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:

ADD "TORT TOURISM" TO YOUR LEXICON – "Tort tourism" is a term used by U.S. Chamber of Commerce CEO Tom Donahue to describe the recent practice of suing U.S. companies in foreign jurisdictions, frequently on dubious grounds, obtaining large judgments for alleged wrongdoing, then seeking to enforce the foreign judgments in other countries including the U.S. where the defendant corporation has assets. Chevron Corporation is currently fighting a dubious claim obtained in Ecuador in which the judge awarded the plaintiffs $8.6 billion in damages, then tacked on $10 billion more when Chevron declined to apologize within 15 days for its actions. *This case has already been through federal courts in the U.S., but Chevron has been denied relief on procedural grounds until the plaintiffs try to enforce their judgment. We will be reading and hearing more about this case and other such claims.*

"WOULDN'T IT BE LOVERLY…" – There was a brief spate of bipartisanship and business cooperation resulting from Hurricane/Tropical Storm Sandy. New Jersey governor Christie praised President Obama's leadership and FEMA's performance, and ATT and T-Mobile agreed to combine their cell phone tower connections in the storm area to assist in providing cell phone access where 25% of towers were not working after the storm passed. *Wouldn't it be loverly, as Eliza Doolittle sang, if some bipartisanship and cooperation lasted after the storm and election? The nation could sure use it!*

SIGN OF THE TIMES? – The *Chicago Tribune* is featuring a post-election countdown calendar on its editorial page, a countdown to the end-of-the-year fiscal cliff date of December 31, 2012, not the more customary shopping-days-to-Christmas countdown calendar. *Given the financial impact and stresses on the U.S. and international economies, worrying about this countdown seems to be a whole lot more important than counting shopping days.*

GOOD READING … See you in December

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NOT-FOR-PROFIT LAW DEVELOPMENTS

CONSENT DECREE ON HIGH SCHOOL SPORTS SCHEDULES A PRECEDENT? – Ten high schools in southeastern Indiana have entered into a consent decree binding them to schedule girls' and boys' basketball games equally on Friday and Saturday nights by the 2016-17 school year, following litigation brought under Title IX of the (federal) Higher Education Act. The schools are expected to start such scheduling in the interim years. The consent decree, following a recent federal appellate court ruling in Chicago requiring equal scheduling for boys' and girls' games, is expected to be a strong precedent influencing other schools and high school athletic associations in the U.S. Seventh Circuit appellate court states of Indiana, Illinois and Wisconsin. *The impact will be felt beyond those three states, so schools and their associations should pay attention and get ready to comply. The devil will be in the details, such as access to courts and other facilities, practice times, etc., so it is not all that easy to comply.*

SCAMS BLOW IN WITH SANDY – The Frankenstorm was still at its worst when the scammers started to take advantage of Sandy's devastation to fleece as many people as possible. Some of those scams involved fake charitable solicitations to aid the storm's victims, coming from people who not only wanted to pocket well-intended donations for themselves, but also wanted to solicit credit card, debit card and bank account numbers and personal information for their own other uses. Some scams involved links to fake news articles, photos and videos, and they were distributed via Facebook posts, tweets, text messages and email. *We see these scams after every heavily publicized disaster. Charitable appeals from scammers give nonprofits a bad name, and, of course, divert donations from legitimate charities. Appeal recipients in the nonprofit community also can be targets. So, be careful clicking on unknown links and responding to appeals without thoroughly researching them.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

NEW YORK COURT GIVES GUIDANCE ON INFRINGEMENT JURISDICTION – A recent decision by New York's Court of Appeals, the state's highest court, provides guidance on the factors state courts should consider when determining whether they have jurisdiction in lawsuits involving claims of copyright infringement on the Internet. A publisher in New York alleged a not-for-profit group, incorporated in Oregon and headquartered in Arizona, had infringed four of the publisher's books by posting copies on its servers in Oregon and Arizona and making them available to the group's members and the public. The group moved to dismiss the lawsuit, arguing lack of jurisdiction and no injury to the publisher in New York. A federal appellate court asked the New York Court of Appeals for guidance on the jurisdictional issue under New York state law. The latter court framed the issue as choosing between the place of injury where the infringing took place (by putting the books on the Internet in Oregon or Arizona) or where the publisher had its principal place of business. The New York court concluded the publisher's rights under the Copyright Act attached where it was headquartered, and other factors were too insignificant because infringing injury (lost sales) could occur anywhere a reader had Internet access. Therefore a court in New York should have jurisdiction, assuming other factors giving rise to liability were met. *The court's jurisdictional analysis is likely to have significant precedential value in federal and state courts as the New York Court of Appeals is well regarded, and New York is the center of the U.S. publishing industry. The decision is also important for what it did not decide, leaving that to lower courts to determine.*

FEDERAL APPELLATE COURT SAYS SUB PAYMENT NOT SUBJECT TO FICA – A federal appellate court in Cincinnati has affirmed a bankruptcy court and district court ruling that SUB ("supplemental unemployment compensation benefits") payments are not subject to FICA, thereby paving the way for the employer and former employees to obtain a refund of the 12.4% (6.2% share from employer and employee) FICA contribution withheld from the severance payments to the employees when the employer went out of business. The Internal Revenue Service argued that just as the SUB payments are subject to income tax withholding, they should be subject to FICA withholding to be consistent. The three courts disagreed, noting SUB payments are included in gross income, and Congress provided for income tax withholding in order to avoid an unexpected tax liability at year-end for a SUB payment recipient. SUB payments are like wages but "like" distinguishes them from wages. Concluding SUB payments are not wages, they are not subject to FICA. *The employer is seeking a $1,000,125 refund for itself and its employees, and first filed for the refund in 2002. The appellate court emphasized a five-part test for a SUB payment. It is the amount paid to an employee; pursuant to an employer's plan; involving involuntary temporary or permanent separation from a job; due to a reduction in force, discontinuance of a plant or operation, etc.; and is included in an employee's gross income. Not every severance agreement will meet this test. While this ruling applies in Ohio, Michigan, Kentucky and Tennessee (the U.S. Sixth Circuit appellate area), it is expected to have national impact, and send employment lawyers and HR personnel back to the drawing board when drafting severance agreements.*

WILL SMALL EMPLOYERS FOLLOW SUIT? – A recent *Wall Street Journal* article reported a number of larger employers that do not currently provide health benefits to their employees or at least their hourly employees, or that provide benefits deemed inadequate or too costly for their employees, are turning to part-time employees in place of full-time employees in order to avoid a requirement of the 2010 Affordable Care Act requiring the provision of health care benefits (meeting federally imposed minimum standards) or payment of a penalty between $2,000 and $3,000 per uncovered employee. This provision will apply to employers with a workforce of 50 or more employees who work 30 or more hours per week. *Smaller employers have been less inclined or less able over the years to provide health care benefits, especially for hourly employees. With this requirement in place, small businesses under 50 employees may be more reluctant to add employees if that would push them into the 50 and over bracket, or may be tempted to add or switch to part-time employees. Another future consideration is 50 employees now, but that number may go down as the push for mandated benefits continues to grow. While most associations are small employers with well under 50 employees, some of their members may be facing such choices.*

NEW OPTION FOR AGE DISCRIMINATION SUITS RECOGNIZED – A federal appellate court in Chicago created a conflict with the rulings of six other federal appellate courts by ruling individuals complaining of age discrimination in violation of their rights under the U.S. Constitution are not limited to remedies provided under the (federal) Age Discrimination in Employment Act ("ADEA"), but can also sue under §1983 of the (federal) Civil Rights Act of 1871. The other federal appellate courts have held that Congress, in enacting the ADEA, intended it to be the only remedy for age discrimination. But the court in Chicago disagreed, allowing a former Illinois Assistant Attorney General, who claimed he was fired from his position because of his age, to sue four employees of the Illinois Attorney General under §1983 when his ability to sue them might have been precluded or limited under the ADEA. The ADEA allows suits against employers, employment agencies and labor organizations, but not other individuals, whereas §1983 allows suits against any individual who caused or participated in the deprivation of a plaintiff's constitutional rights. Additionally, the ADEA

expressly limits suits by certain government employees, and, as currently interpreted by the courts, it denies all state and local government employees monetary damages as a remedy for age discrimination, whereas money damages are available as a remedy under §1983. *This case presents a perfect example of how ingenious plaintiffs' attorneys have expanded many employee legal remedies over time. However, the remedy made available by the appellate court in Chicago in this case will only be available in Illinois, Indiana and Wisconsin, unless and until other appellate courts accept it as precedent or the U.S. Supreme Court takes up the question and resolves the conflict in the circuits presented by this decision.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

HUMAN TRAFFICKING IS A HOSPITALITY INDUSTRY CONCERN – The *New York Times* recently reported on efforts being made by some major corporations in the travel and hospitality industry to combat human trafficking, a world-wide problem. Companies such as Sabre, Amtrak, Carlson, Delta, Hilton Worldwide, Accor Hotels and Wyndham Worldwide were among those identified as participating in the Tourism Child-Protection Code of Conduct, a voluntary set of guidelines for the travel and tourism industry introduced in 2004. The U.S. Department of Transportation and the Homeland Security Administration are also supporting efforts to combat human trafficking. *The U.S. is by no means immune. First we must recognize there is a crime here, and it is not victimless. So how can your association help? One recent event illustrates how awareness can be raised. The International Women Associates, Inc. ("IWA"), a §501(c)(3) organization in Chicago with members from around the world, is devoting substantial resources to educate its members and to advocate for efforts to address this issue. Most recently at its annual award dinner IWA recognized a woman now living in the Netherlands for her efforts to combat human trafficking in Bosnia and elsewhere. Cook County (IL) sheriff Tom Dart brought the issue home to those at the awards dinner by telling them of efforts right here in Chicago to combat human trafficking. Efforts by associations to raise awareness and educate the public, especially by and for those in the hospitality industry, could be a helpful addition to efforts to combat human trafficking.*

REGULATORY LAW DEVELOPMENTS

THE USUAL "GUILT NEITHER DENIED NOR ADMITTED" SETTLEMENT – The Consumer Financial Protection Bureau ("CFPB"), the Federal Deposit Insurance Corporation ("FDIC") and the Office of the Comptroller of the Currency ("OCC") investigated credit card companies Capital One and Discover on charges they used deceptive marketing practices to induce consumers to accept add-on fees for various services such as ID-protection, credit score tracking, payment protection and other questionable services. The two companies agreed to take steps to prevent deceptive marketing practices in the future, and pay restitution of $350 million with another $74 million in civil penalties expected to be added to the total. The alleged deceptive practices were inducing cardholders to think the services were free or could be easily dropped after an initial try-out period. The corrective action includes credits on the bills of millions of credit card holders. *At least one other federal judge has recently not accepted a proposed settlement because he found such settlements and penalties for major charges of wrongdoing which ended in "neither admit nor deny" pleas were unacceptable. Let's see how this judge feels about such pleas.*

TAX LAW DEVELOPMENTS

IRS PUBLISHES INFLATION-ADJUSTED ITEMS RELATING TO NONPROFITS – The Internal Revenue Service has published a list of tax provisions that are being inflation-adjusted for tax years beginning in 2013, some of which relate to nonprofits. For purposes of calculating "unrelated business income" subject to tax when received by nonprofits, "low cost articles" that can be distributed by an organization in connection with a request for charitable contributions without causing taxation of income

received can now include items costing the distributing organization $10.20 or less (twice a former $5 limit). "Insubstantial benefits" that can be received by a donor in return for a charitable contribution without causing loss of a full tax deduction for the contribution are now subject to value limits that have more than doubled, with the particular limit that is applicable depending on which of three IRS-approved formulas is used by the organization in valuing the benefits. The IRS is also increasing, from $75 to $108, the limit on annual dues that social welfare organizations and agricultural and horticultural organizations can charge without losing their ability to avoid, under certain circumstances, reporting and notice requirements relating to the percentage of their dues used for lobbying. *Apparently the IRS has recognized inflation beyond anything the Social Security Administration sees happening. For more detailed information, talk with your tax professionals.*

REMEMBER THIS TERM: "BATNA" – According to the *Washington Post*, "BATNA" may be the key to whether the politicians in D.C. arrive at some sort of compromise on spending and taxes before the end of the year to avoid the so-called "fiscal cliff," or fail to do so and send the economy back into recession with a corresponding increase in unemployment, not to mention what it might do to other economies around the world and future borrowing costs at home. BATNA? The *Post* says it is an abbreviation from negotiating theory which is short for Best Alternative To Negotiated Agreement. No deal, then what's the next best outcome for each negotiating party? For President Obama and the Democrats, a recession but a big increase in revenues and reduced government spending they can blame on the Republicans. For Republicans, blaming the Democrats for higher taxes and the recession (which the voting public seems unlikely to buy, based on the election results). But the Republicans hold an alternate card, refusing to raise the debt ceiling when the U.S. hits the debt limit about year-end, thereby threatening a default on U.S. debt and triggering a credibility crisis in international finances of incalculable proportions. *So maybe each side's BATNA is not such a good idea after all with all the intended and unintended consequences, and coming to a compromise, that dirty word in D.C. these days, is better. Hang on. It could be a wild game of chicken the rest of the year.*

IRS "TAXABLE FRINGE BENEFIT GUIDE" – The Internal Revenue Service has prepared a useful guide to help those determining whether various fringe benefits provided by employers are taxable or nontaxable benefits. Go to www.irs.gov/pub/irs-tege/fringe_benefit_fslg.pdf to find the guide. *This guide provides a detailed summary of what tax practitioners and their clients need to know about fringe benefit tax issues, but a disclaimer says it is general and does not address individual situations. There is a useful table of contents to direct you to the topics of interest to you. Fair warning – the guide runs 91 pages, but it is understandable and concise.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

HERE WE GO AGAIN – ANOTHER CRISIS POINT FOR THE USPS – The U.S. Postal Service is up against another barrier to its business model. The USPS for the first time has hit the $15 billion borrowing limit from the U.S. Treasury which the USPS uses to finance its ongoing operations. Now the USPS is limited to incoming revenues from daily operations to finance its activities. The problem is the USPS continues to hemorrhage cash, for example losing $5.2 billion during the quarter ending June 30, 2012, and borrowing $2.4 billion since June 30, 2012. Even with higher revenues projected in the months ahead during the holidays season and a one-cent hike in first-class postage to 46 cents in January, the USPS continues to operate at a loss, due in no small part to steadily declining first class mail volumes. Congress blocks meaningful reforms including closing post offices and eliminating Saturday deliveries. *In many*

ways the USPS is its own worst enemy with sky-high labor costs and no-layoff contracts. So how to cut the Gordian Knot of lagging revenues and increasing expenses with Congress blocking changes? One magazine publisher in New York has decided to go to private delivery as its solution to the postal situation. What's your backup plan if and when the USPS runs out of cash to operate?

FUNERAL PROTEST LAW UPHELD – *H&H Report Update* **–** Reversing a previous decision by a three-judge panel of the court, the full U.S. Court of Appeals for the Eighth Circuit in St. Louis has upheld the constitutionality of a Manchester, MO ordinance limiting protests at or near funerals. Among other things, the ordinance says that protesters will not be allowed within 300 feet (the length of a football field goal line to goal line) of a funeral or burial service while it is occurring and for one hour before or after such a service. The ordinance was a response to picketing of military funerals by the Westboro Baptist Church of Topeka, KS, whose members believe that U.S. military deaths are a punishment from God because of the acceptance of gays in the U.S. Members of the church, supported by the American Civil Liberties Union, argued that the ordinance violated their First Amendment rights. But the full court found the ordinance constitutional because it leaves open sufficient alternative channels for the church members to communicate their (highly unpopular) views to the public. *Similar laws have been passed and have withstood judicial scrutiny in other parts of the country, usually in response to such funeral demonstrations around the nation by members of this one church.*

H & H DEVELOPMENTS

In November …

Jonathan Howe presented "The Lawyer is Here" at Abaco Beach Resort Meeting & Incentive Planners Experience Business Round Table. He also presented two sessions: "Association Law Update – The Good, The Bad, and The Ugly" and "It's a Brave New World – Current Legal Issues for Meetings, Conventions and Tradeshows" at a Fall Educational Symposium & Expo for association executives in Richmond, Virginia. **C. Michael Deese** delivered a presentation entitled "Board Legal Orientation, Board Meeting Best Practices and Antitrust Basics" to the American Academy of Orthopaedic Surgeons annual Executive Directors' Institute in Rosemont, Illinois. **Barbara Dunn** presented two webinars for meeting professionals regarding liability, risk management, insurance, and indemnification. **John Peterson** gave a report on legal and regulatory developments and trends to an international trade association, and an antitrust law update for association executives of a multiple management company. **Sam Erkonen** spoke to a HelmsBriscoe group in Newport Beach, CA. Topic was current trends in the hospitality industry and contracts. He also spoke to a hospitality class at Roosevelt University, Chicago on the topic of contracts, and current trends in the hospitality industry.

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Contributors to this issue…
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