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:

ANOTHER "TOO BIG TO FAIL?" – With all the hand-wringing about banks, insurers and financial firms that must be bailed out because they are too big to fail, the American Antitrust Institute has warned the Obama administration and Congress of another group – the four biggest accounting firms necessary to audit America's and the world's largest corporations – too big to fail. This was first noted following the demise of Arthur Andersen in 2002. *Four major accounting firms are already too few for the job, and if one of them fails, the profession will be down to a "triopoly," pretty risky.*

IS SPIRIT AIRLINES INDIRECTLY PROMOTING SOUTHWEST? – In addition to the plethora of fees that airlines are charging flyers these days while claiming to keep ticket prices low (or lower at least), Spirit Airlines has added the latest wrinkle – charging up to $45 for carry-on bags. Spirit's explanation: flyers are clogging the aisles and slowing boarding and disembarking while getting bags in and out of overhead bins, thus delaying flights, so the fee may deter them from using big carry-ons, and its tickets are $40 less on average so flyers still do well. Other airlines are waiting to see how flyers respond before following suit. *If the comments appended to online news articles describing the latest Spirit add-on fee are any indication, flyers see this fee as one more reason to fly on the airline with the tagline, "Bags Fly Free." Is it a coincidence that Southwest is consistently profitable, unlike most of its competitors? Which airlines do you, your staff and your members prefer to use to attend meetings, conventions and trade shows?*

WILL THIS COPYRIGHT TASK FORCE MAKE A DIFFERENCE? – The U.S. Department of Justice has announced formation of an intellectual property task force to go after rampant international copyright piracy directly affecting content creators in the U.S. The software, movie and music industries have been the primary losers to IP piracy. It is estimated by one industry association, for example, that 19 of every 20 songs downloaded is pirated, not purchased. *Will electronic books on Kindle, iPad and other such units be the next target? While associations may not think they have much of a dog in this fight, those that publish standards, how-to guides and industry handbooks or other information used commercially are vulnerable to the theft of their intellectual property. Don't accept such thefts without a fight.*

GOOD READING.. See you in May ...

Howe & Hutton, Ltd.:
20 N. Wacker Dr., Suite 4200 • Chicago, IL 60606 • 312/263-3001 • Fax: 312/372-6685
Washington Office:
1901 Pennsylvania Avenue, NW, Suite 1007 • Washington, D.C. 20006 • 202/466-7252 • Fax: 202/466-5829
St. Louis Office:
1421 Buckhurst Ct. • Ballwin, MO 63021 • 636/256-3351 • Fax: 636/256-3727
E-Mail: hh@howehutton.com

Not-For-Profit Law Developments

DISPUTE OVER NONPROFIT'S RECRUITING RULES RAISES LEGAL ISSUES – An association's proposal to limit the time period for on-campus recruiting of students by law firms has caused so much dissent among the nonprofit's members, including some who questioned the proposal's legality, that the association backed down from adopting the proposed limitation. The National Association for Law Placement was considering establishment of a January "kickoff" date before which firms would be prohibited from making employment offers to law students. Proponents said the rule would provide time for better evaluation of student progress in school and allow firms to recruit after they were in a better position to assess their employment needs. But the proposal drew a mixed reaction from law firms and schools, with some lawyers suggesting that the rule might be an unlawful restraint of trade, some saying that the organization was "sticking its nose in places where it doesn't belong," and some even calling for abolition of the association. As is usually the case when nonprofits decide to adopt rules that will govern a trade or profession, the proponents of this proposal had some arguments that the rule would benefit everyone involved. *However, "unreasonable" restraints of trade are prohibited by the antitrust laws, and if anyone thinks their business will be hurt by a nonprofit's proposal, you can bet they will charge that it's unreasonable, leading to possible legal action or, at least, some very damaging publicity.*

Intellectual Property & Computer Law Developments

DOL SAYS NO MORE OPINION LETTERS ON FACT-SPECIFIC FLSA CASES – The U.S. Department of Labor's Wage and Hour Division ("DOL") has announced that it will no longer issue opinion letters under the Fair Labor Standards Act responsive to fact-specific opinion requests. Instead the DOL will respond with citations to statutes, regulations, interpretations and cases relevant to the request, but without the analyses the DOL used to provide. The DOL may provide such analyses in situations where proper interpretation relates to an entire industry, or category of workers or all workers. *Alarm bells are going off in employment lawyer circles, especially among those representing employers, who predict wholesale reversals of earlier opinions and more pronouncements intended to apply broadly disallowing employer pay practices. Not so, says DOL. This will allow more efficient use of resources than fact-specific responses subject to change based on minor fact differences. We shall see.*

MISCONDUCT DOES NOT BAR CONTINUING TTD BENEFITS IN ILLINOIS – The Illinois Supreme Court has ruled that alleged misconduct resulting in an employee's termination does not also permit the employer to terminate the employee's temporary total disability benefits. The court ruled the Illinois Workers' Compensation Act provides an employee unable to work due to an on-the-job injury is entitled to temporary total disability ("TTD") benefits until the employee reaches maximum medical improvement, and the employee's alleged misconduct while receiving such benefits is not a statutory exception permitting termination of TTD benefits, thus limiting the power of the Illinois Workers' Compensation Commission to deny, suspend or terminate TDD benefits. *While two justices dissented, this is now the law in Illinois. There appear to be few precedents in Illinois or from other state courts, something to keep in mind if you run up against this.*

Regulatory Law Developments

FEDERAL WIRETAP ON NONPROFIT RULED ILLEGAL – A judge has held that the federal government illegally wiretapped an Islamic nonprofit and its attorneys without a warrant, rejecting the government's argument that allowing victims to sue for damages would potentially expose intelligence-gathering methods and expose state secrets. Al-Haramain Islamic Foundation, a purported charity based in Saudi Arabia, once had branches in Oregon and Missouri, as well as in many other countries with Islamic populations, but is now banned worldwide by the United Nations Security Council, and some individuals allegedly connected to the organization have served time in Guantanamo. The nonprofit's attorneys still must show the extent of the government's monetary liability for the wiretapping, but they are claiming "hundreds of thousands of dollars" in damages under the 1978 Foreign Intelligence Surveillance Act, which allows penalties of $100 a day per violation per person plus additional punitive damages. The nonprofit's representatives learned about the wiretapping only when the National Security Agency accidentally turned over to them logs of intercepted calls. *It's hard to say which is scarier, allegations of some Islamic charities aiding terrorism in the United States, the government's illegal warrantless wiretapping of a domestic nonprofit years ago, or the fact that the government tried to use the "state secrets" defense in this case, supporting the notion that such government activity may still be going on. Maybe scariest of all was the "accidental" disclosure of intercepted calls by the National Security Agency, indicating that someone at the NSA needs to gather some intelligence for personal use.*

Meeting & Travel Law Developments

DID YOU KNOW THIS ABOUT VISAS? WELCOME TO THE U.S. – While looking at what the U.S. State Department website tells prospective foreign visitors to the U.S. about the visa process for entry here, the following pops out in boldface print in the qualification for visa information: "The presumption in the law is that every visitor visa applicant is an intending immigrant. Therefore, applicants for visitor visas must overcome this presumption by demonstrating…" five separate things. The visitor's purpose is for business, pleasure or medical treatment; an intent to remain for specific, limited time; enough funds for expenses; "compelling" social and economic ties abroad; and a residence and other binding ties outside the U.S. *Presumption in the law? You might wonder how visitors respond to that presumption.*

DHS REVISES ENTRY-SCREENING PROCESSES FOR VISITORS TO U.S. – Immediately following the aborted bombing attempt on an Amsterdam to Detroit flight on Christmas Day by a Nigerian citizen, the Department of Homeland Security imposed enhanced screening processes for visitors to the U.S. from fourteen countries, primarily with Muslim populations. Among the fourteen were nominal allies Saudi Arabia, Iraq, Afghanistan and Pakistan. The enhanced screenings included pat-down searches, body scans where there was such equipment, and hand searches of carry-on bags. The across-the-board screenings drew criticism for ineffectiveness and blanket suspicions of persons from these nominal allies. Three months later the U.S. has announced the enhanced across-the-board screenings will be replaced by using "… real-time, threat-based intelligence," and information on specific individuals. *As one late-night comedian put it, "You mean we weren't doing that already?" Perhaps this will make it easier for travelers from those and other countries to come to the U.S., including persons interested in doing business, going to school or simply touring and spending money here. Meanwhile, the previously imposed and much more rigorous entry requirements for foreign visitors will remain in place, including advance information, fingerprinting, photographs, etc.*

EMPLOYMENT LAW DEVELOPMENTS

WHAT CONSTITUTES "FILING A COMPLAINT" UNDER THE FLSA? – The U.S. Supreme Court has agreed to hear a terminated employee's appeal of a decision by the federal appellate court in Chicago rejecting his claim that his former employer had violated the anti-retaliation provision of the Fair Labor Standards Act ("FLSA"). The court accepted the employer's argument that the FLSA provision required the employer to file a *written* complaint to the employer and the employee's oral complaints (regarding placement of factory time clocks which the employee claimed resulted in underpayment of time for donning and taking off protective clothing required by his job) were not "filed." *There is a split between appellate circuits which must be resolved by the Supreme Court or Congress. The issue is basic: what constitutes "filing a complaint?" The Supreme Court's decision will have ramifications for nearly all employers.*

DON'T GET MAD, GET EVEN – AND GO TO JAIL – Recall the old maxim "Don't get mad, get even!" It's better as a soundbite than a policy. The former IT director of a nonprofit organ and tissue donation center serving some 200 hospitals in Texas was terminated and her access to the center's computer system was closed down. So they thought. From her home she was able to access the system and she erased numerous database files and software applications related to the center's operations. She was not successful in covering her tracks. She subsequently pleaded guilty to charges stemming from her activities and is awaiting sentencing to a federal prison and a hefty fine. *Some lessons here for employers and employees: employees who pull such reprisals are typically caught and face serious jail time and fines. Don't get mad and try to get even. And employers had better lock up access to their systems, and should change system access passwords when personnel leave for any reason.*

Tax Law Developments

ASSOCIATION'S SALE OF CERTIFICATES FOR USE OF FACILITIES IS UBI – The Internal Revenue Service has ruled that a trade association received taxable unrelated business income from selling discount certificates to the public, at a substantial profit to the association, for use of participating sports facilities. The IRS said that the certificate sales were not "related" to the exempt purposes of the organization for tax purposes, even though the IRS conceded that the association's certificate program enhanced public participation in a sport that the association was formed to promote. Instead, the IRS viewed the certificate program primarily as advertising for the specific businesses that ran the participating sports facilities, and performing such advertising services for individual businesses could not be considered a tax-exempt activity. The IRS further noted that most of the businesses participating in the certificate program were not even members of the association. But the IRS cited its previous holdings that providing particular services to individual parties, whether to member or nonmember businesses, conflicts with a trade association's purpose to promote an industry as a whole. *Nonprofits must keep in mind that the primary benefits provided by an activity may determine whether the IRS will tax it as "unrelated," regardless of the actual motive that the nonprofits may have for participating in that activity. The purposes set forth in your articles of incorporation are critical to this analysis.*

TAXPAYERS HAVE NO RIGHT TO SUE IRS OVER NONPROFIT'S EXEMPTION – It should be reassuring for those in the nonprofit community to know that a taxpayer, simply by virtue of being such, cannot sue the Internal Revenue Service to require revocation of an organization's tax-exempt status. A federal appellate court in San Francisco ruled the (federal) Administrative Procedure Act gave taxpayers no such general right. Instead, individuals seeking to challenge a federal income tax exemption in the courts must show more than they paid their own taxes. Before a court could even consider whether an exemption was improper, the taxpayers must show they have suffered an injury of some sort, the organization's exempt status caused that injury, and a favorable decision revoking exempt status would likely redress the alleged injury. *Short of saying that taxpayers cannot sue to revoke an organization's exempt status under any circumstances, it is hard to see how the court could have rendered a decision more favorable to nonprofits, as the court's burden of proof would be a hard row to hoe for any taxpayer. But there's always the IRS, which, on its own, can revoke an exemption, subject to the organization's appealing that decision to the courts. We can help nonprofits preserve their exempt status against all types of challenges.*

Other Issues, Trends & Developments

IF YOU DON'T WANT TO SEE IT ON A LARGE SCREEN, DON'T E-MAIL IT! – Corporate clients and their lawyers have nightmares over e-mails sent by employees which can come back to haunt their employers in litigation matters. Just days before Toyota Motor Corporation announced its massive recall, a recently retired company executive sent an internal email: "We need to come clean" about accelerator problems. "We are not protecting our customers by keeping this quiet…the time to hide on this one is over." Employees say things via e-mail that they might say in conversation at the office without much forethought and without recognition that their words are all but etched in electronic stone. Employees, including executives, simply fail to consider that off-hand comments can and do matter, and even when deleted, still can be traced by forensic software. Among other problems, off-hand comments taken out of context and seen online and printed out may look devastating. *We've said it before, and we'll say it again: Remind your employees that e-mails and other electronic communications are not private, and are very much subject to discovery in the course of litigation. If you don't want to see it in bold-faced print in the national news media or on a large screen before a jury, don't e-mail it. E-mails linger in the computer's memory for years and years and years – and are subject to disclosure at the most disconcerting times.*

AND NOW, THE COURT'S RATIONALE – *H&H Report Update* – Last month we reported a on federal court decision in Chicago denying motions to dismiss a personal injury liability claim against the Window Covering Manufacturers Association ("WCMA") and its affiliated Window Covering Safety Council ("WCSC"), a separate entity established by WCMA and member manufacturers, importers and retailers of window coverings in response to a threatened product recall of certain types of window coverings by the Consumer Product Safety Commission. The WCSC undertook a product retrofit and recall program and nationwide advertising campaign warning consumers about dangers associated with certain types of window blinds. The WCMA, WCSC and a manufacturer were sued after a small boy was strangled by the cords of a miniblind. The court declined to dismiss the complaint against the WCMA and WCSC, concluding they might be liable under the plaintiff's theory of a "voluntary undertaking." This legal theory is that if a party voluntarily undertakes for free or consideration to render services to another to protect a third party, the party may be liable to the third party for failure to exercise reasonable care in providing the service. The plaintiff alleged the WCMA and WCSC voluntarily undertook a service which should have been performed by the manufacturer, namely the retrofit, recall and warning to customers of the manufacturer, and they did so negligently. The court addressed other decisions holding associations were not liable for injuries caused by products manufactured or sold by their members, distinguishing between standards or guides prepared by associations but not binding on their members, and the participation of the WCMA and WCSC in the retrofit, recall and warning actions alleged to have been done negligently. *Associations and their related standards groups should be aware of this decision, as far as it goes. This was denial of a motion to dismiss the complaint, very preliminary in the proceedings, and not final by any means. Discovery will follow, and the allegations of the plaintiff will be put to proof. But with any standards or industry guidance, care must be taken in stating the scope of the association's undertaking and appropriate disclaimers prepared to reduce or eliminate potential liability claims by parties looking for additional parties to sue. We can be of assistance in addressing such potential liability concerns.*

H & H Developments

In April…

Jonathan Howe presented "Strategic Contracts and Strategic Negotiations for Senior Level Planner" and a second session entitled, "You, the Senior Planner – What Is It That You Need to Know to Move Your Cheese?" at the Midwestern convention of a large professional organization in Chicago and "Lions & Tigers & Bears – Oh My!! Surviving in Difficult Economic Times" in Norman, Oklahoma. He also co-presented "Writing and Revising Contracts" as a webinar hosted by a major publishing company.

Samuel Erkonen presented "Negotiating Your Way Through the Recovery Plus some Things You Need to Know" for an association chapter in Des Moines, IA

Barbara Dunn presented **"**Legal Considerations in Managing Boards: The Good, The Bad and The Ugly" to a regional association in St. Louis, MO

Gerard P. Panaro presented "Lessons from Fort Hood: New GINA and ADA Regulations at a Spring conference for school business officers.

Contributors to this issue ...

John M. Peterson, Terrence Hutton, James F. Gossett, and Naomi R. Angel