

THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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“BELIEVE IT OR NOT” – According to an online survey of British office workers by Toshiba, a manufacturer of office equipment, nearly three in five considered the environment and chose not to print a document in their workplaces. *Interesting result but you would want to know a lot more about the survey before accepting it as realistic. Somehow it seems implausible that most office workers in the U.S. would have this consideration top of mind in deciding whether or not to hit the print or copy button.*

SAME OLD STORY, IT APPEARS – A suburban Catholic Church deacon and business manager is alleged to have embezzled approximately \$315,000 from parish accounts over the past three years, most of it from estates of deceased members of the parish. The process was apparently uncomplicated: the accused is alleged to have simply written checks to himself, transferred funds from parish accounts to his account, used a parish credit card for his personal expenses, and did not deduct family expenses from his salary. When the parish accounts were audited in connection with a change of pastor, the embezzlement was discovered. *Where was the financial oversight by the previous pastor and others involved with parish finances? Ronald Reagan was right: “Trust but verify!” Too many nonprofit boards fail to take elementary steps to prevent such thefts.*

TRIPS TO THE LIBRARY ARE CHANGING – Have you visited your local library lately? You will notice rows of computers and users waiting in line to use them in addition to the books, magazines, videos and music to which we are accustomed. Another development may change what is meant to “visit” the library. Some are beginning to offer access to eBooks, audio books, music and videos downloaded to library users’ mobile devices all for free. Downloaded materials will expire automatically at the end of the lending period (so no late fees). *In a fast-changing world, libraries have had to adapt to remain relevant. This latest approach could be a benefit to many. Check out your library to see if it offers such access.*

GOOD READING ... See you in June

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NOT-FOR-PROFIT LAW DEVELOPMENTS

ILLINOIS ATTORNEY GENERAL INVESTIGATES THEFT FROM CHARITIES – The Illinois Attorney General is investigating alleged thefts from two charities, as well as from the State of Illinois, by the former director of a township’s Welfare Services Department. The former director is charged with using her government position to gain access to the charities’ bank accounts to steal welfare funds intended to feed the needy. Allegedly, she used the money to pay dental bills and personal expenses, including the cost of a birthday party for her daughter. *This is an all too frequent occurrence when individuals have access to a non-profit’s funds and there is insufficient board oversight, so that the individuals can cook the books, at least for a time, and make everything look okay. We have seen nonprofits fleeced to provide financing for drug and gambling habits, among other things. Bottom line, board members must be vigilant in periodically checking on those with access to checking and reserve accounts who may be misusing funds. “Mind the Store!”*

VIRGINIA A.G. SAYS STATE CAN’T PAY SOME NONPROFITS – Responding to a request from a state legislator, the Virginia Attorney General has issued an advisory opinion that the state violates its own constitution when it provides direct funding for charitable institutions that are neither owned nor controlled by the Commonwealth of Virginia, with a few exceptions. The Attorney General’s ruling is based on the plain language of a state constitutional provision that appears to have been largely ignored for years, as the Commonwealth has directly provided millions of dollars in funding for hundreds of charities. But, while the Attorney General’s opinion has caused some serious concerns in the Virginia nonprofit community, it has, in fact, no legal authority, and the Commonwealth could continue to ignore it. Alternatively, the Commonwealth could move toward adoption of an indirect form of state subsidy for charities that is expressly sanctioned by the Attorney General in his opinion, namely, establishing a state program to provide services to Virginians, and then making “appropriations to state agencies that, in turn, result in payments to charitable entities for goods purchased or services provided.” *The Attorney General’s solution to the problem he himself raised has been adopted as a strategy in other states that have similar constitutional provisions limiting state payments to charities, such as Nebraska and Pennsylvania. However, given the budgetary problems many states are facing, as well as the general antipathy some people have toward nonprofits because of adverse publicity generated by the way some of them are operated, it wouldn’t be surprising if disputes over state funding continue to make news. If your nonprofit depends on state funding, this may be another hazard to address.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

COURT CONSIDERS JURISDICTION FOR INTERNET INFRINGEMENT SUITS – The Court of Appeals for the State of New York, the state’s highest court, has ruled that a New York copyright holder can file a suit based on Internet copyright infringement in that state, even if the alleged infringing uploading of copyrighted material occurred in another state. The New York Court considered whether the state’s long-arm statute allowed a publisher principally residing in New York to file a suit there against an Oregon nonprofit with its principal place of business in Arizona. The New York court said that “an injury allegedly inflicted by digital piracy is felt throughout the United States.” Moreover, the court concluded the alleged injury to the New York publisher in this case could best be considered as occurring in that state, and properly redressed there, rather than in other states where the actual alleged uploading of copyrighted material may have occurred. *Nonprofits are major copyright owners, and, as in this case, they can also be alleged copyright infringers. This decision, rendered by an influential state court and widely commented upon, may help copyright owners bring successful suits against Internet infringers in the state where the owners reside, where suing is usually more convenient and where courts may be more sympathetic to them. As the New York court*

noted, the court's decision "Does not open a Pandora's box allowing any nondomiciliary accused of digital copyright infringement to be haled into a New York court when the plaintiff is a New York copyright owner." Among other things, the U.S. Constitution has been found to require that nondomiciliary defendants must have "minimum contacts" with the state where a case is to be decided, and the prospect of defending a suit there must comport with "traditional notions of fair play and substantial justice." Even so, it helps copyright owners file suit "at home."

REGULATORY LAW DEVELOPMENTS

APPELLATE COURT AFFIRMS REAL ESTATE MLS RULES WERE ILLEGAL – *H&H Report Update* – Over a year ago, we reported that the Federal Trade Commission had found certain policies of a southeastern Michigan real estate multiple listing service violated the antitrust laws because they limited the ability of low-cost, limited service brokerages to post their listings on heavily used public websites. Now, a federal appellate court has affirmed that decision. The MLS is affiliated with a real estate association whose members include almost half of all Michigan real estate agents. *Nonprofits must be certain that their policies do not unreasonably restrict competition in the marketplace based on the cost and quality of goods and services. The cost of violating the antitrust laws can be high, as penalties can include heavy monetary damages awards, along with prison sentences for responsible individuals, as well as attorneys fees and costs, which can be sizable for any organization, even in a successful defense against antitrust charges. Nonprofits should consult experienced antitrust counsel whenever there is any chance that their policies could be considered anticompetitive.*

FTC'S FRAUD STATISTICS ARE ALWAYS INTERESTING READING – The Federal Trade Commission's annual summary of consumer fraud complaints always makes interesting reading. In 2010 identity theft held on to first place for the third straight year at 19% of complaints. Phony debt collections rank second at 11% of complaints. Internet services rank third and represent a fast-growing category. The old prizes, sweepstakes and lotteries category hangs on to the number four position. Other trends: wire transfers have moved ahead of credit cards as the swindlers' preferred payment method. Mail continues to decline as the method of initial contact. Those most likely to be victimized are in the age 50-59 range followed by the age 40-49 range, together accounting for just under half of all complaints. *Are these folks easier to con, or just targeted more because they are more likely to have some wealth worth going after? The FTC does not say. Be careful out there. If it seems too good to be true, it is.*

TAX LAW DEVELOPMENTS

SENATE FINALLY PASSES FORM 1099 REPEAL – *H&H Report Update* – The U.S. Senate finally passed legislation repealing an expansion of Form 1099 reporting requirements contained in last year's health care reform law. The health care law required taxpayers to file Form 1099 with the IRS and payment recipients for most payments aggregating \$600 or more in any calendar year made to providers of goods and services, including payments to corporations, which previously had been exempt from 1099 reporting. The President signed it into law even though he was reportedly not enthusiastic about the loss of increased tax.

revenue that might have accompanied greater 1099 reporting. Supporters of the health care law had counted on such increased tax revenue to offset greater government expenditures under other provisions of that law. But many of them eventually voted for the repeal because of the cost of compliance for taxpayers, who would be required to file many more 1099s, and the IRS, which had concerns about processing them. Associations were among those facing a burdensome task of filing Form 1099s with all the suppliers and service providers who billed them more than \$600 in aggregate in a year. *This is an example of the problems that can arise when Congress passes legislation with insufficient consideration and debate in order to meet deadlines imposed by political leaders. Some members of Congress admitted that they didn't read the entire massive health care reform bill before voting on it, and some said they were surprised when they later discovered that it contained the 1099 reporting expansion.*

DO YOU NEED AN IMMERSION IN IRS FORMS AND PROCEDURES? – During July and August this summer, the Internal Revenue Service and co-hosting legal and accounting associations will be hosting Tax Forums in six cities: Atlanta, Chicago, Orlando, New York City, Las Vegas and San Diego. IRS leadership and experts in fields of tax law, compliance and ethics will present three days of seminars. Participants will earn continuing education credit, learn about IRS e-Services products, visit a Practitioner Case Resolution room for a sit-down with IRS staff, and learn about new registration, testing and e-filing requirements for return preparers. *While most IRS update information is now online, and we can answer many of your questions, the forum is an opportunity for in-depth information for NFP staff and their professional service providers.*

EMPLOYMENT LAW DEVELOPMENTS

FEDERAL APPELLATE COURT REVERSES ON “CAT’S PAW” JURY VERDICT – A federal appellate court in Chicago reversed a trial court’s post-trial ruling overturning a jury verdict for a white employee who was terminated at the instigation of her immediate supervisor who was black. The termination arose out of an incident involving the aunt of a young boy allegedly hitting her nephew with a belt as a disciplinary measure at the end of the day at a cultural center’s after-school program. The employee confronted the aunt, and then reported the incident to her supervisor, saying it appeared to be child abuse. The supervisor replied the employee did not understand black culture and this was customary discipline but the employee could report it if she thought it necessary. The employee did, and that led to a child welfare investigation on behalf of the boy. The supervisor and aunt then confronted the employee, allegedly made racially-charged statements and told her to get out. The supervisor went to her superior who was black and then to his superior who was white, and persuaded them to terminate the employee. The employee sued, relying on the “cat’s paw” theory of liability, *i.e.*, a biased supervisor persuades an unbiased superior who unknowingly relies on biased information to terminate the employee. The jury found in the employee’s favor but their verdict was overturned by the trial judge. His decision in turn was reversed by the appellate court which noted the superior who terminated the employee relied on information from the biased supervisor, did not have personal knowledge, and did not make an independent investigation. *In a decision last November, judges from the same appellate court rejected a “cat’s paw” theory liability suit, so this was not a doctrinaire result. There the superior who terminated the employee had personal knowledge and conducted her own investigation; the terminating superior here did not. The lesson is pretty clear. Before you decide on a disciplinary measure, investigate thoroughly.*

DO OFF-SITE INFORMAL WORKING ARRANGEMENTS UNDERCUT SECURITY? – A recent survey of government employees indicates the answer is yes, but what to do about it? The workers surveyed in 2009 reported 22% of them did some telecommuting. Other surveys from 2008 concluded the number of government workers telecommuting part of the time ranged from 59% to as high as 89%, and more than half weekly. Telecommuting is a broad term encompassing such varied activities as use of cell phones, smart phones, laptop computers, and other electronic devices, and most employees today have one or more of these

devices which they use for work-related and personal activities. Their use presents a number of problems, including security of confidential information, potential wage and hour claims, and even personal injury hazards. Workers in turn complain IT security measures in the workplace interfere with their ability to access information needed for work purposes. *This is a tricky one for employers. How is confidential information kept secure if employees can access it from outside the office on the ever-expanding universe of smart phones, iPads and other tablet computers, laptop computers and other such devices. There is the risk of deliberate theft of data by employees, and loss or theft of devices on which data is stored for starters. Usually off-site use of devices is informal, unsupervised, taken for granted or ignored. Do you have a policy governing this in your workplace?*

MEETINGS & TRAVEL LAW DEVELOPMENTS

A TRAVEL QUIZ – WORST ADD-ON FEES? – Is it airlines' add-on fees, or hotel and resort fees, cruise line fees, travel agent fees, car rental fees? All are in contention, none are popular. But in a recent poll, rental car add-on fees, especially at airport car rental outlets, topped the list of fees most disliked. *Please note the federal, state and local government add-on fees to your travel bill from all of these service providers were not included in the poll although they are a significant addition to all of these bills, including those cell phone and computer access fees for the electronic tools we cannot do without on the road. Tax the travelers. They don't vote here.*

SOMEONE PLEASE EXPLAIN THIS ONE TO ME – American Airlines is suing Orbitz and travel distributor Travelport Ltd. for alleged monopoly violations under federal antitrust laws. You will recall American stopped accepting ticket orders placed by flyers using Orbitz as the ticket seller. American wanted to save the commissions it was paying Orbitz and other online travel sites and drive ticket searches to American's website. Orbitz opposed its termination to no avail. Travelport is said to own three of the five big distribution systems. American settled a similar dispute with Expedia, a competitor of Orbitz. Now American has taken the additional step of claiming Orbitz and Travelport colluded to attempt to monopolize the distribution of airline tickets to business travelers, and that due to American cutting off Orbitz from American's schedule and fare information, American lost sales, and is seeking treble damages as a consequence. *Huh? As a business traveler it is much more convenient to go to one website for fare and schedule information for most airlines rather than having to go to each airline's website and download all that information again*

JUDGE INVALIDATES PARTS OF STATE McCORMICK PLACE LAW – H&H Report Update - A federal judge in Chicago has struck down portions of last year's state legislation intended to revamp work rules for labor at McCormick Place to reduce exhibitor costs for the work of unionized workers on the show floor, limiting labor overtime and crew sizes while allowing exhibitors to do more of the work on their booths. In a lawsuit brought by local Teamsters and Carpenters unions to challenge the state law, the judge ruled the National Labor Relations Act preempted states from enacting legislation that would interfere with the ability of private-sector employees to collectively negotiate the terms of their employment through trade unions. Most of the workers that set up and tear down shows at McCormick Place work for private contractors and belong to trade unions. Officials at the state-city agency in charge of McCormick Place have indicated they plan to appeal the judge's ruling. *The latest decision is a set-back for Chicago and state political leaders who, with last year's legislation, were trying to stem the tide of trade shows leaving McCormick for other states' show facilities with more relaxed labor rules and lower exhibitor costs. Their efforts had been somewhat successful until this ruling, as some trade show organizers had recommitted to McCormick for their events following passage of the state law. In the short run, watch to see what happens at the next big show at McCormick Place. If exhibitors complain about onerous work rules and expenses, anticipate that other big shows are likely to reconsider coming to Chicago. A pyrrhic victory for the unions?*

OTHER ISSUES, TRENDS & DEVELOPMENTS

WHAT DO THESE ACTIVITIES HAVE IN COMMON? – Reprogramming GPS devices, retrieving something you dropped, text messaging, putting on makeup or shaving, looking at a map, opening a package of nuts, candy or chips, fishing in a glove box – the list goes on and on – are all activities causing distracted driving with potentially deadly consequences. Distracted driving is similar to drunk driving for its potential consequences to the driver and others. The National Safety Council estimates 1.6 million car crashes a year involve drivers talking on cell phones or texting while driving. The National Highway Traffic Safety Administration estimates about 16% of fatal vehicle collisions involve a distracted driver. Talking on a hand-held cell phone may be the most common activity of all, despite numerous state and local laws prohibiting such calls. Hands-free calls are regarded by experts to be nearly as dangerous because the conversations, not just using the device, are distracting. The American Academy of Orthopaedic Surgeons and the Orthopaedic Trauma Association are two of the leading voices calling on drivers to eliminate distracted driving habits. They don't need the business from car accidents. *Almost as worrisome as distracted driving activities is the view that most people who engage in these activities will continue to do so – at least until they are convinced by an accident or near miss that such activities really are too dangerous for safe driving.*

H & H DEVELOPMENTS

In May ...

Jonathan T. Howe presented “How To Make Contracts Work for You” on May 11, to an association meeting for executives in Washington, D.C.

John Peterson presented “Antitrust Law Update for Associations” to a bar association meeting in Chicago and a report on legal trends and developments to a trade association in Miami.

Barbara Dunn presented: “Advanced Contract Legal Issues and Negotiation Strategies” in Windsor, Connecticut to a local chapter event for meeting professionals. She also presented “Marketing Your Meetings and Events With Social Media: It’s All Good....Or Is It?” to a community service public council in St. Louis, Missouri. On May 18, she will present “Mastering Tradeshow Contracts: An Overview of the Many Interlocking Contracts that Create a Successful Tradeshow” at an association law symposium in Chicago. Barbara also presented several workshops for corporate meeting professionals at a national conference in Houston, Texas, including "Roadmap to Successful Contracts," "Advanced Contract Negotiations," "Veteran Meeting Professionals Workshop," and "Social Media: The Good, The Bad and The Ugly."

Nathan Breen will present a session on Contract Negotiations on May 18 to the Pennsylvania Chapter of a large meeting professionals organization.

Naomi Angel presented a program on “Health Care Reform” at annual trade association meeting of manufacturers in Indian Wells, CA. She delivered a presentation on “Non-Compete Agreements and Other Restrictive Covenants” to a manufacturers’ trade association board of directors in Orlando, FL, and presented a session regarding “Disaster Planning and Emergency Management” to a group of meeting professionals in San Francisco, CA. She also provided an update on “Legal Trends and Developments of Interest” at the spring meeting of a north American trade association in Jacksonville, FL.

Contributors to this issue...

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