decision in June regarding the use of unpaid interns which is expected to reverberate in employment circles. The judge ruled the producers of the movie "Black Swan" had employed a number of unpaid interns in violation of federal law regulating employment since the 1930s. The work performed by the interns ran afoul of the Department of Labor tests for unpaid internships because the work did not involve training meeting an educational standard, was basically unskilled work that would normally have been done by paid employees, and was not compensated. *Unpaid internships have become all too often a source of unpaid labor, especially by students and workers desperate to break into an industry or to come to an employer's attention. But the Department of Labor has fairly strict guidelines for internships, and if they are not met, an employer faces potential liability under the Fair Labor Standards Act for not paying the interns at least the federal minimum wage of $7.25/hour. (The movie grossed over $300 million.) The six basic requirements are an intern is provided training equivalent to an educational environment (i.e., classroom); the experience is for the benefit of the intern, and not the employer; employees are not displaced by the interns; the intern and the employer agree compensation will not be paid; and it is not necessary that a job will be offered and the internship is not a work trial. In short, the intern's training should not be the routine work of the employer. This is a demanding test and most unpaid internships do not qualify. Given the widespread publicity given the* "Black Swan" *decision, other lawsuits by interns seeking back pay seem likely. Keep in mind the decision stated interns cannot waive their statutory rights to compensation.*

YOU CAN'T JUST MAKE THIS STUFF UP — The U.S. Department of Justice ("DOJ") is currently using some 95 assistant U.S. attorneys who are working for free, and other such positions are listed on the department's website, according to an article in the American Bar Association's online journal. Does this comply with the (federal) Antideficiency Act which says the government is not allowed to use unpaid volunteers to do the government's work? Another question is whether using free volunteers runs afoul of the Department of

Labor's strict six-factor test for using unpaid interns. *Surprise, surprise. The federal government is exempt from complying with the Department of Labor's regulations for unpaid interns. More governmental "do as we say, not as we do." The DOJ explanation: We are coping with staff cutbacks due to sequestration. But don't you do it.*

U.S. SUPREME COURT RECOGNIZES GAY MARRIAGE RIGHTS — In a pair of recent rulings, the U.S. Supreme Court took on the controversial subject of gay marriage. In one case, the Court held unconstitutional a section of the (federal) Defense of Marriage Act ("DOMA") defining marriage as a heterosexual union for purposes of federal laws providing benefits to married couples, though another section of the Act, which allows states to refuse recognition of gay marriages performed in other states, was left standing because it wasn't challenged before the Court. In another case, the Court, on procedural grounds, dismissed an appeal from a lower federal court decision that California's Proposition 8, outlawing gay marriage in the Golden State, was unconstitutional, thus leaving the lower court decision intact and allowing gay marriage in California. The Court held that the supporters of Proposition 8 who filed the appeal had no standing to do so because private litigants could not defend a state law in federal court when state officials had declined to do so. *Employers, take note. The ruling on the Defense of Marriage Act, among other things, will require revision of many employee benefit plans, or at least a reconsideration of how they are interpreted, since federal laws largely govern employee benefit plans, and since legally married homosexual couples will now have to be provided with the same benefits as legally married heterosexuals. Another question is whether benefits that were not previously provided must be provided retroactively. The Court's rulings, however, left to each of the states, for now, the question of whether they will allow homosexuals to marry in their jurisdictions, and which unions they will recognize as granting rights conferred under state law, including marriages recognized where the couples were married but no longer reside. Which state's law applies? The Court's DOMA decision presents a host of complexities as hundreds of federal laws will be scrutinized to determine benefits going forward (and perhaps retroactively). The DOMA decision involved a refund claim for federal estate taxes so many claims could arise for that reason alone.*

Meetings & Travel Law Developments

OUTRAGE OVER LONG U.S. ENTRY WAITS AND ABU DHABI DEAL — Two converging sets of headlines display the frustrations with flying to the United States this summer. Extended delays at getting through Customs and Border Protection ("CBP") stations to enter the United States at a number of major airports with international portals have been widely reported with waits in multiple hours rather than minutes. Even foreign governments are complaining about the delays. The CBP blames the delays on cutbacks in staffing and overtime due to the congressional sequestration debacle. Others say the staff cuts are intended to aggravate U.S. and foreign travelers so they in turn will put pressure on Congress to remedy the sequestration cuts. Meanwhile U.S. and UAE authorities have entered into a deal to provide preclearance into the U.S. through a CBP station in Abu Dhabi. That has really upset European airlines which claim it is unfair to provide such preclearance to the UAE while not permitting it for passengers in Europe (except for flights through Dublin and Shannon, Ireland). The long entry delays are also forcing airlines to adjust schedules to avoid peak entry times in U.S. airports. *Any U.S. citizen flying internationally frequently ought to look into the Global Online Enrollment System ("GOES") trusted traveler program (to obtain trusted flyer status). It helps you to avoid the worst of the airline security procedures and delays in the U.S. at airports where it is in effect, and greatly facilitates your return to the U.S. when flying internationally, allowing you to skip the long reentry lines. Meanwhile, be prepared to wait in long, slow lines.*

Regulatory Law Developments

BEWARE OF "GINA" BECAUSE THE EEOC IS PAYING ATTENTION — The Equal Employment Opportunity Commission recently settled its first lawsuit on behalf of a job applicant who claimed she was discriminated against by her prospective employer in violation of the Americans With Disabilities Act when she was rejected for employment based on her pre-employment physical results. The employer's medical examiner thought on the basis of her examination that she might suffer from carpal tunnel syndrome. The applicant's doctor disagreed but she was not hired. She filed her ADA lawsuit with the EEOC which noticed her job application included a questionnaire that asked about her medical history and the medical history of her family. That was enough for the EEOC to file an added claim to the ADA lawsuit, alleging a violation of the Genetic Information Nondiscrimination Act ("GINA"). The EEOC alleged the questionnaire was an unlawful inquiry for genetic information. The employer quickly settled for $50,000 without admitting liability under ADA or GINA, plus agreeing to perform various antidiscriminatory training measures internally, and to cease inquiries into employees' and applicants' family medical histories. *GINA is relatively new and untested but is an outgrowth of new biomedical testing, genetic mapping, and other advances in determining the probability a person is subject to an identified or even previously undetected condition. Congress was concerned that as medical information on persons other than the employee or applicant is considered in connection with employment, employers would increasingly screen out employees or applicants based on statistical probabilities they might become an expensive medical claim in the future. Review the information you request on applications or related forms, and become familiar with GINA and its progeny under state employment discrimination laws to avoid seeking information prohibited by statute.*

Tax Law Developments

IRS PROVIDES FASTER EXEMPTION FOR SOME SOCIAL WELFARE ENTITIES — The Internal Revenue Service announced that it will be sending letters to some social welfare organizations whose prior applications for recognition of tax-exempt status under Internal Revenue Code §501(c)(4) have been caught in an IRS "backlog." The letters will offer recognition of exemption within two weeks if recipient organizations certify that they devote 60% or more of both their spending and their time to activities that promote social welfare, and that political campaign intervention involves 40% or less of both their spending and their time. These thresholds apply to past, present and future years of operation. For purposes of these certifications, communications that identify a candidate and occur within 60 days prior to a general election or 30 days prior to a primary election are considered political campaign intervention. *The IRS says it will "treat these groups fairly and review applications promptly." Given recent election campaigns trends following the U. S. Supreme Court's 2010 Citizens United decision and the growth of §501(c)(4) organizations' participation in campaigns, do you think the certification requirements will impose an impediment to such organizations' exemption applications?*

IF YOU MAKE UNDER $1,000,000, YOU ARE UNLIKELY TO BE AUDITED — According to official Internal Revenue disclosures, if your adjusted gross income ("AGI") is less than $200,000, the IRS is not likely to audit you. In FY 2012 ending 9/30/2012, the IRS said it examined just under 1% of all individual tax returns. For those reporting under $200,000 and not filing Schedules C (a business), E (supplemental income or loss), F (activities outside the U.S.) or Form 2106 (employee business expenses), your odds of an IRS examination fell to 0.4%; and if under $200,000 and filing Schedule E or Form 2106, your odds were 1.1%. For those between $200,000 and $1,000,000, the IRS said it examined about 2.8% of returns, but for those reporting more than $1,000,000 AGI, the odds of being examined jumped to 12.8%. *Maybe the IRS has finally wised up. Go after the big returns because that's where the real money is when you have limited resources for conducting audits. Willy Sutton was right. When asked why he repeatedly robbed banks, he replied, "That's where the money is."*

OTHER ISSUES, TRENDS & DEVELOPMENTS

WILL CELL PHONE SUPPLIERS PROVIDE US WITH "KILL SWITCHES"? — They will if law enforcement authorities and many consumer advocates have their way. Kill switches are intended to permit cell phone users to disable a stolen cell phone or other such mobile devices. By disabling the devices, the person who steals the device would have a much more difficult time selling the device to buyers because the disabled phone would be essentially useless to the buyer. (A word to the wise for buyers: check that second-hand phone to see if it works before you pay for it.) As you might expect, the manufacturers or phone service providers are not eager to do this because there is a cost in making this kill switch available, and its use will make their phones less desirable to some. Police chiefs are on record supporting such kill switches. *What's not to like? The theft of cell phones and other mobile devices is the fastest-growing street crime in the U.S. One in three robberies nationwide involved a mobile device. More than 1.6 million were stolen a year ago. If your phone or device was ripped off, and the likelihood of ever seeing it again was minimal, wouldn't you prefer to disable it and make it useless to the thief?*

LEAST SURPRISING HEADLINES OF THE WEEK — The headline in a recent *National Law Journal* article does not come as a surprise: "Report: Campaign Contributions Influence State Courts." Or another *Chicago Tribune* headline: "Cashing In On Ties To The President – Groups hiring former Obama aides in effort to influence the administration" is typical. *Just why does one suppose all those campaign contributions pour in to political campaigns from presidential races to federal, state and local government legislators' races, state supreme court and local judges' and boards of education races, and a myriad of other election races? Altruism does not run that deep, but lobbying does. Consider the growth of §501(c)(4) groups which are so much in the news these days between IRS scrutiny fallout, and following the U.S. Supreme Court's Citizens United decision.*

H & H DEVELOPMENTS

In July. . .

Jonathan Howe has been accepted as Special Advisor to the America Bar Association Standing Committee on Meetings and Travel. He presented "What Can You Use/What Can You Sign?"… a presentation on meeting contracts for the an annual convention of a nonprofit council for advancement and support of education here in Chicago.

Barbara Dunn completed her second Ballwin Triathlon consisting of a 300 Yard Swim, 9 Mile Bike, and 3.4 Mile Run. This was Ballwin, Missouri's Race Series' 15th Annual Run. Congratulations, Barbara!.

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