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:

IF HOMELAND SECURITY'S BOSS SKIPS EMAIL, SHOULD YOU? – U.S. Homeland Security Secretary Janet Napolitano recently disclosed her method for not having her emails disclosed, hacked or otherwise compromised. She simply does not use email. She said she does not have any email accounts. *So what does the government official ultimately responsible for cyber security know that we blissfully ignore? Our often careless use of email may come back to bite us individually and collectively sooner or later, as others have discovered before us to their dismay.*

SOME (UN)COMMON SENSE ON "JUNK" FAXES – A federal district court in Chicago recently denied a class action claim under Illinois law filed by the recipient of a one-page unsolicited fax message. The judge said the one page of fax paper, a miniscule amount of toner and a slight employee inconvenience did not amount to an injury compensable in damages under the common law of Illinois or under the Illinois Consumer Fraud Act, even if 500 or 5,000 were in the class alleged by the plaintiff. *At last, some common sense on what constitutes an injury in response to one more class action strike suit. But the court did not dismiss Count I under the (federal) Telephone Consumer Protection A, which offers nominal damages of $500 times the number of potential parties in the plaintiff class. This is a sledge hammer statute used to swat a fly, but the federal penalty is so onerous that defendants are forced to settle. The TCPA applies nationally. Be very careful about sending unsolicited fax messages. Know the rules.*

THE FISCAL CLIFF DEADLINE OF JANUARY 1 IS STILL OUT THERE – … but you sure wouldn't know it from the election campaigning. The candidates from the top on down are ignoring the looming January 1, 2013 termination of the 2002 income tax cuts, the end of the 2% payroll tax reduction, estate tax increases, many more taxpayers caught by the AMT (alternative minimum tax), capital gain tax increases, defense and other federal spending cuts of 10% across the board, etc. *Maybe between November 7 and December 31, all those legislators who have been unable to compromise on much of anything involving taxes and spending the past four years may compromise, but maybe not. For now, mum's the word on the campaign trails.*

GOOD READING … See you in November

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Not-For-Profit Law Developments

KNOWING WHEN TO HOLD 'EM AND WHEN TO FOLD 'EM – A foundation in Chicago recently had to decide on whether to hold or to fold in attempting to preserve and carry on its 110-year program of helping single mothers. The foundation's board of directors reviewed its options and decided to wind down operations and transfer $7 million in assets to another foundation with a very similar mission, doubling the second foundation's ability to make grants. The difference between the two foundations came down to fund-raising, $181,000 versus $1.7 million in 2011 for the surviving foundation. *This was not an easy decision, but the first foundation's legacy will continue, with some of its board members and staff joining the surviving foundation institution. Sometimes your best course of action is to merge with a newer, fitter institution with an overlapping program, and carry on that way.*

Intellectual Property & Computer Law Developments

GOOGLE SETTLES WITH PUBLISHERS ON COPYING PROJECT – After seven years of litigation, Google has reached a settlement with some publishers which permits Google to make digital copies of these publishers' books, subject to conditions, as part of Google's project to scan and digitize some 20 million books in conjunction with major libraries around the world. The settlement provides the publishers have the option to grant or deny Google permission to copy their books. The publishers involved are represented by the Association of American Publishers ("AAP"). This does not end the copyright litigation over this scanning and digitizing project, by any means. The Literary Guild, which represents authors, has not settled and vows to press on with the lawsuit, claiming Google is engaged in unprecedented violations of the Copyright Act on a massive scale. *The settlement apparently does not resolve or even address a critical issue with potentially enormous impact, what amount of copying constitutes fair use under the Copyright Act. This lawsuit, with its precedential impact and consequences for Google, publishers, authors and readers worldwide, is by no means over. Associations as publishers have economic interests at stake as well.*

Employment Law Developments

COURT SAYS A "LIKE" RESPONSE ON FACEBOOK IS NOT PROTECTED SPEECH – A federal district court in Virginia has ruled that hitting the "like" response on another person's Facebook page does not constitute free speech protected by the First Amendment. A county sheriff running for reelection discovered that two of his deputies had posted "like" messages including their pictures on the sheriff's opponent's Facebook page. After he was reelected, the sheriff fired the two deputies. The two deputies sued, claiming retaliation for exercising their free speech rights under the First Amendment. The court disagreed, saying merely pressing the "like" response did not constitute speech. "Simply liking a Facebook page is insufficient. It is not the kind of statement that has previously warranted constitutional protection." *The deputies' attorney is appealing the ruling. Commentators have weighed in disagreeing with the ruling. In any event, the lawsuit and ruling are reminders to employees to exercise caution regarding anything they post on social media, but particularly in connection with their employment. Employers may be watching, regardless of what the NLRB is saying these days about employee use of social media to discuss workplace issues as a protected activity. Not always!*

NO ADA ACCOMMODATIONS NEEDED FOR EMPLOYEE'S DISABLED CHILDREN – According to a federal appellate court in Chicago, the Americans with Disabilities Act doesn't require employers to provide accommodations for workers with disabled children if, for example, caring for those children prevents an employee from working weekends. A former church secretary claimed that she was fired by her church employer because she refused to work weekends so she could stay home to care for her disabled child. She argued the Act required the church to make a reasonable accommodation for her situation, while the church argued that she was actually terminated for her poor performance while on the job, rather than her refusal to work weekends. No matter, said the appellate court, because, even if the church secretary was terminated for refusing to work weekends, the ADA did not require the church to accommodate the disabilities of an employee's child, only the disabilities of an employee. *The Act does prohibit employers from discriminating against an employee "because of the known disability of an individual with whom [the employee] is known to have a relationship or association." But the court cited case law and federal regulations for the proposition that avoiding such "associational discrimination" did not carry with it the duty to make accommodations for disabled non-employees, because the duty to make accommodations under the Act's provisions applied only to "qualified employees with disabilities." Be sure to get informed advice when addressing such matters.*

EMPLOYERS PROMOTING WELLNESS PROGRAMS TO CUT MEDICAL COSTS – Facing the inexorable climb in medical costs, some employers are turning to wellness programs to encourage their employees to follow better health and nutrition practices, and provide some relief to employers' rising medical costs. Some of the approaches include such basic steps as putting healthier foods in vending machines, offering healthier foods in cafeterias and at catered meetings, educating employees, encouraging employees to stop smoking, and providing on-site vaccinations or other preventive medicines and screenings. Employers are also offering financial incentives to employees to adopt healthier lifestyles. *Wellness programs can save employers – and employees – substantial dollars on insurance costs and by reducing time away from the job. It may be worth looking into as an investment that returns real dollars to employers and employees.*

TAKE SEXUAL HARASSMENT CHARGES SERIOUSLY – Sometimes you wonder if companies just don't get it. Retailer Fry's Electronics seems to have had to learn the hard way to take claims of sexual harassment on the job seriously, and furthermore, not to retaliate against the persons presenting the claim. Fry's agreed to a $2.3 million settlement in a lawsuit brought by the Equal Employment Opportunity Commission on behalf of a supervisor in one of its stores who reported a sexual harassment claim by a 20-year-old salesperson against an assistant store manager. The supervisor was fired for an alleged "decline in performance" despite past praise for his work. The supervisor and salesperson will split the award, and the EEOC will also collect $100,000 from Fry's as a penalty for destroying evidence, withholding evidence and filing frivolous motions. *That's quite a litany of charges, and the usual company disclaimer of no findings that Fry's engaged in discrimination, harassment or retaliation, and we settled only to avoid further litigation ring pretty hollow against $2.3 million. How much less costly in terms of executive time and money to have responded properly when the initial harassment claim surfaced. A company policy on harassment which is not followed is worse than no policy at all.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

"SIT TOGETHER" FEES HAVE SOME AIR TRAVELERS STEAMED – Some airlines have been charging passengers extra "sit together" fees to ensure that they will be seated together on a flight, and complaints to airlines about this practice have been on the increase. Members of families who booked their reservations months in advance, and thought they had seat assignments next to each other, have been told later that they would have to pay extra to remain together because of a change in flights, equipment, airline policy, blah, blah, blah. *The airlines continue to search out new fees to charge passengers. Will airlines next come up with "sit apart" fees, to ensure that you will not be seated next to someone to whom you object, or to keep you away from screaming infants. Or, maybe the people who wanted to sit together on the first leg of a trip might be willing to pay extra to sit as far away from each other as possible on their return flight. Stay tuned.*

PYRRHIC VICTORY FOR AMERICAN AIRLINES OR ITS PILOTS' UNION – With travel newsletters and blogs advising travelers, especially business travelers, to avoid flying on American Airlines during its current bankruptcy court clash with its pilots' union over pay and benefits, one wonders if American or the union will achieve a Pyrrhic victory, getting costs down by cutting pilots' pay but causing enough travelers to switch airlines that American will need fewer flights and consequently fewer pilots and become more vulnerable to a takeover bid by U.S. Air. *Both labor and management are at risk here as American continues to incur multimillion dollar losses while in bankruptcy. It was no secret that American filed for bankruptcy to get its costs in line with industry rivals that had previously used bankruptcy to bring their costs down. Commentators are calling this imbroglio brand mismanagement.*

REGULATORY LAW DEVELOPMENTS

NLRB'S ACTING GENERAL COUNSEL CITED FOR ETHICS VIOLATION – The National Labor Relations Board's acting general counsel has been the tip of the NLRB's contentious policies in recent years, including such issues as changing union representation election rules, protecting employees' use of social media to criticize their employers, charging Boeing with an unfair labor practice for opening a plant in employer-friendly South Carolina, and other pro-labor stances. Now, he, in turn, has been cited by the NLRB's inspector general for an ethics violation, i.e., directly participating in a case before the NLRB in which he had a personal financial interest. The general counsel requires all cases before the NLRB involving social media be sent to him personally to review. A regional office asked for advice regarding a case in which Wal-Mart would be charged with an illegally overbroad social media policy. The general counsel discussed the case with his immediate subordinates but disclosed he had inherited Wal-Mart stock worth some $18,000 and needed to seek an ethics waiver to participate in the case. He then instructed his subordinates on how to proceed in the case, pushing for a settlement based on a change of social media policy by Wal-Mart. A week later he sought the ethics waiver, stating he had inherited the stock, and the case would come to him for a decision on whether to file a charge against Wal-Mart if it did not settle. The waiver was denied and he sold his stock. Wal-Mart changed its social media policy, settling the case. The inspector general's report cited the general counsel for personally participating in the case in a significant way while he had a substantial financial interest in Wal-Mart, and for his misleading waiver request that did not disclose he had already directly participated in the case. *He, of course, denies any violation. Wal-Mart settled, apparently in accordance with the instructions he gave his subordinates, and avoided an unfair labor practice charge by the NLRB. No harm, therefore no foul, by Beltway standards?*

FEDERAL APPEALS COURT UPHOLDS ILLINOIS POLITICAL DISCLOSURE LAW – A federal appellate court in Chicago has upheld the constitutionality of an Illinois law that requires groups and individuals accepting contributions or making expenditures in excess of $3,000 within any 12-month period, on behalf of or in opposition to any political candidate or ballot question, to register with the state and make certain disclosures, including the names of those who have made contributions to them. The Center for Individual Freedom, a tax-exempt nonprofit, challenged the law, arguing that it was overly broad and vague and that it "chilled" the organization's free speech, in violation of the First Amendment to the U.S. Constitution, causing the group to refrain from publishing and broadcasting advertisements that referred to the positions of candidates or ballot issues and called on members of the public to take actions such as contacting candidates. But the appellate court, finding the Illinois law constitutional on its face, concluded that any burdens on free speech imposed by the Illinois law are "modest." *The appellate court echoed language in the U.S. Supreme Court's Citizens United decision that described disclosure requirements as a "less restrictive alternative" to more comprehensive, and therefore constitutionally questionable, regulations of speech. Since the Citizens United decision, a number of other federal court rulings have upheld various state and federal political disclosure regulations against constitutional challenges.*

TAX LAW DEVELOPMENTS

HIGH "PROFITS," ABSENCE OF DONATIONS HELP MAKE TRUST TAXABLE – A federal district court for the District of Columbia has held that a pooled-asset special needs trust which benefits over 300 disabled and elderly individuals did not qualify for exemption from federal income taxes under §501(c)(3) of the Internal Revenue Code partly because it subsisted on fees charged to beneficiaries, rather than charitable donations, and partly because it had a high "profit margin." The court noted these two factors were not dispositive as to whether the trust was entitled to an exemption, but were indicative that the trust had not been operated for exempt purposes. *Another factor supporting denial of an exemption included the trust's use for the benefit of the trust's founder through referrals made to his law firm, which had an elder law practice. But the court's preference that a charity support itself from donations, rather than fees paid by beneficiaries, and the court's negative disposition toward an exempt organization achieving a high "profit margin" were particularly interesting. The trust's argument that it could not solicit donations because the IRS had not yet declared it a §501(c)(3) entity didn't cut any ice with the court, which thought the trust should have tried to solicit donations even if it could not have promised donors a tax deduction for a charitable contribution. Nor was the court moved by what may have been the trust's need to accumulate high "profits" in its early years to be able to pay medical benefits to an aging and disabled group of beneficiaries in the future.*

IRS ON A "FAST TRACK" – The Internal Revenue Service has announced that it is making permanent a "fast track" settlement program for exempt organization tax issues under examination by the IRS with respect to one or more tax years for any nonprofit requesting the procedure, excluding "frivolous" issues, cases where the organization has failed to respond to IRS communications, cases in litigation, and, basically, anything else the IRS feels like excluding. The "fast track" settlement process has been an IRS pilot project for several years. It is designed to complete resolution of a limited number of unagreed issues within 60 days of the IRS's acceptance of an application for fast track treatment. "*Permanent" means till the IRS changes its mind, we suppose, but anything that might help organizations find their way more quickly through IRS appeal processes is a step in the right direction.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

DO YOU GET WHAT (OR WHOM) YOU PAY FOR? – According to a recent article in *The Economist,* bribery is hard to stamp out despite all sorts of laws because it is a solid investment. Citing global business surveys and academic studies, respondents reported corruption is common where they do business, it is more common when times are tough, and the ROI (return on investment) is 10-11 times the bribery investment. *U.S. law prohibits bribery, but it seems more than a little coincidental that political campaign contributions seem so often to be accompanied by business contracts awarded by federal, state and local governments. If it looks like a duck, quacks like a duck …*

IS POKER A GAME OF CHANCE OR SKILL? – That was the definitive issue before federal judge Jack Weinstein in Brooklyn, NY recently. The defendant was convicted of operating an illegal underground poker club business in a warehouse. The judge entered judgment for the defense, overturning a jury's verdict, finding poker was more a game of skill than chance, therefore not within the scope of a federal law aimed at organized crime gambling operations. *Judge Weinstein acknowledged that state courts are divided on the issue. He said his ruling will not prevent federal prosecutions against organized crime, or prevent states from banning card games run as businesses. Judge Weinstein is well known for controversial decisions during his long judicial tenure. Of course, there was a nonprofit involved, the Poker Players Alliance, which argued on behalf of the defendant. Will nonprofits use this decision as a precedent for running "Texas Hold'em" poker tournaments as fundraisers to avoid federal laws banning games of chance? Shades of "Guys and Dolls," the 1940s Broadway musical.*

H & H DEVELOPMENTS

In October …

Barbara Dunn presented a session on key clauses for hotel contracts at an annual association law symposium in Washington, DC. She also presented risk management, a contracts quiz show and legal issues with emerging technology sessions at an annual conference of meeting planners for religious organizations in Columbus, Ohio.

Naomi Angel presented "Emergency Continuity Plan – Hope for the Best, But Plan for the Worst, So It's Not Over When It's Over!" and "Legal Issues Affecting Emerging Technologies" to association executives in Orange Beach, Alabama. She also presented "Legal Issues and Negotiation Strategies" and "Advanced Contract Legal Issues and Negotiation Strategies" to a group of government meeting professionals in National Harbor, Maryland.

Gerard Panaro presented "Basics of Employment Law from the Inside Out" at a nonprofit human resources conference in Washington, DC.

Nathan Breen will be discussing hotel contract issues at a national event in Jacksonville geared toward meetings in smaller markets.

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Contributors to this issue…

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