

THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

FEBRUARY 2008

VOLUME 2008, ISSUE 2

THE LAW FIRM FOR ASSOCIATIONSsm

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U.S. APPEARS INHOSPITABLE TO TOURISM – Tourism is up about 6% internationally but fewer tourists are coming to the United States in recent years, for example down three million in 2007 from 26 million in 2006. Why the drop? The U.S. is seen as inhospitable and difficult, especially the visa process which requires an in-person visit to a U.S. consulate and a nonrefundable visa application fee recently increased to \$131 from \$100. *There are other reasons of course but start with these two. An underlying question is whether being more restrictive about those we admit for a visit is doing us more harm than our former relatively open borders.*

THE BEST CARRY-ON DEVICE FOR MORE PLEASANT AIR TRAVEL? – According to one travel columnist offering travel tips from flight crew personnel, the most frequently mentioned carry-on device to make a flight more pleasant was a set of earplugs. *Not wireless gadgets or all the other paraphernalia travelers lug along but something as small, inexpensive and basic as earplugs. Try it and see if you agree.*

SENATORIAL PREROGATIVES COME FIRST – If you wonder why when all is said and done in D.C., a lot more is said than done, look no farther than the current hold on the President’s nominee to head the Federal Aviation Administration by the two senators from New Jersey. The FAA position has been vacant since last September and the nomination has been pending since last October. The two senators are unhappy about proposed changes in the redesign of airspace over Newark’s and Philadelphia’s airports. They argue traffic and safety concerns (meaning more noise for some). To demonstrate their unhappiness the senators have exercised their senatorial prerogative to keep the rest of the senate from voting (the senate’s “advise and consent” role) on a new FAA administrator. *Only in Washington, D.C. does this sort of thing make sense. When we were youngsters we did something similar: “It’s my ball and I am taking it home so you can’t play with it.” So if you wonder why there seems to be little progress on addressing implementation of a modern air control system, passenger rights and the like, thank the senators from New Jersey for their contributions to further delay.*

**GOOD READING... See you in March
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NOT-FOR-PROFIT LAW DEVELOPMENTS

SHOULD THE DHS HAVE TO DISCLOSE ITS POLICIES FOR LAPTOP SEARCHES?

– A federal judge may soon have to decide whether the Department of Homeland Security (“DHS”) should disclose its basis for conducting searches, including indefinite seizures, of laptops and other electronic devices, e.g., cell phones, cameras, etc., brought into the U.S. by U.S. citizens and noncitizens. A lawsuit filed by the Electronic Frontier Foundation and another nonprofit group asks a court to require the DHS to disclose that information. While such searches and seizures may be infrequent, they happen often enough to induce the Association of Corporate Travel Executives to warn its members and the public to be aware of the possibility their electronic devices are subject to search and seizure when entering the U.S., and to consider steps to preserve confidentiality or avoid loss of sensitive personal and business information. *Some basic pointers: Be aware your laptop or other devices may be searched and/or seized with or without cause and held indefinitely at the border. If you don’t want information to be subject to disclosure, don’t have it on your electronic device when you enter the U.S. Try to find out why the electronic device is being searched or seized, who is taking it, and what you have to do to reclaim it. Perhaps the EFF lawsuit will shed some light on why these searches are taking place but don’t count on it. Two federal appellate courts have already upheld such searches, one requiring reasonable cause and the other not requiring reasonable cause or a warrant.*

REGULATORY LAW DEVELOPMENTS

NOT LIKELY TO PASS IN AN ELECTION YEAR – A bill has been introduced in the U.S. House of Representatives that would require the Federal Trade Commission (“FTC”) to change its rules for the FTC’s Do Not Call Registry. The bill would prohibit politically-oriented prerecorded telephone messages to telephone numbers listed in the Do-Not-Call Registry. *How likely is that to be approved in 2008? In addition to presidential campaigning, every congressman and a third of the senate are out campaigning – and making such phone calls. Not likely to even be considered, much less passed.*

WILL MARYLAND BE THE FIRST STATE TO PASS A “DO NOT DELIVER” BILL?

– The Federal Trade Commission’s Do Not Call regulatory scheme has been one of the most popular and subscribed-to regulatory schemes in U.S. history. Now a Maryland legislator, responding to complaints from some constituents, has proposed legislation to impose a “do not deliver” regimen on publishers of so-called “shoppers” or free newspapers distributed by mail or carrier delivery to households in Maryland. Shopper publishers are understandably opposed, claiming the legislation is not needed, and they don’t want to send shoppers to households that don’t want them. *But they do, and some recipients are frustrated their requests to not receive such shoppers are ignored. Similar frustrations on a much larger scale led to state and then national “do not call” legislation and regulations. This one may be tougher because other forms of print advertising including handbills routinely delivered to households would also seem to come within such a prohibition. Shopper publishers might be well advised to address even limited public opposition to their product before legislators respond to their constituents’ anger.*

EMPLOYMENT LAW DEVELOPMENTS

EMPLOYERS BEWARE – WORKPLACE LITIGATION ON THE RISE – According to an annual report published by Chicago law firm Seyfarth, Shaw LLP, workplace class action litigation is on the rise. More employers find themselves defending class-action suits filed by employees under the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Fair Labor Standards Act, the Employee Retirement Income Security Act and various state laws applicable to the workplace environment. In addition, federal and state government organizations such as the U.S. Equal Employment Opportunity Commission and the Illinois Human Rights Department are joining the fray and filing lawsuits on behalf of private plaintiffs. The report cites workplace litigation as “the chief exposure driving corporate legal budget expenditures.” *Trade associations and other nonprofit employers may not face class actions but they are subject to employment litigation and are well advised to comply with all applicable employment laws. Associations may also wish to consider ways to assist their members to manage their employees appropriately to avoid becoming a statistic in next year’s report.*

ANNUAL SURVEY ON OFFICE ABSENTEEISM GENERATES INTERESTING RESULTS – CareerBuilder.com’s annual survey on office absenteeism provides an interesting review of employer and employee attitudes about absenteeism. Approximately one in three workers responding to the survey said they had called in sick at least once during the preceding year, for various reasons including they simply didn’t feel like going to work that day, wanted to relax, had an appointment, wanted to catch up on sleep or had family plans. More than one in four of these surveyed workers said they considered their sick days to be equivalent to vacation days. Three-fourths of the employers surveyed said they accepted the excuses given by their employees, but a number did check up on their employees by demanding evidence of a visit to a doctor or calling or having someone else call the absent employee. The most popular days to be absent are Mondays, followed by Fridays. *Employers were also looking at other ways to deal with absenteeism, including combining vacation, personal and health days as one pool of days, or allowing accrual of sick days. There is no magic formula. But an employer who senses an employee is abusing the system, whatever system may be in place, is less inclined to give the offending employee a break, and any distrust will work its way into compensation, promotion and even termination prospects.*

COURT REJECTS “CONTRACT OF ADHESION” CLAIM BY FORMER EMPLOYEE – The Montana Supreme Court has upheld summary judgment against a former insurance agent who left and set up her own insurance agency. She had signed an employment agreement when she was first hired and then signed it again for the next five years before she resigned. The agreement included an arbitration provision, a covenant not to compete and a liquidated damages clause for violations. Her former employer put her on notice that it intended to enforce the noncompetition and liquidated damages provisions. The employee then brought a declaratory judgment against the employer, claiming the arbitration clause constituted a contract of adhesion, and the noncompetition and liquidated damages provisions were unreasonable restraints of trade against public policy. The Montana Supreme Court followed precedent in ruling that an adhesion contract is a standardized form of agreement, drafted by a party with superior bargaining power, and the weaker does not have an opportunity to negotiate its terms. Even so, the court noted, this does not make the contract unenforceable unless it falls outside the weaker party’s reasonable expectations or is unconscionable. The court found that the arbitration provision was set forth in bold type, and not only this employer but her previous employers had similar arbitration provisions. The court left the noncompetition and liquidated damages provisions for arbitration. *The decision offers some useful pointers. An employer should ensure that an arbitration requirement in a contract is brought to the attention of an employee so there is no question that the employee reads and understands it. Also, the rubric of “contract of adhesion” is not an automatic loser, but this may vary from state to state so it is necessary to check each state’s law carefully on such points.*

MEETING & TRAVEL LAW DEVELOPMENTS

EU PLAN FOR BIOMETRIC DATA FROM VISITORS WILL COME SLOWLY – The European Commission plan to require biometric data from non-EU visitors will apply to U.S. citizens among others when the plan is implemented. First the plan must be approved by the European Commission and thereafter by each of the EU nations, a process that may further delay implementation. The proposed plan is similar to current U.S. regulations requiring European (and other) citizens to provide fingerprints when entering the U.S. whether or not other visa requirements are also in effect. *Implementation of any plan is likely to take a decade or more, and is part of a broader European plan to better control border crossings and tracking of visitors, including those who overstay their permitted visa periods. If implementing a workable system seems difficult here, imagine trying it among 27(at present) countries with different languages, needs and security interests. In the near term, the proposed biometric data requirements should not be a bar to North citizens traveling to or within the EU.*

SMOKERS, BEWARE OF CHICAGO SWISSOTEL'S STAFF BOUNTY HUNTERS – Here's a novel approach to deter smoking in a nonsmoking hotel catering to the business traveler. The Swissôtel in Chicago has established a \$10 bounty for hotel staffers who finger a guest smoking in the hotel against the hotel's nonsmoking policy which was introduced January 1, 2008 after a recent renovation. Hotel guests are warned that \$250 may be added to their room bills if they are caught violating the no-smoking policy in their rooms. More than two dozen violators have already been tagged, mostly by housekeeping staff. *As more states and municipalities adopt no-smoking policies for public facilities, including restaurants, bars and other venues open to the public, and other venues voluntarily restrict smoking, it becomes ever more difficult for smokers to find a legal place to smoke. Attendees at association functions should anticipate more restrictions on smoking. Meeting planners take note.*

TAX LAW DEVELOPMENTS

IRS WARNS OF NEW E-MAIL AND TELEPHONE SCAMS ON REBATES – The proposed economic stimulus package approved by President Bush and Congress is already drawing scammers who are busy trying to come up with taxpayers' financial information, warns the Internal Revenue Service. The IRS says scammers are sending e-mails and making telephone calls pretending to be from the IRS, and asking for Social Security numbers, bank account information and similar information if the recipient wants to receive the rebate. A new twist is telling persons they are being audited and asking for their financial information on fake IRS forms sent by e-mail. *The IRS warns it does not ask for such information by phone or e-mail, and recipients should absolutely refuse to provide information in response to such calls or e-mails. The IRS also asks that recipients of these bogus calls and e-mails report such attempts to the IRS at www.phishing@irs.gov.*

ONE MINOR DETAIL TO KEEP IN MIND CONCERNING THE TAX REBATE – In the rush to pass the economic stimulus to the economy and to get tax rebates out to taxpayers, one not-so-minor detail should not be overlooked by taxpayers. The Treasury Department and Internal Revenue Service will base their computations to determine who qualifies for the one-time rebate check on taxpayers' 2007 tax returns. *So until you file a 2007 return, you are not eligible to receive a rebate. And for those who would not ordinarily file a tax return, it will be necessary to do so for tax year 2007 to qualify for a rebate.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

COURT HOLDS COMPETITOR ASSOCIATION INFRINGED COPYRIGHT – A federal court in Tennessee has ruled a horse breeding association that used its competitor's copyrighted breeding registry and trademark to solicit members has infringed the competitor's copyright but not its trademark. The Tennessee Walking Horse Breeders' and Exhibitors' Association ("TWHBEA") owns a registered copyright to its breeding registry. The association's competitor, the National Walking Horse Association ("NWA"), copied much of the TWHBEA's copyrighted publication in the creation of its own registry. Although most of the TWHBEA's registry consisted of facts, the court found the expression, selection and coordination of those facts warranted copyright protection, and the NWA's unauthorized use of the copyrighted material amounted to infringement. But the court dismissed the TWHBEA's trademark infringement claim based on the use of its name and acronym in advertising and on the NWA website in connection with the announcement that NWA would accept TWHBEA Registry Certificates from applicants. The court found those uses were fair and the NWA employed the TWHBEA's trademarks in a descriptive sense to explain NWA's own offerings and to indicate the type of registration certificates it would accept in registering a horse. *This decision focuses on two intellectual property problems associations deal with on a regular basis: the protection of facts and controlling others' use of their marks. While facts alone aren't protectable, publications which demonstrate originality as to the selection or display of those facts are protected by copyright. As for the unauthorized use of an association's trademark, only those uses which are likely to cause confusion in the marketplace can be prohibited.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

FEDERAL COURT UPHOLDS CONTRACT PROVISION DENYING JURY TRIAL – A federal appellate court in Chicago interpreting Illinois law reversed a trial court and upheld a form contract provision which stated that any dispute would be resolved by a bench trial, thus denying either party a jury trial. The trial court had rejected reliance on this provision because it was not negotiated by the parties nor in the body of their contract, rather it only appeared in a form used in the transaction between the parties. The appellate court disagreed saying form contracts are commonly used and upheld, and a contract provision for a trial before a judge and disallowing a jury trial is no more of a violation of the U.S. Constitution's Seventh Amendment right to a jury trial than a provision to arbitrate rather than litigate a dispute. *Other appellate courts have ruled to the contrary, saying such provisions must be negotiated, so the likelihood of such a provision in a form being upheld may depend on where the parties are located or the litigation takes place. One obvious lesson: you are well-advised to read and understand the small print on forms attached to contracts or accompanying shipments.*

PLAINTIFF CAN SEEK RELIEF AGAINST DEFENDANT’S INSURERS – An Illinois appellate court has ruled that a plaintiff sufficiently alleged facts in a claim for declaratory relief against a defendant’s liability insurers. The defendant was sued in a class action for sending junk faxes. The defendant tendered defense of the lawsuit to its insurance carriers and they declined coverage. But it was the plaintiff, not the defendant, who then sought declaratory relief against the insurers to determine whether or not they were obliged to defend the class action claim. The appellate court reversed a Cook County, IL decision and ruled the plaintiff had standing to seek declaratory relief against the defendants’ insurers. *As we have commented before, take junk fax claims seriously. A common tactic, especially in Cook County, is to turn one recipient’s junk fax into the basis for a class action seeking damages in the hundreds of thousands of dollars, or more. When a small company is sued, the plaintiff may have a greater interest than the small company defendant in bringing insurance carriers in to defend the claim. Associations can also get caught up in this junk fax exposure, so be careful to whom you send faxes.*

H & H DEVELOPMENTS

During February,

Barbara F. Dunn covered negotiations and vendor contracts for a conference planner meeting, and discussed hotel contracts and vendor contracts with at an association executive conference.

C. Michael Deese will be participating on two panels for the Association Management Company Institute. On one he will be talking about transitioning clients and on the other panel he will cover managing clients even when the CEO is not the management company’s employee.

Naomi R. Angel participated in a hospitality mock trial for an international meeting planning group, presented a program on engineering ethics to a building association, and covered warning labels and safety instructions at the annual meeting of a manufacturing trade association.

Samuel J. Erkonen spoke about negotiations to a business travel association; he talked to a group of Chamber of Commerce executives and another group of event planners on a variety of topics including ADA, antitrust, tax, employment, governance issues and SOX.

Layton E. Olson has been named co-chair of the Consumer Demand Committee of Illinois Governor’s Broadband Deployment Council.

Contributors to this issue...

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