

# THE HOWE & HUTTON REPORT

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**“WILLFUL AND WANTON CONDUCT” CONSIDERED** — Illinois statutes offer directors of many nonprofits an exemption from liability for negligence, but hold them responsible for their “willful or wanton conduct.” Few cases have interpreted that language in the nonprofit statutes. Consequently, it is interesting to find an Illinois court interpreting similar language as used in other laws, which the Appellate Court for the First District recently did. That case involved a high school teacher who was facilitating a floor hockey game in which one of the players was hit in the eye by a bouncing puck. In a suit against the teacher, the Appellate Court upheld a lower court’s refusal to dismiss the case without a trial, finding that the teacher’s decision not to require that the players use goggles in the game could be something a jury at trial might find to be “willful and wanton conduct,” in the sense of a “conscious disregard” for the safety of her students. Significant to the decision was the fact that the teacher knew this specific eye injury was possible, that equipment necessary to prevent such injuries was available for her use, and that none of the safety precautions she had implemented would mitigate this particular risk; yet, she made the “conscious decision” to forego the use of available safety equipment. *Few directors of Illinois nonprofits are successfully sued, partly because of the “willful or wanton conduct” standard. But, as this case shows, that high bar to a successful suit can sometimes be reached.*

**FRATERNITY HAZING SUIT REVIVED** — The Illinois Appellate Court for the First District has revived a lawsuit previously dismissed by a lower court and ruled that a fraternity chapter and its officers could be held liable for negligence in the death of a pledge during a binge drinking activity. The lower court dismissed the suit, filed by the deceased’s estate, because it found that a “social host” could not be held liable under Illinois law for injuries resulting from the serving of alcoholic beverages. The Appellate Court, though, while agreeing that such is the general rule, found an exception to that rule exists under the state Hazing Act when someone is “socially pressured” to drink until they are intoxicated, as was alleged in this case. The Appellate Court also found that violation of the Act was, on its face, evidence of negligence. So, the case against the fraternity chapter and its officers has been remanded to the lower court for further consideration in light of the Appellate Court’s rulings. *This decision, obviously, is not a favorable one for fraternities, sororities and their officers. It should be noted that the national fraternity, the chapter’s landlord, and certain women sorority members who were present when the binge drinking event occurred all were dismissed as defendants in the suit because they owed no “duty of care” to the deceased on the night he died.*

GOOD READING ... See you in September

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## NOT-FOR-PROFIT LAW DEVELOPMENTS

**N.J. GETS FEDERAL FUNDING TO BEEF UP SECURITY AT NONPROFITS** — Religious institutions and other nonprofits in areas of New Jersey considered at high risk for terror attacks or other threats will receive \$4.26 million in federal funding to increase security, according to the New Jersey Homeland Security office. The grant will be dispersed between 58 different organizations under a program known as the Jersey City/Newark Urban Area Security Initiative. Up to \$75,000 per recipient will be distributed for staff security training and installation of physical security equipment. *Other states may be in line for similar funding in the future.*

## INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

**PATENT CHALLENGE PROCESS UPHELD** — The Supreme Court of the United States has upheld the legal standard for invalidating patents used by a new appeals board at the U.S. Patent and Trademark Office. The unanimous ruling of the Court will make it easier for companies to fight patent “trolls,” who buy up patents for the sole purpose of threatening businesses with costly litigation if they don’t pay license fees. The “troll” in this case argued that the board interpreted its patent incorrectly while invalidating it for being overbroad. But the Supreme Court found that the board had the authority to construe a patent’s claims “according to the broadest reasonable construction of its words,” as it did in this case. *Congress created the board in 2011 because lawmakers believed the Patent and Trademark Office was issuing too many questionable patents and encouraging threats from trolls. In this case, the board had invalidated a patent for speedometer displays in cars. So, maybe we can drive as fast as we want now? Just kidding.*

## REGULATORY LAW DEVELOPMENTS

**NO CRIMINAL PENALTIES FOR DRIVERS REFUSING BLOOD TESTS** — The Supreme Court of the United States, by a 5-3 vote, has decided that criminal penalties may not be imposed on drivers who refuse warrantless blood tests when they are suspected of drunk driving. However, the Court ruled that criminal penalties may be given to drivers who refuse breath tests, which the majority of the Justices considered less invasive. *Thirteen states have criminal penalties for refusing alcohol tests. Justice Samuel A. Alito, who wrote the majority opinion for the Court, took pains to distinguish such laws from others, like the “implied consent” law in Illinois, that have civil or administrative consequences, such as a fine or curtailment of driving privileges.*

**SEC RULES REQUIRE ENERGY COMPANIES TO REPORT PAYMENTS** — New rules promulgated by the federal Securities and Exchange Commission would require energy companies to report to the Commission all payments they make to foreign governments for extracting oil, gas and minerals. The SEC rules will take effect in late 2018. According to the Commission, as many as 755 companies could be affected by the new requirement. Companies can apply for reporting exemptions on a case-by-case basis to keep certain payment data private. *The new rules are similar to others that were struck down by a federal judge three years ago. The new requirements may suffer the same fate.*

**IS YOUR WEBSITE ADA-COMPLIANT?** — Title III of the federal Americans with Disabilities Act requires any place of public accommodation to be accessible to persons with disabilities. Most current federal enforcement efforts and private lawsuits to enforce Title III have focused on making physical premises accessible. But, in the years ahead, the U.S. Justice Department and federal court decisions are expected to turn attention to the accessibility of public websites to sight and hearing impaired individuals. Proposed

regulations on the subject are expected from the Department in 2018, and, in the meantime, lawsuits to obtain website accessibility, frequently settled out of court, are becoming more frequent. *The cost of providing accessibility features is often less than the cost of litigating over website accessibility. Readers should investigate what changes may be needed in their websites, if any, so that they can meet legal requirements.*

**SENDING UNWANTED TEXT MESSAGE BRINGS CLASS ACTION** — A federal court in Chicago has entertained a class action suit brought by a group that received one unsolicited text message from DraftKings, a fantasy sports operator. While dismissing state law claims, the judge allowed charges brought under the federal Telephone Consumer Protection Act to proceed to trial. Under the TCPA, the class members can each recover \$500 in statutory damages, and the class could be a large one in this case, as it is alleged that DraftKings sent a single message to thousands of wireless phones using an automatic telephone dialing system. But the judge found that state law limited class members to recovery of their actual damages, which the judge concluded were “too small to warrant treatment in the judicial system” under the doctrine of *de minimis non curat lex*, or “the law does not concern itself with trifles.” *No doubt DraftKings thought that sending out one unwanted text message wouldn’t really bother anyone enough to sue them for \$500 because it was, in fact, a “trifle.” But if a plaintiff’s lawyer can get enough people together and obtain payment of their legal fees under the Act, you suddenly have a costly class action suit.*

**FTC OVERSIGHT BILL DIES IN CONGRESS** — A bill to grant the Federal Trade Commission oversight authority for tax-exempt organizations, introduced by Rep. Bobby Rush (D-IL), died in Congress this year. The bill would have specifically given the FTC more authority to protect consumer interests against nonprofits with deceptive data security and privacy practices, among other things. *But does the FTC need more authority to regulate tax-exempt entities, since it has investigated and prosecuted many nonprofits over the years for anti-trust violations and deceptive trade practices. Furthermore, the Internal Revenue Service has already staked a claim to overseeing exempt organizations, and the states certainly can and do prosecute all sorts of deceptive trade practices. Lawmakers must make law, we suppose, to justify their paychecks. But, really, this proposed law would be totally unnecessary. Enough is enough!*

## EMPLOYMENT LAW DEVELOPMENTS

**MORE WORKERS ELIGIBLE FOR OVERTIME PAY** — The U.S. Department of Labor has announced changes to the criteria that determine whether a worker is eligible for overtime pay. The salary threshold for exemption from eligibility will increase from \$23,660 to \$47,476 per year, effective December 1. *Another existing requirement for exemption from eligibility will not change, as workers will still have to perform primarily executive, administrative or professional tasks if they are to be considered exempt from overtime, in addition to receiving pay at or above the new annual threshold. Overtime pay will still be required at a rate of time and a half for time worked in excess of 40 hours per week.*

**REVISION OF FRENCH LABOR CODE SUPPORTED BY AMERICAN BUSINESS** — Proposed revisions in the centuries-old French Labor Code are the focus of strikes and street protests throughout that country, but the U.S. Chamber of Commerce thinks the changes could encourage American companies to invest in France and hire more workers there. Polls show 60% of the French people support the strikes and protests aimed at preventing adoption of changes that would make the Code more flexible. The proposed changes would make it easier for larger companies to negotiate deals with employees directly, rather than through unions, to obtain worker agreement on a work week longer than the 35 hours currently allowed by law, at lower wages. In addition, the changes would facilitate company use of economic reasons as a basis for layoffs, and they would lessen union influence in negotiating salaries, bonuses, pensions and paid time off. *Currently, the Code protects jobs by preventing termination of workers without due cause and, in general, is one of the most anti-business collections of laws in the world.*

**IF YOU FIRE THEM, DON'T DEFAME THEM** — A federal jury has awarded four former employees of Allstate Insurance Co. \$27.1 million, finding that Allstate defamed them after they were fired for alleged violations of the company's conflict-of-interest policy by timing trades in order to inflate their bonuses. The fired employees claimed that their trading practices followed a policy set by high-ranking company employees, and the jury believed them. The defamation resulted from the company's repeating its accusations against the employees in a memorandum sent to 355 co-workers and a filing with the Securities and Exchange Commission. In addition to the largest defamation verdict ever reported in the State of Illinois, the jury gave the workers \$4,000 for Allstate's violation of the federal Fair Credit Reporting Act in refusing to give the employees a copy of an investigation report provided to the company by outside counsel. *More often these days, employees claiming that they were wrongly terminated are adding a defamation count to complaints filed against their former employer. The damages for a tarnished reputation can far exceed wages lost by an employee because of an unlawful termination. Consequently, employers should be very careful about publicizing allegations against workers.*

**WAGE ACT DOESN'T APPLY TO WORKERS WITH MINIMAL IL CONTACTS** — The U.S. District Court for the Northern District of Illinois has held that the Illinois Wage Payment and Collection Act doesn't protect nonresident employees who perform "insufficient" work in Illinois. This case involved employees of an Illinois company who resided and worked in other states except for their attending mandatory sales training in Illinois for a few days each year. They claimed their employer had denied them commissions they were owed, and, hoping to take advantage of favorable law not available in other states, they sued to collect those commissions in Illinois, citing the Act, which allows workers to sue for unpaid wages, bonuses or commissions provided for in a written or oral employment contract. But the court said, first, that the employees' various agreements with the company failed to support the workers' unpaid commission claims and second, even if they did, the employees couldn't collect under the Illinois law because they were nonresidents of Illinois and their employment contacts with the state were "insufficient." *Workers increasingly are living and working in one place while their employer is located somewhere else. The Illinois Act provides a powerful tool for workers claiming they were denied pay to which they were entitled. But this court decision demonstrates that there are limits to the Act's reach outside of Illinois. It would have been nice if the court had provided more guidance as to what contacts with Illinois are "sufficient" to allow nonresidents to claim the protections of the Act. All we know for sure is that the court thought a few days of training in this state each year aren't "sufficient" enough. Any other guidance will have to be found in future decisions.*

## TAX LAW DEVELOPMENTS

**HOUSE VOTES TO KILL IRS DONOR LIST REQUIREMENT** — The U.S. House of Representatives has voted 240-182 to bar the Internal Revenue Service from requiring disclosure of donor names on nonprofit organization information returns. Currently, names of donors who give at least \$5,000 must be disclosed. *The measure now goes to the Senate for approval, but the Obama Administration has threatened to veto it if the bill is approved there, even though IRS officials have talked about eliminating the requirement themselves. The President says that the bill would "constrain the IRS in enforcing tax laws and reduce the transparency of private foundations."*

**FORM 1023-EZ FILING FEE DECREASED** — The Internal Revenue Service has decreased the filing fee for Form 1023-EZ, Streamlined Application for Recognition of Exemption Under Section 501(c)(3), from \$400 to \$275 for those nonprofits able to file it. The form, only three pages in length, is a substitute for the regular Form 1023, now well over 20 pages long. The form must be filed online, and the fee must be paid through

www.pay.gov when the application is filed. Only organizations with annual gross receipts of \$50,000 or less and assets of \$250,000 or less can use it. *Clearly, the IRS wants to encourage use of the short form, which takes less time for nonprofits to complete and less time for the IRS to process.*

## MEETINGS & TRAVEL LAW DEVELOPMENTS

**ZIKA TIED TO MOSQUITOES IN U.S.** — The U.S. Centers for Disease Control and Prevention recently reported that the Zika virus “is now here” in the U.S. Previously, Zika had been tied to birth defects in the fetuses and babies of six women in the U.S. But the infections were all clearly travel-related. Now, however, recently infected people in the Miami area are believed to have contracted the virus from mosquito bites in the U.S., even though no mosquitos carrying Zika have been found in Florida. All other known methods for transmission of Zika, including travel to stricken foreign countries, have been ruled out in the cases of those individuals. Most of the pregnant U.S. women infected with Zika appear to have contracted the virus through mosquito bites, but two cases involved transmission through sexual contact. Overall, 234 pregnant women tested positive for the Zika infection through June 9. More than half of the pregnancies are still under way. CDC says that pregnant women infected with the virus during the first trimester of pregnancy face a significant risk that the unborn child will develop microcephaly, an unusually small head. *Travel and attendance at events in certain countries has been adversely affected by the Zika virus and the publicity surrounding infections. The CDC has warned that pregnant women should avoid travel to areas where Zika has been found. But now those areas apparently include Miami if mosquitoes there are transmitting the virus. The agency plans to continue reporting outcomes of Zika-infected pregnancies on a weekly basis.*

## OTHER ISSUES, TRENDS & DEVELOPMENTS

**OBAMA IMMIGRATION PLAN BLOCKED BY DIVIDED SUPREME COURT** — An Obama Administration plan to shield from deportation millions of illegal immigrants and give them work permits has been blocked by a divided Supreme Court that voted 4-4 on whether the plan was lawful, leaving in place a decision by the U.S. Court of Appeals for the Fifth Circuit siding with 26 states that sued to prevent implementation of the plan. The Court of Appeals ruled that the Administration had no authority to adopt the plan without approval from Congress. *Immigration is a major issue in the 2016 elections, but few of the immigrants impacted by the President’s plan will be deported soon, since Congress has appropriated money to deport only a small percentage of them.*

**NO RICO SUITS FOR FOREIGN INJURY** — The Supreme Court of the U.S. has put the brakes on foreign plaintiffs wanting to sue under the U.S. Racketeer Influenced and Corrupt Organizations Act (“RICO”) for injuries occurring outside the U.S., and they did it in a suit brought by the European Union (before Brexit), no less. The EU sought to sue RJR Nabisco in the U.S., claiming that the tobacco company was part of a scheme to launder drug money through the purchase of cigarettes. But the EU alleged no injury to itself occurring in the U.S., and the Court, in a 4-3 decision, with Justice Sonia Sotomayor not participating, threw out the suit, ruling that such a domestic injury was necessary for anyone seeking damages in a RICO suit filed in the U.S. *Plaintiffs from abroad have long tried to sue even other foreigners in the U.S. because U.S. courts have a tendency to award larger judgments to prevailing complainants than courts in other parts of the world. RICO suits are particularly attractive to attorneys representing complainants because RICO allows them to sue for triple the actual damages caused by losing defendants.*

**VISA, MASTERCARD SUED OVER SECURITY ISSUES** — Home Depot, Inc. has sued Visa and MasterCard in an Atlanta federal court, alleging that they conspired to prevent adoption of more secure credit card processing technology in the U.S. in order to maintain profits and market dominance. Home Depot alleges that new payment cards with “chip” technology, as used in the U.S., remain less secure than cards used in many countries because they rely on customer signatures instead of Personal Identification Numbers (PINs) for verification. *Wal-Mart Stores Inc. filed a separate suit against Visa in New York earlier this year over similar issues. About 80 countries require cards with chips, and most also require a PIN for verification. Nonprofits, which rely on credit cards in collecting dues, registrations and other payments, should take note.*

## H & H DEVELOPMENTS

**Jonathan T. Howe** has been named Distinguished Counselor by the Illinois State Bar Association. For his speaking engagements this month, he was the keynote speaker for the DuPage Bar Association on Association Leadership. Additionally, he presented “Cybersecurity” in Seattle for PCMA and co-presented two sessions “Claustrophobia” and “Things You Absolutely Need to Know” for ASAE as well as at Connect Marketplace..

**C. Michael Deese** was a co-presenter of the Association Management Company Accreditation Workshop at the recent meeting of The AMC Institute in Salt Lake City.

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