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A VIRAL LESSON NOT TO BE IGNORED — When you see a headline that a teen's Facebook post cost her dad $80,000, you have to wonder what that's about. It seems the teen's father entered into an employment severance settlement which required the terms were to be kept confidential by the parties. This is standard. But the father disclosed the terms to his wife and daughter, and the daughter bragged about the settlement on Facebook, naming the employer. The employer's lawyers invoked the confidentiality provision to revoke the $80,000 payment. Apparently this story has now gone viral. *When there is a confidentiality provision in a contract, it behooves the parties to observe it. This seems fairly basic. It's not just meaningless boilerplate. And in the age of social media, and especially with young people who live online, confidentiality is so easily breached. This was one family's very expensive lesson, and something we all need to keep in mind, especially in contract and litigation-related matters.*

FOR YOU TAX ITEMIZERS, ONE MORE THING — If you itemize your deductions, keep in mind the deduction for medical and dental expenses only kicks in for 2013 after it exceeds 10% of your adjusted gross income ("AGI"), an increase from the long-time of 7.5%. But if you or your spouse are 65 or over, the 7.5% limit still applies. *Thanks, Congress, for that little tax increase and contribution to Internal Revenue Code simplification.*

WILL THIS RULING GO NATIONWIDE? — A California appellate court overturned the conviction of a motorist who was ticketed for checking his cell phone for an alternative route using a map application while stalled in traffic. He claimed the applicable California statute only bans listening and talking on cell phones, therefore it did not apply to looking at a road map. The appellate court said the statute might have been written more clearly if the legislature meant to ban map using and other uses. *Will this ruling go elsewhere? It depends on the statutory language used by other states' laws. Some expressly ban using cell phones for any reason while driving. Our readers will be happy to know California bans texting while driving in a different statute. One might wonder about the distinction between reading a cell phone map app and reading a text message, but that is a different question not before this court. Any use of a hand-held cell phone while driving, even when stalled in traffic, still seems like a bad idea to us.*

GOOD READING … See you in April 2014

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NOT-FOR-PROFIT LAW DEVELOPMENTS

SHOULD NONPROFIT EXECS DISCLOSE THEIR SALARIES? — This interesting question was recently raised by Rick Cohen writing for the *Nonprofit Quarterly*, in connection with an interview with a foundation CEO who had just moved from one high profile philanthropy to another, and her intention to make her new foundation's grant-making process more transparent. When asked if that included making her own salary public, she responded no, it would be in the foundation's Form 990 return (but a year or two later). So Cohen asked if "transparency" should extend to CEO salary information beyond the Form 990 requirement. *Form 990 may now disclose such information but the information is dated, and most of us don't go looking for it. So perhaps it comes down to a philosophical inquiry, would such disclosures by nonprofit executives make a difference to members, donors or others? This is a broader question than Mr. Cohen's inquiry which seemed to focus on foundations. What do you think?*

ASSOCIATIONS ON BOTH SIDES OF MICHIGAN MEDICAL MARIJUANA LAW — The Michigan Supreme Court in a unanimous decision has ruled that municipalities may not ban the use of medical marijuana within their borders. The decision is expected to overturn local ordinances in at least five municipalities which passed ordinances saying any activity illegal under federal law was also illegal in their community. The ordinances did not mention medical marijuana but the ordinances were perceived as banning medical marijuana use permitted by Michigan's medical marijuana statute. *Associations were all over this lawsuit, including those supporting the local ordinances such as the Prosecuting Attorneys Association of Michigan, the Public Corporation Law Section of the Michigan Bar Association and the Michigan Municipal League representing 524 municipalities, while the ACLU of Michigan and the Cato Institute in Washington, D.C. opposed such ordinances. This decision may be a precedent for other states' courts looking at similar issues. Will this be a precursor to whether employees terminated for medical marijuana use may be denied unemployment compensation, currently on appeal by the Michigan Chamber of Commerce from two trial court decisions rejecting efforts to deny benefits? That's another precedent-setting decision coming soon.* *(See Page 4)*

MEETINGS & TRAVEL LAW DEVELOPMENTS

ROSEMONT CONVENTION CENTER TO GET A FACELIFT — Rosemont, Illinois mayor Brad Stephens announced the Donald E. Stephens Convention Center in Rosemont, Illinois will undergo a $2.5 million facelift, courtesy of vendor Aramark Sports and Entertainment Services which operates the catering and concessions services at the convention center and at the nearby Rosemont Theater and Allstate Sports Arena. Aramark and the Village of Rosemont will each invest an additional $500,000 in upgrades in five years. In return Aramark's exclusive contract to provide such services at the three venues will be extended through 2029. *The convention center is named for the former and very long-time mayor of Rosemont, the current mayor's father. The convention center, perhaps better known to many meeting planners as the Rosemont Convention Center, hosts many smaller trade shows and meetings, which take advantage of its proximity to O'Hare Airport a few minutes away, and the many hotels which have sprung up nearby to service the meetings and trade show industry. More association meetings are probably held around the O'Hare and Rosemont area than downtown Chicago. Location, location, location!*

USE AIRPORT KIOSKS TO SPEED YOUR WAY THROUGH U.S. CUSTOMS — If you would like to shorten your wait to get through U.S. Customs, consider using the kiosks now available in a number of the larger airports' international terminals including Chicago O'Hare and Midway, Seattle, Miami, Newark, Dallas-Fort Worth, Kennedy in New York, Vancouver and Montreal. U.S. and Canadian passports can be scanned and customs declarations verified, which cuts processing times for travelers. *Remembering last summer's long lines for international arrivals, anything that speeds up the process is a plus.*

ARE MIGRAINE HEADACHES A DISABILITY FOR ADA PURPOSES? — Not necessarily, at least for one federal appellate court in Denver, CO. The plaintiff, a medical assistant in a busy medical practice in Oklahoma, claimed she experienced dehabilitating migraine headaches when she had to work for one specific doctor whose heavy patient load she found very stressful. The appellate court affirmed summary judgment for the defendant hospital and affiliated parties. The court agreed the plaintiff had failed to establish she had a physical or mental impairment that substantially limited one or more of her major life activities, the statutory definition of a disability for Americans With Disabilities Act ("ADA") purposes. In her deposition testimony she said she could sometimes drive to work on days when she was suffering from a migraine and work a full shift. She said she collapsed when she returned home, was consequently unable to care for herself such evenings and slept badly on such occasions. The court found her testimony insufficient for ADA requirements. *Some points to keep in mind: this case was decided on summary judgment after discovery was completed; it never went to trial. The court did not say migraines could not constitute a disability for ADA purposes, just that this plaintiff had failed to provide sufficient evidence that her migraines met ADA statutory requirements. The record is silent on whether she may have lacked such evidence or this may reflect inadequate lawyering on her behalf. Plaintiffs and defendants need to keep in mind that ADA claims are fact-intensive so you have to provide factual evidence of disability or lack thereof. Anyone who is personally familiar with migraines is aware they can be very dehabilitating; whether they amount to an ADA disability is a separate question, as this decision illustrates.*

SO WHO BAILS OUT THE FEDS' PENSION BAILOUT PLAN? — The Pension Benefit Guaranty Corporation ("PBGC"), the government's pension benefit guarantor for defined benefit plans unable to meet their payout obligations, is running annual deficits itself, paying out more benefits than it is taking in by way of insurance premiums (a/k/a taxes) on solvent single and multiemployer pension plans. The government recently allowed a multiemployer plan to be split up among other solvent pension plans while the PBGC took on the pension obligations of the bankrupt employer which were about to sink the entire multiemployer plan. This was only the third time this has been permitted, but it seems likely other multiemployer plans in trouble will seek similar relief. And if they get it, won't single employer plans demand more flexibility in restructuring their obligations? Some employers and even some unions want flexibility to reduce their current obligations and benefits rather than have the plan cease all payments in the future. (Are you paying attention, public pension trustees and beneficiaries?) *The government predicts at the current pace of bailing out defined pension plans in distress, the PBGC itself will be insolvent in ten years or less. So, allow flexibility to pension plans, raise premiums on everyone else, or inject more taxpayer funds into PBGC coffers? Somehow this all has a familiar track record akin to Social Security, Medicare and Medicaid. The promises exceed the revenues. If you want to know who is expected to bail them out, look in a mirror. This is one more illustration why employers, including many associations, are moving away from defined benefit plans to defined contribution plans.*

WORKERS FIRED FOR MEDICAL MARIJUANA AND UNEMPLOYMENT COMP — The Michigan Chamber of Commerce is asking a state appellate court to rule employers may lawfully terminate workers who use medical marijuana even though Michigan permits medical marijuana use. The Chamber is also asking the appellate court to deny unemployment benefits to workers terminated for using medical marijuana. Two trial courts have rejected the Chamber's two positions. *This is a tricky situation for employers. The first issue is whether employees may terminate workers for medical marijuana use away from work when it is permitted by state law, as it is in many states. There are decisions going both ways on that question around the country. The second part of the question is eligibility for unemployment benefits. These are both questions that will vary from state to state so you must know the evolving law in the state where you are located or doing business. The decision here is likely to be a precedent for similar claims in other states.*

TAX LAW DEVELOPMENTS

LACK OF DIRECT LOCAL BENEFIT COSTS NONPROFIT TAX EXEMPTION — The District of Columbia Office of Tax and Revenue recently revoked a property tax exemption that had been held by the nonprofit Meridian International Center for over 50 years. The Center focuses on international affairs and strengthening understanding through the exchange of people, ideas and culture. In revoking the exemption, the Office cited the organization's lack of a "direct benefit to the residents of D.C." *Really? Think how many nonprofits could lose their property tax exemptions if they were prohibited from focusing on international matters, or national matters, and had to provide a "direct benefit to the residents of D.C." We suppose many local churches, schools and hospitals could meet that test. But we're not sure about many other organizations in the District of Columbia. This appears to be a decision just asking for an appeal.*

IRS RELEASES ANNUAL "DIRTY DOZEN" TAX SCAM LIST — The Internal Revenue Service has released its annual "dirty dozen" list of tax scams. Of particular interest to nonprofits is "impersonation of charitable organizations," a long-standing type of abuse that seems to increase in the wake of significant natural disasters, when scam artists use fake solicitations of aid for disaster victims to obtain money and personal information from well-intentioned contributors. Also on the list are identity theft in the filing of tax returns claiming refunds, fake phone calls from people pretending to be with the IRS, phishing for valuable personal information through the use of fake websites and unsolicited email, tax preparation scams promising "free money" from inflated refunds, other types of tax return preparer fraud, schemes for illegal tax evasion through the hiding of income offshore, other false tax return claims, frivolous arguments to the IRS that have been rejected by the courts, misuse of trusts, and abusive use of flow-through entities such as limited liability companies. *Be careful out there. Don't be the victim of such scams or unwittingly participate in them. Check out the IRS website for more detailed information, especially about how the IRS does and does not contact taxpayers.*

NONPROFIT CAN SELL "MITIGATION CREDITS" TO DEVELOPERS — The Internal Revenue Service has ruled that a nonprofit originally formed to educate individuals about the arts and natural sciences would not derive taxable unrelated business income from selling private developers "mitigation credits" it had earned from working with a state agency to protect the natural resources of a certain watershed. The IRS noted the organization had amended its articles of incorporation to include the tax-exempt purposes of protecting natural and scenic spaces, protecting natural resources, and maintaining or enhancing air quality. The "mitigation credits" had been given to the nonprofit by the state with the understanding that the nonprofit could sell them to developers for use in obtaining state authorization for projects that might cause stream disturbance or otherwise impact a stream elsewhere in the state. *Here was a creative way for a nonprofit to earn revenue that the IRS would deem related to its exempt purposes and thus not subject to income tax. The case also provides an example of how a tax-exempt nonprofit can change its purposes and still remain exempt.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

U.S. TO GIVE UP MANAGEMENT OF ICANN IN 2015 — Since its inception, the Internet has been managed by an agency of the U.S. government. It came as a surprise earlier this month when the U.S. National Telecommunications and Information Administration ("NTIA") announced that it would end its relationship to operate key domain-name functions for the Internet Corporation for Assigned Names and Numbers ("ICANN") in September 2015. Instead ICANN is expected to develop a new governance model with "broad community support" from user nations and companies. This comes at a time when the ICANN is also expected to authorize hundreds of new top-level domains ("TLDs") beyond the long–

established .com, .net, .org and similar domains. The NTIA is stating it will ensure that any new governance model will continue to maintain the security, stability and resiliency of the Internet system, and be transparent in its operations, and not subject to a government-controlled or intergovernmental authority. *The boo birds are already asking why the U.S., which created the Internet, would give up management of the domain name system, especially with efforts in many nations to greatly restrict access to the Internet except under tightly-managed government control. Good question. Let's see what the new governance model looks like before ceding oversight. In the meantime, carefully police your TLDs while the expanded categories are implemented.*

REGULATORY LAW DEVELOPMENTS

CAPA AND NORTHWESTERN UNIVERSITY FILE POST-HEARING BRIEFS — *H&H Report Update* — The College Athletes Players Association ("CAPA") and Northwestern University have filed post-hearing briefs with the National Labor Relations Board's regional director who is expected to decide whether the Northwestern football players are university employees who may organize, petition for recognition as a labor union and force Northwestern University to engage in collective bargaining on labor issues, or are students engaged in educational pursuits and not employees at all. The Northwestern players are the first group of college athletes in the country to seek union representation. The hearing featured testimony by Northwestern's highly regarded senior quarterback (whose college career is over) and its celebrated football coach, one claiming football was a year-round, full-time job, the other extolling the educational benefits of a Northwestern education and accommodations made to student-athletes. *Whatever the regional director decides, it is likely to be appealed to the NLRB, and from there to the courts. But this first take on the issues presented may establish a precedent going far beyond Northwestern and impact college conferences and the National Collegiate Athletic Association broadly. This may be quixotic or revolutionary. We will all be watching.*

ANOTHER COURT REJECTS ANTITRUST INFERENCE FROM TRADE MEETING — A federal trial court in Pennsylvania has rejected an inference of executives colluding because they attended an industry trade association meeting with competitors, among other claims. The court awarded summary judgment to defendant chocolate candy manufacturers Mars, Inc., Nestle USA, Inc. and The Hershey Company after extended discovery in a lawsuit filed in 2008. The underlying claim was a conspiracy to raise prices basically derived from defendants' parallel pricing practices. The court said the record after years of intensive discovery including hundreds of depositions, production of thousands of documents and tireless efforts of plaintiffs' lawyers, failed to support plaintiffs' theories." Lastly, plaintiffs assert that defendants' executives with pricing authority had numerous opportunities to conspire proximate to the 2002, 2004 and 2007 price increases. Specifically, plaintiffs contend that high level trade association contacts predating price increases in 2004 permit the inference that defendants' executives either offered pricing information to one another … or agreed to conspire during the meetings …. Defendants observed there is nothing abnormal about regular interaction of competitors, especially in the context of trade association meetings ..." …. *The court noted that several top executives of the defendant manufacturers were among hundreds of attendees at a meeting of the Grocery Manufacturers Association trade meeting in 2004, "[P]laintiffs have not uncovered anything more insidious." And plaintiffs' expert could present nothing more than his own speculation that the executives discussed collusive price increases at trade shows. It takes more than speculation to plausibly establish a conspiracy.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

DOES THIS MAKE ANY SENSE? — The City of San Jose is attempting to sue Major League Baseball ("MLB") and eliminate its long-standing antitrust exemption because MLB will not approve a transfer of the Oakland Athletics baseball franchise from Oakland to San Jose. It seems that involves moving into a geographic area assigned under MLB rules to the San Francisco Giants who don't want the new competition. A trial judge dismissed the lawsuit, citing the MLB's antitrust exemption, but a federal appellate court in San Francisco has agreed to hear an appeal of the dismissal ruling. Even if MLB relented and allowed the franchise transfer, San Jose's voters would have to approve a stadium deal, naturally at taxpayer expense. Meanwhile the City of San Jose is cutting back on all municipal services including police, fire and education, because of its public workers' present and future pension obligations. San Jose's public worker unions are steadfastly refusing to renegotiate those obligations or increase their contributions. *San Jose is in deep financial trouble. Bankruptcy is not out of the question. Does asking San Jose's voters to approve a stadium deal at taxpayer expense when the city is going broke make sense? Some other California cities filed for bankruptcy before Detroit did so there are precedents for doing so. How all of this will play out in the courts in California and elsewhere remains to be seen, as unions claim state constitutional protection for their members' pensions, cities seek relief in bankruptcy proceedings, and an occasional wild card such as the antitrust exemption for MLB is thrown in the hopper. Only the lawyers, accountants and other consultants will come out whole.*

ANOTHER WORD MAKING THE ROUNDS — "Tortification" is a term coming into play in contract litigation circles. It is shorthand for using tort law concepts in contract litigation, to avoid straightforward breach of contract provisions including damages. Most state courts have traditionally made a distinction between tort and contract liability concepts. *Tortification is an effort to expand breach of contract claims into a broader set of claims, thus expanding the possibility of damages beyond what the contract provides by its own terms.*

H & H DEVELOPMENTS

In March . . .

John Peterson will provide an antitrust update and a report on legal trends; and developments of interest later this month to the semi annual meeting of a North American trade association. At the beginning of April, **John Peterson, Sam Erkonen and Naomi Angel** will be among the presenters at the Annual Association Law Symposium in Chicago. You can register for the 2014 Annual Association Law Symposium at asaecenter.org/ChicagoLaw.

Jonathan Howe co-presented, "It's Your Day In Court: Common Contract Disputes on Trial" at a convention meeting of both the Washington and Oregon State MPI Chapters in Spokane, Washington. This session was represented from both sides (contracting organization and event supplier). Case studies were examined and attendees had an opportunity to be interactive in small groups. He also presented "Risk Management in Uncertain Times" at the joint meeting of the Arizona Sunbelt Chapter of MPI together with and the local chapter of HSMAI in Scottsdale, AZ.

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