THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

June 2011 VOLUME 2011, ISSUE 6

THE LAW FIRM FOR ASSOCIATIONS®

IN THIS ISSUE:

DISTRIBUTORS TAKE NOTE – In a recent edition of *The Economist,* an article on the disruption of manufacturers' just-in-time supply lines due to the triple disaster in Japan noted that manufacturers may be rethinking their lean inventory practices and relying on their supply chains to keep their manufacturing assembly lines humming along. "So a new growth industry may emerge from the crisis: that of holding and maintaining essential stocks on behalf of manufacturers." *New growth industry? Holding and maintaining essential stocks is the role played by distributors long before just-in-time became the manufacturing mantra. Distributor associations, encourage your members to remind their manufacturer and assembly partners of the advantages of working with distributors to avoid unexpected inventory problems. It doesn't take an earthquake, snowstorm, tornado, train derailment or other disaster to raise havoc with just-in-time supply chains*

LACKLUSTER ECONOMIC OUTLOOK CALLS FOR CAUTION – Some economists are beginning to turn negative on the economic outlook, citing inflationary pressures, a weakening manufacturing sector after major improvement the past year, a weak job market with private sector employment gains offset by government layoffs, and very small gains in compensation offset by rising food and fuel costs. *With government debt refinancing problems and a deadlocked Congress, state and local government debt and spending woes, and a slowdown in manufacturing, don't expect federal stimulus spending to lift the economy. This seems like a good time for associations to batten down the hatches in anticipation of stagflation - a stagnant economy and inflation - which may well dim members' enthusiasm for spending on association activities.*

LANDLINES MORE LIKELY TO BE DROPPED BY THE YOUNG AND POOR – A recent government study says poorer households, younger people and renters are most likely to drop landlines and rely on cell phones. For many, the cost of two phone types is the overriding concern, especially with more and more dependence on cell phones away from home. The study reported 30% or more households in 10 states have already dropped landlines. *Phone companies have to be looking at these numbers and planning for this trend to increase in the years ahead. In many third world countries landlines are not even an option – too expensive to build such systems. Adios landlines, newspapers and other print media, mail as we know it? To be determined….*

GOOD READING … See you in July

Howe & Hutton, Ltd.:
20 N. Wacker Dr., Suite 4200 • Chicago, IL 60606 • 312/263-3001 • Fax: 312/372-6685 • Email: hh@howehutton.com
Washington Office:
1901 Pennsylvania Avenue, NW, Suite 1007 • Washington, D.C. 20006 • 202/466-7252 • Fax: 202/466-5829
St. Louis Office:
1421 Buckhurst Ct. • Ballwin, MO 63021 • 636/256-3351 • Fax: 636/256-3727
E-Mail: hh@howehutton.com

NOT-FOR-PROFIT LAW DEVELOPMENTS

ATTORNEY GENERAL SEEKS TO END PAYMENTS TO NONPROFIT DIRECTORS – The Boston press has reported the Massachusetts Attorney General plans to ask the state legislature for authority to prohibit at least some public charities from paying board members for their services. This legislative effort arises from the public outcry that greeted disclosure of a plan by the Massachusetts Blue Cross Blue Shield to pay about $11 million to its departing chief executive. The Attorney General investigated board compensation by other nonprofit health insurers, publicly slammed board compensation by public charities as unjustified, and managed to convince some nonprofit health insurers to suspend payments to board members. But two of the largest nonprofit health insurers in the state indicated that they will continue to pay board members for their services, and a spokesman for one of them essentially called the Attorney General a "political hack" and dared her to do anything about his company's practices. *It's not nice to call government officials names, and daring them to do something is like waving a red flag in front of a bull. We trust the A.G. won't let the hubris of a few individuals influence her judgment about appropriate public policy. Nonprofit boards are well advised to carefully scrutinize compensation for their staff executives. Of course, labeling a Blue Cross Blue Shield a charity or even a nonprofit is a stretch in itself.*

ASSOCIATION LOSES ANTITRUST SUIT AGAINST MANAGEMENT COMPANY – A federal appellate court in New York has rejected a homeowners association's antitrust suit against the management company for a vacation property development, finding that the association failed to show how the management company's practice of tying the purchase of properties within the development to service contracts with the company injured competition in a relevant market. The court ruled that the association inadequately defined a real market impacted by the company's practices when it asserted that the company was restraining trade with respect to (1) vacation properties in the immediate vicinity of the development and (2) recreational facilities located in counties easily accessible from the development. *It isn't easy for a nonprofit to bring an antitrust suit against anyone, because such suits are expensive and there are numerous technical hurdles to overcome. As this case shows, not all restraints of trade violate the antitrust laws, even if they may cause actual harm to some individuals. A practice must have a prohibited effect on at least one well-defined "market" if there is to be a violation, and a "market" must reflect a discrete class of consumers in the real world rather than solely being created on paper for the purposes of a suit.*

SOME TOP ILLINOIS ASSOCIATIONS SILENT ON "CONCEALED CARRY" – A recent article in the Chicago Tribune's business section pointed out that the business community in general, and a number of prominent Illinois associations, had remained silent or neutral on an Illinois House bill that would authorize the carrying of concealed weapons in Illinois, including into restaurants, hospitals, office buildings, retail stores, etc. Singled out were the Chicagoland Chamber of Commerce, Illinois Licensed Beverage Association, Illinois Casino Gaming Association, Illinois Retail Merchants Association and the Illinois Chamber of Commerce. Only the Illinois Restaurant Association ("Smoking banned but guns OK?!") was outspokenly opposed to the bill. *Will you feel safer knowing someone on your train or bus, in your store, restaurant, hotel or place of work might be carrying a concealed weapon? Wait till your members start asking what they must do to comply with "concealed carry" in the workplace or at a meeting? What will you tell them?*

REGUATORY LAW DEVELOPMENTS

FTC SLAPS DOWN ENVIRONMENTAL CERTIFIER FOR MISREPRESENTATION – The Federal Trade Commission has entered into a consent decree with Nonprofit Management LLC, also doing business as Tested Green, and one of its officers who also is identified as Tested Green, to terminate their practices of selling environmental certifications to businesses which were not based on any actual environmental reviews or inspections and also misrepresenting the certifications were endorsed by two independent associations, which were instead owned and operated by the owner of Tested Green. *How many things are wrong here? First, Nonprofit Management LLC is not a nonprofit. Second, it purports to conduct environmental reviews which in fact were paper exercises for money ("Send us the money and we will send you the paper."), and third, they misrepresent that two other independent associations endorse the certifications. Which is worse, the man who came up with this scheme or the businesses that paid for these phony certifications? No wonder the FTC is acting against "greenwashing."*

TAX LAW DEVELOPMENTS

WILL NONPROFITS GO ON AUTO-PILOT? – Numerous municipal and county governments are asking that question, but responses to date are not encouraging. "PILOT" programs are "payments in lieu of taxes" and proposed by local governments to nonprofits exempt from paying local property taxes but dependent on local governments for all sorts of services including police and fire, water, and sometimes other utilities. At a time when local governments are laying off workers, looking at shrinking tax revenues and demands for more, not less, services, local officials are more inclined than ever to seek financial help, usually a percentage of what they would pay in property taxes but for their exemptions, from those they deem getting a free ride on the backs of local taxpayers. The nonprofit community of course sees it differently, that they provide employment, enrich their communities in many ways, and argue that their revenues are also down and demands for their services are up. *However it is phrased, taxes, payments in lieu of taxes, fees, or contributions, nonprofits should anticipate that state and local governments strapped for cash will be looking at ways to develop more revenues from nonprofits. It might be wiser for cooler heads to come together on this issue rather than engage in hostilities with unforeseen consequences to both sides.*

THIS COULD PROVE VERY INTERESTING! – The Internal Revenue Service has served notice that donations to nonprofit groups and used to fund political ads may not be as anonymous – or as free from taxation – as the donors may have expected. The IRS is investigating five donors who made large contributions to §501 (c)(4) organizations to determine if gift taxes are owed on their contributions. The last round of elections saw many ads by §501(c)(4) organizations, and the ads were regarded as having an impact on the election results. But donations to §501(c)(4) organizations are taxable gifts, and the tax rate is 35% for amounts over $13,000 per individual donor in a given year. *2012 is already shaping up as a hotly contested election year, and we can anticipate the political ads to come at us fast and furiously. It will be interesting to see if the IRS goes after such donations in a serious way. To be determined…. Those who can afford six and seven-figure donations for such purposes can afford skilled lawyers and lobbyists too.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

COURT REFUSES TO DISMISS SOME CLAIMS IN NCAA LICENSING SUIT – A federal district court in California has denied motions to dismiss most of the claims filed by former college basketball and football players against the National Collegiate Athletic Association, its licensing affiliate, and a video game maker, Electronic Arts Inc., in a lawsuit stemming from production of NCAA-sponsored video games that allegedly contain the images, likenesses and names of college athletes. Plaintiffs have charged that the defendants conspired to restrain trade in the market for such products and to ensure that college athletes received no compensation for use of their images, likenesses and names, in violation of federal antitrust laws and state right of publicity laws, among others. The court has dismissed antitrust claims against the video game maker because of the plaintiffs' failure to allege that Electronic Arts actually agreed to join a conspiracy to restrain trade, as opposed to merely facilitating one. But the court gave plaintiffs leave to file an amended complaint correcting that error, and the court has denied motions filed by the NCAA and its licensing affiliate seeking dismissal of all the charges filed against them, finding that claims were stated upon which judgment could be granted against those defendants, assuming the plaintiffs could adduce evidence proving the truth of their claims in later proceedings. *Nonprofits can make a great deal of money from licensing their names and logos for use in connection with various products and services. But the question in this case is whether the defendants could deprive the plaintiffs of any compensation for the use of their own names and identifiers in connection with such products and services. The NCAA requires college athletes to sign various waivers of rights to profit from use of their names, etc., in order to participate in college athletics. We'll watch this case for guidance on how effective such waivers can be.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

UK REFUSES TO RELAX THE BAN ON LIQUIDS IN CARRY-ON BAGS – The British government has decided to not go along with the planned April 29, 2011 European Union relaxation of the ban on liquids over 100 ml. (equivalent to the U.S. 3 fl. oz. limit) in passengers' carry-on bags, citing security concerns. This means at least for now that passengers on flights from outside the EU will not be permitted to carry duty-free liquor and perfume and other liquids into UK airports, and that in turn affects other airports throughout the EU. About 6 million passengers a year pass through London's Heathrow Airport on connecting flights. The Airport Operators Association lobbied to delay implementation of the relaxation of the 100 ml. rule, arguing their security systems are not able to detect suspect liquids. Of course the manufacturers of the security equipment claim their machines can be capable of detecting suspect liquids with software upgrade. *The British position will likely delay relaxation of the 100 ml. limit for six months or more. Don't expect to fly into EU airports with liquids over 100 ml. in you r carry-on luggage until further notice.*

EMPLOYMENT LAW DEVELOPMENTS

U.S. SUPREME COURT CLARIFIES "CAT'S PAW" THEORY LIABILITY – *H&H Report Update* – The U.S. Supreme Court has released a decision clarifying the standards for "cat's paw" theory job discrimination liability claims, reversing a 2009 Chicago federal appellate court decision. Cat's Paw theory liability is shorthand for a supervisor's biased advice to a superior as the basis for the superior's decision to discipline or terminate an employee when the superior does not have an independent basis for making such a decision. Here, the employee alleged he was terminated in violation of the Uniformed Services Employment and Reemployment Rights Act ("USERRA") based on the biased recommendation of his two immediate supervisors that

the employee was required to miss work on occasion due to his service in the U.S. Army Reserve. They persuaded the employer's vice president of human resources and the chief operating officer to terminate the employee because they said the employee's unavailability was a strain for other employees and that he had violated a corrective order addressing his alleged shortcomings as well as a company policy. A jury found the company responsible for wrongful termination based on a Cat's Paw liability theory. The appellate court reversed the jury decision. The issue for the Supreme Court was whether Cat's Paw liability requires the superior to be wholly dependent on the advice of the immediate supervisors. The Court concluded, "[I]f a supervisor performs an act motivated by antimilitary animus that is *intended by* (italics in original) by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under the USERRA." The Supreme Court reversed and remanded the lawsuit to the appellate court to determine if a new trial is needed or if the jury's decision should stand. *While the Court's decision is based on application of the USERRA, the decision will be applied more widely to other claims of Cat's Paw liability. As we have previously advised, before taking disciplinary action based on the recommendation of an immediate supervisor, an employer is well advised to conduct an independent investigation concerning the accuracy of the facts underpinning the supervisor's recommendation.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

"MAY I HAVE YOUR ZIP CODE PLEASE?" – DISAPPEARING IN CALIFORNIA – In a case watched closely by retailers, the California Supreme Court recently ruled unanimously that California retailers may no longer collect ZIP codes from credit card customers, except in limited cases such as at gas station pumps where the information is requested for security reasons and in transactions that involve shipping. The law also allows ZIP codes to be requested when a credit card is used as a deposit or for a cash advance. The court determined ZIP codes were "personal identification information" that retailers can't demand from customers under a state consumer credit card law dating back to 1971. Retailers may still ask consumers to produce a driver's license for identification purposes, but may not record the personal information on it. Statutory penalties are up to $250 for the first violation and $1,000 for each subsequent violation. Retailers typically use ZIP codes to determine where their customers live and for other marketing purposes. The decision is expected to help protect consumers from credit card fraud and identity theft. California is short on cash. *With an estimated 1.5 million retailers in California, enforcing this ruling could bring in big money for the state. Don't risk fines! Associations with members in California can help them out by advising them of this ruling, and the need to comply with it immediately. One pointer: If the point of sale (POS) system prompts for zip code, whether optional or required, update the system immediately to remove the prompt. Additionally, retailers should inform cashiers not to ask the question, and post a bulletin in the "break room" as a reminder. The court rejected the defense argument that the decision should be applied prospectively with the not unexpected result that in the few days since the decision, a couple of dozen class actions were filed. Any retailer that asked for zip code information is potentially at risk for damages.*

2011 USPS MOBILE BARCODE PROMOTION EXTENDED TO ASSOCIATIONS – Associations and other not-for-profit groups are now eligible for the U.S. Postal Service's 3% discount on First-Class and Standard Mail pieces that include a mobile barcode. The Mobile Barcode Promotion was designed to build awareness of mobile barcodes and demonstrate to mailers how mobile barcodes can increase the value of mail, while "blurring" the lines between online and offline marketing. The promotion runs July 1 through August 31, 2011. *For more information, go to "Fact Sheet and Frequently Asked Questions," http://www.usps.com/mobilebarcodepromotion.*

INTERNET SERVICE EXPANSION VS. GPS INTERFERENCE – An interesting collision between expanding Internet wireless service versus claims of potential interference with existing GPS systems seems likely to be headed for the courts after the regulators have their say unless the alleged bugs can be worked out to both sides' agreement. The Federal Communications Commission wants to expand faster wireless Internet service across the U.S., and has authorized a Virginia company named Lightsquared to build a nationwide broadband system using electromagnetic frequencies very close to those used for GPS signals. The trouble is the signals from Lightsquared's planned 40,000 transmitters are much stronger than the GPS signals and the navigation community is very concerned that GPS capabilities will be greatly compromised. The Federal Aviation Administration has already warned the aviation community that flying into or out of Las Vegas and the surrounding 350-mile area may be adversely affected during trials of the Lightsquared technology. *Many associations are weighing in on this dispute, as you might well imagine, especially those involved with GPS navigation which matters to a lot more associations than you might initially suspect, e.g., aviation community, of course, but the freight and transportation community, law enforcement community, and so on. One issue is paying for upgrades to all the current devices using GPS signals: are we talking millions or billions of dollars? This is an issue that may well affect all of us.*

DUTY TO PRESERVE DOCUMENTS APPLIES TO SOCIAL MEDIA – As one might expect, the volume of companies with a presence on social media outlets has increased significantly. Many of these social media savvy companies also maintain blogs. All of these communications are subject to the rules of electronic discovery. In the wake of this increase in online communications with customers and other industry members comes an increase in court-issued sanctions against attorneys and their clients for failing to comply with e-discovery rules. In a study of 401 federal cases before 2010 in which sanctions were sought, sanctions were awarded in over half of the cases, with some being particularly severe – case dismissals, adverse jury instructions and large monetary sanctions. *All parties have a duty to preserve relevant or potentially relevant information once litigation is pending or reasonably anticipated so long as it is in the parties' custody or control. The executive director or an IT manager should issue the litigation hold and "do not destroy" notice once it is anticipated that a lawsuit will arise, even before the complaint is filed. As an additional protection against possible sanctions, associations and companies with a social media presence should update their document retention policy and electronic storage system to include social media communications.*

H & H DEVELOPMENTS

In June…

Jonathan Howe presented "How To Make Contracts Work For You" in Washington, D.C., "Contract Law & Events" in Chicago, IL, and "Incentives, Events, Meetings You And The Law" in Dublin, Ireland.

Naomi R. Angel presented a report on legal trends and developments twice, once to a trade association in Park City, UT and the second time to trade association in Chicago, IL.

Barbara Dunn presented a workshop on crisis planning and management for a national group of meeting professionals in Chicago. She also presented a workshop on corporate and business issues for chapter managers in San Antonio and a lawyer's debate program on hotel contract issues in Long Beach.

Samuel Erkonen presented "Is That Legal" to an association chapter meeting in Dallas and "Executive Law" to a national organization for organization management education in Madison, WI.

Gerard Panaro presented "Internet/Social Media Issues" and "The Law and New Developments in Federal Law" to a major association in Washington, D.C.

Contributors to this issue…

Terrence Hutton, John M. Peterson, James F. Gossett, Naomi R. Angel, Joshua W. Peterson