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:

DELAWARE GIVES ACCESS TO DIGITAL ESTATES — Delaware is the first state to pass a law that gives executors and heirs the same level of authority over digital accounts after a person's death as they have over a decedent's physical assets. With a few limited exceptions, companies must now treat the executor of a decedent's estate the same as they would the account owner, including providing usernames, passwords, and other accounting information. By expanding access to the deceased's digital accounts, including email, social media, content licenses, health records, and cloud storage, estate attorneys and other fiduciaries have more control over the fate of paperless digital properties. *The laws simply haven't kept up with the evolution of the digital world and advancements in 21st century technology and communication. About 10 states have considered versions of the Delaware legislation. Supporters of Delaware's law hope other states will follow so that family members will no longer have to deal with corporate red tape and uncooperative (to put it mildly) policies of various social media companies following the death of a loved one.*

ARE SMALLER BOARDS OF DIRECTORS BETTER? — A recent Wall Street Journal article presented that question in the context of large, publicly traded corporations, arguing smaller boards were more cohesive, less formal, easier to manage, more flexible, and better able to delve into details. Now apply that argument to not-for-profit boards. Would smaller boards be better? *In many cases, probably yes, for all the reasons listed. In fact, the trend to downsize boards is long-standing. Contrary arguments include promoting inclusion for political reasons, especially when member companies are of different categories and sizes; promoting more diversity; and preserving culture or tradition. We also see that boards vary in size between trade associations and professional societies. There is no one best solution. What do you think?*

TWO SHOCKERS — NOT! — President Obama will not return or turn down campaign contributions from donors who have profited from mergers involving U.S. companies going offshore for lower taxes, a practice that president has loudly and repeatedly condemned. Warren Buffet has argued for higher income taxes on the wealthy, but works to make sure companies he invests in use all the tax avoidance mechanisms allowed by law. *As always, watch what I do, not what I say.*

GOOD READING … See you in October 2014

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NOT-FOR-PROFIT LAW DEVELOPMENTS

ASSOCIATION SUED FOR PEER-REVIEWED ARTICLE — The National Strength and Conditioning Association ("NCSA") and two Ohio State University professors have been sued for a single sentence in a peer-reviewed article in NCSA's journal studying the CrossFit group workout regimen at a gym licensed to use the program by CrossFit, Inc, a California company. The CrossFit regimen of a very high-intensity workout has become a nationwide phenomenon in fitness circles. Two academic researchers studied the program to analyze training results for 54 volunteers for over two months. They reported positive results for 43 of the volunteers, but reported that nine of the 11 volunteers who did not show up for a second testing of results said it was due to overuse or injury. That negative statement is the basis for a lawsuit by the owner of the gym against the two professors and the NCSA alleging fraud and defamation, and a separate lawsuit by CrossFit against NCSA for false advertising and unfair competition. (NCSA and CrossFit both certify trainers for a fee.) *However this turns out, the lawsuits illustrate that authors and the journals that publish their peer-reviewed articles have to be cognizant of the potential litigation risks when commercial entities are involved. Such lawsuits may be uncommon, but uncommon does not mean unprecedented. Read indemnification and hold-harmless provisions very carefully, and consider the deep pocket (usually insurance) behind them.*

EMPLOYMENT LAW DEVELOPMENTS

FEDERAL APPELLATE COURT RAISES THE ANTE ON FMLA NOTICES — A federal appellate court has raised the ante for employers sending Family Medical Leave Act notices to employees. An employee requested personal leave to address some personal issues. She then filled out a FMLA medical certification. Her employer properly converted her personal leave to FMLA leave and mailed her the required FMLA notice. When she returned to work 14 weeks later she was informed she had been terminated when she did not return to work at the end of 12 weeks FMLA leave. Her response was that she was never informed she was on FMLA leave, and never received any notice. The employer invoked the common law "mailbox rule" that a letter properly stamped and deposited in the U.S. mail is delivered. No, said the court. That is a weak presumption, and allowed her case to go to forward to a jury trial. *Employers, take heed. Employees (and others) regularly claim they never received a mailed notice, letter, check or other document, especially when the document would undercut a claim. So spend the extra money and effort using certified or registered mail or overnight delivery to get a receipt to avoid such claims of "I never received it."*

EMPLOYEE'S ROLE NOT TO DECIDE REASONABLE ACCOMMODATION — As a recent federal appellate court decision in Chicago reminds us, an employer is required by the Americans With Disabilities Act to provide a "reasonable accommodation" to address an employee's disability, and that is not necessarily the accommodation the employee wanted. A Dairy Queen franchise in Indianapolis employed a legally blind worker. Other employees rotated through various positions but the legally blind employee, unable to see well enough for the work required at some positions, was limited to two positions. Unhappy about this and shortened work hours during winter months, he resigned and sued for failure to accommodate his limited vision and for disparate impact. A trial and appellate court rejected his claims, finding the employer's accommodation was reasonable and met ADA requirements, and the employee could not identify any way he was treated unfairly compared to others. *Of particular note was the appellate court's declaration that the ADA requires a reasonable accommodation, not necessarily the accommodation the employee demands. Keep that in mind when considering accommodation requests.*

Intellectual Property Law Developments

BE GLAD YOUR NAME IS NOT McBRIDE, ETC. — McDonald's is at it again with a recent trademark application, this time for "McBrunch." McDonald's explains that breakfast is a profitable and growing portion of its overall business, and McDonald's frequently files "intent to use" trademark applications whether or not there are specific plans to enter a new line or expand an existing line of business. So McDonald's might expand its current breakfast offerings into a longer period or different menu, or maybe not. *Well, be happy your name does not begin with "Mc" or you might find McDonald's applying for a trademark on it. But think about whether your association should be considering filing additional trademark applications for current or future activities. Just avoid anything beginning "Mc" however.*

Regulatory Developments

HOW MUDDLED IS THIS? — *H&H Report Update* — The National Labor Relations Board tossed out a 50-year-old precedent in 2012 and ruled an employer may not simply end a dues checkoff process because its union contract has expired. But the NLRB said the ruling would apply prospectively so the parties to that dispute could not appeal. Now an NLRB administrative law judge has cited the U.S. Supreme Court's Noel Canning decision last June that said President Obama's three recess appointments to the NLRB in January 2012 were invalid; therefore he disregarded the NLRB's 2012 decision because it occurred during the period from January 2012 to August 2013 when the invalidly appointed commissioners were issuing decisions. However, with all five commissioners now validly appointed, they recently ratified the approximately 400 decisions and appointments made by the invalidly appointed commissioners rather than go back and decide each decision and appointment individually all over again. *So, where does that leave the law regarding a dues checkoff at the expiration of a contract? It's unclear and may have to go to the full NLRB or the courts again, even after the NLRB apparently thought it had made this unnecessary. Got that clear in your head? Neither do we.*

THE TIDE IS STARTING TO TURN ON PHONE "KILL-SWITCHES" — California has passed legislation mandating the installation of "kill switch" technology on cell phones sold in California after July 1, 2015. The intent is that kill switches will enable phone users to remotely disable their phones (turning them into "bricks") and wipe their data if they are lost or stolen, greatly reducing their value, especially to thieves. California is such an important market that manufacturers are expected to comply, and also make them available elsewhere. Predictably, CITA-The Wireless Association, which has fought such legislation for years, reacted by calling the mandate "… a state-only technology that is unnecessary, inconsistent, arbitrary and counterproductive." *Minnesota had previously passed such legislation. Expect other states to follow. This may head off federal legislation or regulation. Police and consumer groups have supported such technology on the grounds that disabling stolen or lost phones would greatly reduce the incentive to steal them, thereby reducing the incidence of one of the most common and increasingly violent street crimes in the U.S. as the price and resale value of such phones have climbed. CITA has claimed the phone industry would come up with technology voluntarily, and indeed, many manufacturers agreed in mid-April to adopt such technology voluntarily. Blackberry has had such a switch for years. Apple has already enabled buyers of its latest phones to disable them if lost or stolen, and thefts of Apple phones in New York have come down markedly, as one example. Samsung has followed suit. The California law does not say how manufacturers have to do this so one of CITA's gripes that this will stifle innovation is a bit hard to swallow. Users will have the option of opting out of enabling the kill switch at the time of purchase. The law applies to the retail sale of cell phones, and is enforceable by state and local authorities, but there is no private right of action. Sorry, consumers.*

TAX LAW DEVELOPMENTS

IRS, FOUNDATION SETTLE SUIT OVER CHURCHES AND POLITICS — *H&H Report Update* — The Internal Revenue Service and the Freedom From Religion Foundation have reached an agreement that resulted in the Foundation's dismissing a lawsuit the Foundation had filed against the IRS contending that it was not enforcing against churches and religious organizations those federal laws generally prohibiting groups exempt from federal income tax under Internal Revenue Code §501(c)(3) from engaging in political activity. The foundation said the dismissal comes after the IRS established a protocol to enforce anti-electioneering prohibitions. *The dismissal was "without prejudice," meaning that the lawsuit could be reinstated if the Foundation finds the IRS is not following its protocol. But the dismissal also follows a number of court decisions, reported here, in which litigants have had considerable difficulty forcing the IRS to take action against other entities through lawsuits.*

COURT FINDS PUBLICLY AVAILABLE CONSERVATION LAND EXEMPT USE — The Maine Supreme Judicial Court has held that holding land for conservation of natural resources was a charitable use qualifying the owner trust for exemption from state taxes. The land was open to the public throughout the year and was used for local school field trips and environmental education, as well as hunting, fishing, hiking, cross-country skiing and snowmobiling, which the court found to confer sufficient public benefit to justify the exemption. Language in the owner's Articles of Incorporation authorizing the trust to engage in "logging, farming and other compatible commercial activities" was not found to defeat the exemption where the only such commercial use actually engaged in was an educational program on sustainable tree harvesting, with revenue from timber sales flowing back into the trust's conservation activities. *In its opinion, the court favorably cited a similar holding from a court in Massachusetts, previously reported here.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

HOW TO ACHIEVE NATIONWIDE ATTENTION BRIEFLY — United Airlines handled an altercation between two passengers seated in their flight's Economy-Plus section by diverting the nonstop flight from Newark to Denver and having police escort the two passengers off the flight. The cause of the altercation was a male passenger's use of a device called "the Knee Defender" which attaches to a passenger's tray table and prevents the seat immediately forward from reclining. A woman passenger in front of him was angered when she was unable to recline her seat, and then threw a glass of water at the male passenger, and shortly thereafter the pilot diverted the flight to Chicago. *A number of lessons are apparent. One, United says it does not allow passengers to use the Knee Defender so be forewarned, such self-help is out. Two, some common sense and courtesy between passengers might save everyone on a flight the stress and inconvenience of a diversion and the two passengers an extended delay in their travels or a trip before a judge, worse case, not to mention having your name in news media nationwide. Is the discomfort and inconvenience of another discourteous passenger worth that sort of hassle? Three, one-size-fits-all cramming of passengers in ever smaller seats with less leg room is likely to result in more of these altercations, something airlines seem to ignore for the sake of revenues. (See our August 2014 article about even tighter seating ahead.) The joys of travel….*

GOES, NEXUS AND SENTRI ACHIEVE MILESTONE NUMBERS — *H&H Report Update* — The U.S. Department of Homeland Security announced it has surpassed two milestones, 500,000 direct enrollees in the TSA PreCheck direct enrollment system, and more than 3,000,000 enrollees in the Customs and Border Protection ("CBP") Global Online Entry System ("GOES"), NEXUS and SENTRI systems.

These programs allow enrollees to pass through airport security checkpoints in the U.S. via shorter lines and being permitted to wear shoes and belts, coats, not open their laptop computers, and less scrutiny of carry-on toiletries, among other benefits. GOES access also permits international travelers to use kiosks at airports and avoid long CBP lines. NEXUS and SENTRI permit expedited entry at the Canadian and Mexican borders respectively for those traveling by auto as well as providing the benefits of GOES. *We have previously extolled the benefits of PreCheck, GOES and NEXUS or SENTRI registration for travelers, based on personal experience. One practical thing to keep in mind for NEXUS and SENTRI is that each person in a vehicle is required to be enrolled in the program, not just the driver, and enrollment must be prearranged and done at a border CBP post. GOES registration can be done online plus a brief visit to a CBP station at many major airports.*

CITY FACES A CONUNDRUM FAMILIAR TO MEETING PLANNERS — A small city in western Pennsylvania faced a conundrum all too familiar to meeting planners. How far must a municipality go to enable a nonresident 8-year-old deaf child to participate on an equal basis with other youngsters in a municipal recreational soccer league coached by volunteers? The boy's parents filed a federal lawsuit under the federal Rehabilitation Act of 1973 and Title II of the Americans With Disabilities Act alleging discrimination because the city refused to provide an American Sign Language interpreter ("a signer") to attend each practice and game to enable the boy to communicate with coaches and other players. The city disagreed that it was obliged to provide a signer for a nonresident who wanted to play in a recreational league coached by volunteers, but ultimately caved, and has agreed to provide a signer for the boy through 2016. The parents are also seeking compensatory damages and legal fees and have not yet agreed to a settlement. *Meeting planners are all too familiar with this conundrum, when the costs of providing such an accommodation greatly exceed dues or registration fees derived from one person. But that is not the relevant test. Does the accommodation impose an undue burden on the provider? It appears the city council may well have decided the cost of defending the lawsuit would be greater than the cost of providing the signer.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

MORE TIMES THEY ARE A CHANGIN' — The *Chicago Tribune* recently posted an article that Big Ten universities are concerned that their students are less inclined to attend football and basketball games in person, preferring to have a much different experience "attending" games on their electronic devices with multiple features, ability to communicate with friends, and experience games in other ways. A different article commented on universities raising student fees to attend all games, another attendance deterrent to many students already coping with costs of tuition, books, living expenses and debt repayments. Recent *Sports Illustrated* and *Bloomberg BusinessWeek* articles noted the need for a much different attendance experience for pro sports as many fans want wi-fi connections and shopping experiences so they can experience games in a different way, communicating with friends, taking "selfies," and the like. *While the various reports seem to focus on the "millennials" and sports, is there a broader question to be considered? Are the millennials already in and coming into the work force expecting a different experience than associations' and meeting planners' traditional meetings, conventions, trade shows, educational products, and all the other revenue-creating streams associations are used to providing, as well as expecting different experiences in the workplace? How well are associations bridging generational attitudes and aptitudes? It is not just universities experiencing these trends and changing demographics, and the changes appear to be accelerating.*

GOLF STRUGGLING TO ATTRACT NEWCOMERS — Many of our readers may not be aware of this trend, but those in the golf industry certainly are. Golf is struggling to attract new players, and thus is a matter of real concern to golf course owners, golf clubs, industry manufacturers and pros. One recent illustration of this trend was a decision by retailer Dick's Sporting Goods to largely drop golf equipment after another year of lower sales and revenues. The decision will result in a one-time write down of millions of dollars of inventory and valuations of trademarks and for severance payments to an estimated 300 golf pros who will lose their jobs in Dick's retail outlets. *This is just one example of the wrenching changes facing the industry. Without new players, there will be more such business stories. Many associations and businesses use golf events for social, sales, charitable and networking opportunities and some associations as a source of revenue for affiliated foundation activities. Check your numbers carefully going forward.*

MARRIOTT WILL REMIND GUESTS TO TIP HOUSEKEEPERS — Marriott International has begun a campaign to remind guests to leave a daily tip for the workers who clean and make up guest rooms. An envelope suggesting tips will be left in hotel rooms. The tip amount is left up to the guest. *Some travelers tip housekeeping staff regularly, some occasionally, some not at all. It will be interesting to see if other hotel chains will follow Marriot's lead. To be determined...*

H & H DEVELOPMENTS

In September . . .

John M. Peterson spoke about Legal and Legislative Issues of Interest to members to a meeting of a North American trade association.

Naomi R. Angel spoke on Patent Reform Act and other intellectual property developments to trade association of manufacturers.

Jonathan T. Howe co-presented "Ethics and Risk Management" at the 2014 Risk Summit — Hard Rock Chicago.

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Contributors to this issue…

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