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:

HAITI RELIEF – ANOTHER EXAMPLE – *H&H Report Update* - An example illustrating last month's warning that all of the announcements for Haiti earthquake relief need close scrutiny is a report out of New York that a fund-raising concert at Carnegie Hall featuring a top international pianist and European orchestra should only clear about $8,000 on ticket sales of close to $200,000 after expenses are paid, including hall rent, equipment rental, labor and advertising. The latter two alone cost about half of the proceeds even with the pianist and orchestra waiving their fees. *Unlike the scams we warned about last month, these are legitimate expenses. One claim is the event will raise public awareness of Haiti's continuing need for help. Perhaps, but is this the best way to raise relief funds or public awareness? (And the concert tickets are not tax-deductible.)*

CHARITABLE SECTOR INCREASES MAY BE MISLEADING – Some recent numbers illustrate the rapid growth of the §501(c)(3) charitable tax-exempt sector. A study by students at Stanford University concluded that 99% of public charity applications were approved by the Internal Revenue Service in 2008. The overall number of §501(c)(3) entities increased by 60% during the past decade, far more than any other exempt category, but that may be misleading in part. *One reason given by organizers of the tens of thousands of small, specialized entities that apply for charitable tax-exempt status each year (about 40,000 in 2008 for example) is to qualify for cash or in-kind contributions from corporations, foundations, government entities and individuals. They also claim their purpose is too specific or focused or unique to join some other group. So keep in mind that most of the tens of thousands of entities applying for charitable exempt status are very small, focused and unique, and vulnerable because of their limited resource and volunteer base, including many association-affiliated foundations.*

ADA ANTICIPATES A MAJOR UPTURN IN ITS CLIENTELE – Good news or bad news if you are the American Diabetes Association? The ADA estimates that if current trends toward obesity in children continue, nearly one in three children born in the last ten years will develop type 2 diabetes, and the figure is one in two for minority children. *That may be good steady business for the ADA but it's bad news for families – and the country – from a health, cost and even a national security basis. Habits must change! This can be reduced!*

GOOD READING... See you in... April

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

ILLINOIS SENATE PASSES AMENDMENTS TO ILLINOIS NOT FOR PROFIT ACT – Senate Bill 3387, which would clean up and clarify three of last year's amendments to the Illinois General Not For Profit Corporation Act, was recently passed by the Illinois Senate. If it becomes law, the bill would (1) add section 107.10(d) to restore language allowing members of a corporation to take action outside of a meeting via unanimous written consent; (2) amend sections 108.45(a) and (c) to clarify that, in connection with informal action taken by directors, it is not necessary to have signatures of all directors; and (3) amend section 108.60(d) and delete section 108.60(e) to clarify that an officer or director is not indirectly a party to a transaction solely by sitting on the boards of both parties to a transaction. *We will follow this legislation and report to you if and when the Act is amended.*

MAJOR CHARITY IN HOT WATER – The Boys & Girls Clubs of America have attracted unwanted attention on Capitol Hill over its high salaries awarded to its executives and their expensive travel bills. Tax records revealed that in 2008 its CEO was compensated almost $1 million, and its officials spent $4.3 million on travel, $1.6 million on conferences, conventions and meetings, and $544,000 in lobbying fees – all while closing local clubs for lack of funding. Questioning these numbers, four Senators sent a letter to the head of the charity's board of governors seeking detailed financial information about executive compensation, travel and lobbying expenses, and how the national charity awards grants to local clubs. There is currently a bill in the Senate that would provide up to $425 million in federal money to the organization over the next five years. Obviously that bill will be tabled until the organization responds to the Senators' questions. *All nonprofits are required to list their top 5 staff members and consultants making over $50,000 on their Form 990's. Organizations should treat their 990's as a public relations document and realize that news reporters can access the information freely. Don't become the 2010 version of The Boys & Girls Clubs of America or be ready to explain if you do!*

PRECEDENT-SETTING POTENTIAL LIABILITY DECISION – A federal judge in Chicago has denied motions to dismiss a negligence lawsuit filed against the Window Covering Manufacturers Association ("WCMA") and a related industry safety council, the Window Covering Safety Council ("WCSC"). The WCSC includes manufacturers, importers and retailers of window covering products. It was established by the WCMA in 1994 in response to Consumer Product Safety Commission threats to take action including a product recall against the window covering industry to address the hazard of strangulation due to some window coverings' cord systems. The WCSC undertook a corrective action for products already sold and installed in customers' homes including free repair kits, undertook a national warning campaign advising consumers of hazards posed by window covering cords and chains, and set standards to make new products safer for use in homes. A plaintiff whose three-year -old son choked to death a year ago after becoming entangled in the cords of a miniblind has sued the manufacturer, the WCMA and the WCSC, alleging in part the WCMA and WCSC are liable under Illinois tort law for its retrofit and warning campaign. The judge distinguished other Illinois decisions dismissing lawsuits against associations for injuries from products manufactured or sold by their members. *Some caveats: A motion to dismiss argues a lawsuit should be dismissed as a matter of law based on what is alleged by the plaintiff. It is filed before discovery begins. Denial of the motion is not a decision on the merits. The WMCA and WCSC are obliged to go through the discovery phase of litigation and may later file for summary judgment if the evidence warrants that, or may eventually go to trial. Next month we will focus on the court's reasoning for denying the motion to dismiss.*

STATE BAR ASSOCIATION EMBEZZLER GETS JAIL TIME AND FINES – The former director of real estate property operations for the State Bar of California was sentenced to 32 months in prison, restitution of $615,000 and audit and legal investigation fees of $167,000 plus an additional $117,000 tax penalty. The embezzlement took place over more than five years. She was responsible for collecting rents from tenants in the State bar's office building, and simply diverted a portion of rent payments to an account she controlled. She maintained two sets of books to avoid detection. *The State Bar of California is a not-for-profit association with over 222,000 members, the largest bar association in the country. Membership is a condition of practicing law in California. You have to ask, where were the internal checks and balances to prevent or at least detect this sort of embezzlement at the outset? Where were the auditors? When embezzlement goes on for years at a company or association, there appears to be more wrong with its operations than one sticky-fingered employee.*

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 him 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." *The court's decision sets up 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 has ramifications for nearly all employers.*

Regulatory Law Developments

FTC WARNS OF DATA LEAKS – The Federal Trade Commission has recently sent notices to almost 100 organizations, both large and small, that personal information originating from their computers has been shared or made available on peer-to-peer (P2P) file-sharing networks. The FTC further notes that the information, relating to the organizations' customers, employees and others, could be used for identity theft or fraud. Recipients of the notices are warned that it is their responsibility to protect sensitive personal information from unauthorized access, and failure to protect such information from being shared on a P2P network may constitute a violation of federal and state laws. *Nonprofits collect data on members, donors, employees and others, and they should maximize their efforts to protect sensitive personal information. Furthermore, if security breaches occur, nonprofits should contact legal counsel about the need to notify those whose information has been leaked. The federal government and many states have such notification requirements. We can provide advice on compliance.*

Intellectual Property & Computer Law Developments

COURT CLARIFIES COPYRIGHT REGISTRATION REQUIREMENT (A LITTLE) – Federal statutory law generally says that no suit for copyright infringement "shall be instituted" until copyright claims have been registered or preregistered with the (federal) Copyright Office, or a registration application has been submitted in proper form and has been refused by the Office. But courts have disagreed as to whether a suit can be filed, pending final Copyright Office action, if the alleged copyright owner has filed an application for registration with the Office that has not yet been acted upon, with some courts holding that a suit cannot be filed on the basis of such a pending application because the "shall be instituted" statute is "jurisdictional," meaning courts must dismiss all suits not filed in strict compliance with it. The U.S. Supreme Court recently provided some clarity, determining the statute in question is not "jurisdictional." Considering how long the Copyright Office is now taking to act on registrations (years, in some cases), this is an important issue. *Nonprofits are major copyright owners, and if they have to wait until the Office approves a registration application before bringing suit, much infringement of their rights can occur after the filing of the application. Further court clarification is likely to occur fairly soon, as this issue arises frequently in copyright cases.*

Tax Law Developments

IRS LIKELY TO SCRUTINIZE CHARITABLE DEDUCTION CLAIMS – The Internal Revenue Service has announced it will be taking a stricter view of charitable deduction claims on 2009 tax returns. If you contribute cash instead of a check or by credit card, get a receipt or other written evidence. Any contribution of $250 or more requires a written acknowledgment from the charity. In-kind contributions of articles should be in good condition, and the value is the price the charity can obtain, not what the good cost you. A qualified appraisal is generally accepted by the IRS for more valuable articles. *A common error is taking the listed invoice or ticket amount for a charity fundraiser such as a gala, reception or similar event, and not the lower net value to the charity reflecting that the donor received something of value, e.g., the gala dinner at some fancy venue. Charities should be careful to provide written acknowledgments to donors for cash contributions and net value information for fundraiser events.*

IRS 2010 EXAMINATION PRIORITIES ANNOUNCED – Internal Revenue Service representatives recently discussed 2010 examination priorities at a Chicago Bar Association committee meeting. Initiatives carried over from 2009 will target colleges and universities for tax compliance, including possible excessive compensation paid to officers and key employees, their reporting of unrelated business income, and their allocation of income and expenses between the schools and for-profit subsidiaries. In addition, the IRS will continue to scrutinize nonprofit political activities; exempt credit counseling services; the classification of nonprofits as supporting organizations; donation of conservation easements; gaming activities as fundraisers; nonprofit governance issues; and whether organizations are spending sufficient money and time on tax-exempt activities. Finally, the IRS will be focusing more on employment tax compliance by nonprofits. *The IRS makes these announcements of examination priorities to encourage voluntary compliance with tax laws by nonprofits. But it is worth noting that the IRS is also hiring and training many new employees who will be involved in audits and Form 990 examination in 2010.*

INSUFFICIENT FREE CARE COSTS HOSPITAL TAX EXEMPTION – *H&H Report Update* – In a closely watched decision the Illinois Supreme Court has denied Provena Covenant Medical Center a charitable use property tax exemption because it provided insufficient free medical care for the poor. The court also found that the appellate record was insufficient to support a religious use exemption. The court did not specify any amount of free care to be provided by exempt hospitals, but concluded that the number of uninsured patients receiving free or discounted care at this hospital, and the dollar value of the care they received, were minimal. Instead the court found that, with very limited exceptions, the hospital's property was devoted to the care and treatment of patients in exchange for compensation from private insurance, Medicare and Medicaid, or direct payment from the patient or the patient's family. The court rejected the hospital's argument that it qualified for an exemption because charitable care was offered to all who requested it, but few did. That argument failed because the court found that the hospital had not advertised the availability of charitable care at the hospital during the relevant time period, and if there were few people in the hospital's service area in need of and demanding charity care, that itself might demonstrate there was little need to give the hospital a charitable use exemption. Furthermore, the court noted that the hospital billed all patients as a matter of course, unpaid bills were automatically referred to collection agencies, hospital charges were discounted or waived only after it was demonstrated that there was no way to collect standard charges, and even the hospital's discounted services generated a surplus for the hospital because they were billed at more than double the actual cost of care. Nor could the hospital justify a charitable use exemption for its property because of the discounted payments the hospital received for treating Medicare and Medicaid patients, the hospital's provision of some charitable services (such as ambulance service) off the hospital premises, or the hospital's charitable contributions to other nonprofits. *This decision has implications for many nonprofit hospitals desiring a charitable use property tax exemption. After the Illinois court's decision they should be examining their activities very closely to see if the free care they provide meets the court's expectations, although that process will be made more difficult because of the court's failure to specifically address the amount of free care that will qualify a hospital for an exemption. In addition, nonprofits should examine what types of services other than free care, which were not addressed by the court in this case, might qualify a hospital for exemption. One example might be hospital expenditures for participating in the Illinois Rural HealthNet, which connects rural hospitals with specialists at larger facilities throughout the state and nation, allowing access to specialty care in areas where it would otherwise be unavailable.*

Other Issues, Trends & Developments

SOME ISSUES WILL NOT DIE – *H&H Report Update* – Do cell phones cause cancer? No matter how many studies say they don't, there are those who contend maybe they do and let's not take chances, just in case. A state legislator in Maine has introduced legislation there that would require manufacturers to put warning labels with graphics on cell phones and their packaging stating there is a risk of cancer connected with electromagnetic radiation, and telling pregnant women and children to keep cell phones away from their head and body. The mayor of San Francisco is also pushing for a warning of a different sort. *Maine would be the first state to adopt such a requirement. The legislator says Maine's 950,000 cell phone users in a population of 1.3 million do not understand the risks. [Perhaps a more realistic risk is using a cell phone while driving or walking down a flight of stairs or on a busy street.] CTIA – The Wireless Association asserts cell phones are safe, noting there are some 270 million cell phone subscribers in the U.S. You have to ask how many in Maine or elsewhere will give up their cell phones due to this risk. Not many, we would bet.*

YOUR ASSOCIATION'S "PRINCIPAL PLACE OF BUSINESS" IS — WHERE? – The U.S. Supreme Court recently held that a corporation's "principal place of business" for purposes of federal diversity jurisdiction is where its "nerve center," *i.e.*, its headquarters, is located. For corporations incorporated in one state, headquartered in another, and with its principal facilities or site of its principal economic activities in a third state, the Court's decision brings long-needed clarity for purposes of determining whether a federal court in each of the three states has diversity jurisdiction over a lawsuit removed from state court to a federal court by a party, typically a defendant. Federal courts will now have one rule instead of a variety of rules depending on federal appellate circuit rules where a lawsuit is filed. *The decision involved Hertz Corporation which was sued in California, the state where it does the most business. Hertz is incorporated in Delaware and headquartered in New Jersey. Under the Court's decision Hertz is a citizen of Delaware where it is incorporated and New Jersey where its "nerve center" is, but not California even though it does more business there than any other state, so Hertz could remove a class action there from state to federal court. Many associations are incorporated in one state with their headquarters in another state, and some may have significant or even their principal activity such as a trade show or annual conference in a third state. This Supreme Court decision could be relevant to such an association if it were sued in state court in that third state. And many association corporate members will be directly affected by the Court's decision.*

H & H Developments

In March…

Naomi R. Angel spoke to an association chapter in Albuquerque NM on the topic, "The New Normal in Contract Negotiations."

Barbara Dunn served as served as moderator of a Conflict Resolution Panel for a major association meeting in New York City

John Peterson gave a presentation on recent legal developments to a trade association.

Samuel J. Erkonen gave a dynamic presentation to hospitality students at Roosevelt University in Chicago entitled, "Contracts, Risk Management and Legal Safeguards for Special Events."

Jonathan Howe participated as a panelist on "Current Events" for senior hotel executives in Florida; and presented a session for large meeting professional group in Park City, Utah entitled, "The Lawyer Is In." He presented a session as part of an educational event in Atlanta, Georgia entitled, "Advanced Contract Legal Issues and Negotiation Strategies;" and a similar session in Nashville, TN entitled, "The Lawyer Is In – Meeting/Event Contracts and Legal Issues."

Contributors to this issue ...

Terrence Hutton, James F. Gossett, John M. Peterson, Joshua W. Peterson