

# THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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## THE LAW FIRM FOR ASSOCIATIONS<sup>sm</sup>

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End Of An Era?

### A POINT OF CLARIFICATION RE SPARE LITHIUM BATTERIES ON PLANES

– The U.S. Department of Transportation recently announced a ban effective January 1, 2008 on carrying some kinds of spare lithium batteries on flights by airline passengers. These are the batteries typically used in consumer electronics products such as computers, cell phones, iPods, etc., something many passengers do. Spare batteries may not be packed in checked luggage, but passengers can carry on spare batteries of up to 8-gram equivalent lithium content and up to two spares of up to aggregate 25-gram equivalent lithium content. *See <http://safetravel.dot.gov> for the precise details, and hope that Transportation Security Administration staff at airports are also aware of the details.*

### DOES THIS SQUARE WITH YOUR EXPERIENCE?

– According to a recent report in *CEOUPDATE*, a salary survey concluded that approximately 30% of association executives work without a contract, slightly more than the number of professional society executives who work without a contract. *We have seen arguments both ways on working with or without a contract, but over the years we have concluded contracts provide useful protections to associations and their executives. Contracts set forth expectations and parameters, and should clearly state what happens if termination is being considered by the association's board or if the executive is thinking about departing. Contractual certainty usually trumps ambiguity – for both parties.*

### ANOTHER BUZZ WORD – “FREEMIUMS”

– When you open a charitable solicitation and out falls a packet of address labels or note cards or some other “gift,” the charity is intending that you will feel sufficiently grateful or guilty to return a donation. The term for these front-end premiums is “freemiums.” *They work well enough that charities continue to use them although many in the field question whether in the long run donors will be turned off by freemiums. How many free labels from multiple charities can you use?*

**GOOD READING... See you in February  
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**RECENT ILLINOIS COURT DECISION OFFERS LESSONS TO ASSOCIATIONS –**

A December 2007 Illinois appellate court decision involving a dispute between an association, its directors, some members, the association’s attorney and a membership applicant offer a variety of lessons for anyone interested in Illinois not-for-profit law. It all seems to have begun when a former director demanded access to the association’s books and records. When he was turned down, he filed a lawsuit in the Circuit Court of Cook County seeking access to the association’s books and records and achieved partial success. The association’s directors subsequently amended the association’s bylaws to include a mandatory mediation/arbitration provision of all operation and membership-related disputes binding on all members when they renewed their membership each year. The appellate court addressed a derivative lawsuit by some of the association members on behalf of the association against the association and its directors; a lawsuit by the members against the association’s attorney alleging breach of fiduciary duties and negligence; and a membership applicant’s class action against the association on behalf of himself and other persons like him.

The plaintiff members first filed for declaratory relief to get rid of the mandatory mediation/arbitration provision in the bylaws, claiming it had been approved in bad faith to protect the directors. They also alleged waste of corporate assets, breach of fiduciary duties, and alleged a conspiracy involving kickbacks and other financial claims. The class action was based on a denial of membership in the association.

The association, its directors and the association’s attorney moved to dismiss the various claims on the basis of the mediation/arbitration provision in the bylaws. All of the claims were dismissed by the trial court, including the class action claim.

First, the appellate court ruled that the mediation/arbitration provision in the bylaws had been properly passed by the board of directors and was binding on claims “...against the Association, its employees, officers or directors...,” and applied to the plaintiffs’ claims against the association and directors. However, the association’s attorney was not among the parties protected by the mediation/arbitration provision. The court affirmed dismissal of the lawsuit against the association and directors, but reversed the dismissal as to the association’s attorney.

The court also affirmed dismissal of the class action on the basis that the membership applicant lacked standing to represent the class he claimed to represent, and he failed to establish that being a member constituted an economic necessity, essential to his claim of injury when he was denied membership.

*The appellate court decision includes a number of key rulings summarized hereafter. A trial court’s decision to compel arbitration is not discretionary. If there is a valid arbitration agreement, and the parties’ dispute is within the scope of the agreement, arbitration is mandatory. Second, the mediation/arbitration agreement only applied to those specified in the provision. The court noted that the terms “attorney” and “agent” were not included in the mediation/arbitration provision, therefore the attorney was subject to litigation instead of arbitration. Even though the attorney was a member of the association, he was being sued in his role as attorney, not as a member. If the association intends to protect not only officers and directors, but others such as committee chairs, members and agents against claims, the language of the indemnification provision must be broad enough to cover them.*

*Another key point to take away from this decision is that Illinois courts will not review a private association's denial of an application for membership or benefits unless what is applied for constitutes an "economic necessity." This is a substantial hurdle for frustrated applicants to overcome.*

*For detailed reading of the opinion, go to James D. Griffith, et al. vs. Wilmette Harbor Association, Inc., et al., Ill. App. 1<sup>st</sup>, 12/17/07, No. 07-0893.*

## NOT-FOR-PROFIT LAW DEVELOPMENTS

**ILLINOIS NONPROFIT ANNUAL FILING FEE INCREASES TO \$10** – Beginning January 2008, Not-For-Profit corporations will pay a \$10 annual filing fee to Illinois Secretary of State, instead of \$5. The additional \$5 supports the Charitable Trust Stabilization Fund to be set up in 2008 by the Illinois State Treasurer. The Fund is designed to make small loans to charitable NFP's for cash flow or capacity-building, and to provide startup assistance. Governed by designees of five state public officials, and six citizens nominated by the state Treasurer and confirmed by Senate, it will start in summer 2008, with operations later in the year or in 2009. *With several thousand NFPs registered in Illinois, the fund is expected to be substantial, and will likely begin substantial lending program by the end of 2008. While there will be limited funding, this is public sector support for emergency loan fund kinds of NFP enterprises. Stay tuned for the paperwork.*

## REGULATORY LAW DEVELOPMENTS

**EMPLOYERS NOW REQUIRED TO USE UPDATED I-9 FORMS** – The U.S. Citizenship and Immigration Services ("USCIS") has announced that all employers are required to use a revised Employment Verification Form (I-9) from and after December 27, 2007. This form must be completed and retained for each new employee. The revised I-9 form includes a revision date in its lower right-hand corner – (*Rev. 06/05/07*) for ready identification. The revised form and accompanying "Handbook for Employers, Instructions for Completing the Form I-9" are available on line at [www.uscis.gov/files/form/i-9.pdf](http://www.uscis.gov/files/form/i-9.pdf). *The transition time to change from the old form to the new form ended December 27, 2007. Employers must use the new form or face penalties. The forms are available online for free from the USCIS website. Employers do not have to obtain the forms from commercial vendors also selling the forms.*

**FTC LOOKING AT "GREEN MARKETING" CLAIMS FOR CARBON OFFSETS** – The Federal Trade Commission ("FTC") recently conducted its first hearing on advertising claims for carbon offsets, commonly referred to as "green marketing." Carbon offsets are monies paid by one party to another which promises to use the money for environmental purposes such as planting trees; underwriting wind and solar power to make them more price-competitive in the marketplace; and even to purchase credits on the Chicago Climate Exchange, established to exchange credits among companies trying to offset their carbon emissions. The FTC is not accusing anyone of wrongdoing at this stage. It is trying to determine whether its environmental advertising guidelines known as the "Green Guides" which were adopted in 1998 need to be revised. *If your association or its members are involved in green marketing or being asked to engage in carbon offsets, you might want to look at the FTC's Green Guide as a starter and then take a more detailed look at how any carbon offset funding is actually used in practice.*

## EMPLOYMENT LAW DEVELOPMENTS

**HOW NOT TO DO IT** – A federal court in Chicago has ruled a terminated employee may proceed to trial on her retaliation claim based on the Illinois Workers' Compensation Act against her employer, denying the employer's motion for summary judgment. The employee, a store manager, alleged that she received awards for her work as a store manager and training manager until she informed her boss that she had filed a workers' compensation claim. The following day she was formally reprimanded, and over the next few months she was accused of lying about her claimed injury (which eventually led to surgery for two herniated disks) and received poor performance reviews which led to her termination. The court noted the employee had to present evidence that her termination was due to her claiming the workers' comp benefits and enough for a jury to find the employer's reasons for the termination were pretextual, i.e., more than a mistake, specifically a lie or otherwise phony. The court said a jury could rationally find the sudden change in performance reviews immediately after the employee informed her boss of the workers' comp claim and other evidence as indicative of a pretextual motive sufficient to support a retaliation claim. *Employers are often suspicious of workers' compensation claim, but this supervisor's approach almost guaranteed the employee a jury trial. As the judge noted, a jury may rationally conclude after a trial that the supervisor's sudden turn from praising an employee's performance to finding repeated faults, beginning the day after the employee provided notice of a workers' comp claim, had more to do with her filing an unwanted claim than a change in performance. And that's why it's called retaliation – and prohibited by statute. The potential damages in a lawsuit such as this are substantially greater than a workers' compensation award.*

## MEETING & TRAVEL LAW DEVELOPMENTS

**ONE MORE THING FOR U.S. TRAVELERS TO CANADA TO KEEP IN MIND** – According to an article in the *San Francisco Chronicle* and also reported at [www.sfgate.com](http://www.sfgate.com), and confirmed by a Canadian government website, U.S. travelers to Canada should be aware that they may be barred from entering Canada without warning if the traveler has been convicted of a criminal offense in past years, even as long as 20-25 years ago. The offenses may have been minor and long since forgotten, but still remain in old databases which are now being shared by U.S. and Canadian officials in their effort to limit travel by terrorists. Old criminal records can be used as the basis to deny entry even if the travelers had previously traveled back and forth numerous times for decades. Offenses such as possession of marijuana 20 years ago as a college student, shoplifting, driving under the influence, etc., might be sufficient for barring entry. *Youthful and not so youthful indiscretions may come back to haunt travelers. While the number of those barred to date may be small, the numbers are expected to grow. Speculation: From Canada's perspective an unstated consideration may be that Canada is demonstrating to U.S. authorities a tit-for-tat response to much tighter U.S. border crossing requirements on Canadians entering the U.S. In addition to embarrassment, this could become an employment issue for some travelers. Will the exchange of such databases with other countries expand?*

**NEW YORK PASSENGERS' RIGHTS LAW UPHELD BY FEDERAL JUDGE – H&H Report Update:** A federal judge in Albany, NY has rejected a challenge by the Air Transport Association (“ATA”), representing airlines, to New York’s recently enacted Passengers’ Rights Act which requires airlines at airports in New York State to provide minimum standards of relief to passengers on planes which are parked at gates or on tarmacs or runways for over three hours awaiting departure. It does not apply to flights which have landed and are unable to get to a gate to disembark passengers, another source of stranded passengers. The Act is effective as of January 1, 2008. It requires an airline to provide electric generation service for temporary power for fresh air and lights; waste removal service for an airplane’s holding tanks for on-board restrooms; and adequate food and drinking water and other refreshments. Airlines are also required to provide clear and conspicuous consumer complaint contact information and forms. The Act establishes a consumer protection board to enforce the Act, including the power to refer violations to the NY Attorney General who may seek civil penalties up to \$1,000 per passenger for violations of the three minimum service requirements (less any compensation paid or offered by the airline to the passengers affected) and up to \$1,000 per violation for other violations of the Act. The Act does not provide for monetary awards to passengers. The judge said the Act addressed health and safety issues, typically a concern of state governments, and not airline services which are controlled by federal authorities. The ATA said it opposed the Act because there should be one regulator of airline service, the federal government, and not 50 different state regulators. Other states are also considering legislation similar to the NY Act. *It remains to be seen how this will play out in the real world. Once planes have left the gate and are stranded in lines, often due to bad weather where they are or where they are going, moving them around or sending mobile units to provide the mandated services may create safety hazards or delay departures. The Act’s investigation requirements and processes may slow rushed enforcement, allowing airlines time to consider benefit options to passengers to offset regulatory penalties.*

## TAX LAW DEVELOPMENTS

**IRS AGAIN REMINDS §501(c)(3) ENTITIES NOT TO ENGAGE IN POLITICS –** The Internal Revenue Service has issued another reminder to §501(c)(3) organizations not to engage in political activities, especially endorsing political candidates for office. They may undertake educational activities, support get-out-the-vote and other candidate-neutral activities, but openly endorsing or otherwise acting on behalf of candidates is prohibited. *The IRS makes such declarations every election cycle but the number of enforcement actions is so small that one may question how serious the IRS is about such pronouncements. 2008 should provide numerous opportunities for enforcement.*

**SOME OTHER USEFUL NUMBERS TO KEEP IN MIND FOR 2008 TAXES –** The Social Security taxable wage base is up \$4,500 to \$102,000 now. Roth and traditional IRA contributions max out at \$5,000, up another \$1,000, and catch-up contributions for employees 50 and older remain at \$1,000. 401(k), SARSEP, 403(b) and 457 plan deferrals remain at \$15,500 and the catch-up contribution remains at \$5,000. SIMPLE deferrals remain at \$10,500 and SIMPLE catch-up contributions remain at \$2,500. *The opportunities for retirement funding are not generous so start as early as possible.*

## INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

**CYBERSQUATTER SUBJECT TO SUIT IN ILLINOIS** – A federal court in Chicago has found that a Florida company is subject to suit in Chicago for alleged cybersquatting. The Chicago Architecture Foundation sued Domain Magic alleging that the Florida-based company had registered the domain name [chicagoarchitecturefoundation.org](http://chicagoarchitecturefoundation.org) and used it to host a website which sold click-through advertising that competed with the Foundation's educational offerings. In finding jurisdiction to be proper, the court employed a "sliding scale" analysis as to the nature and quality of commercial activity that an entity conducts over the Internet. Noting Domain Magic's failure to respond to interrogatories, the court drew the negative inference that the company received payment generated by "click-through" advertising and other revenue through its use of the domain name. In addition, the court noted that Domain Magic had misappropriated the name of an Illinois corporation for its own economic gain and had included links on the site to various Chicago businesses that competed with the Foundation. *This decision serves as a reminder that those who engage in unfair competition on the Internet may be subject to suit in the location in which their activities are directed. It also serves to reinforce the importance of adhering to court rules and deadlines with respect to discovery. Had the defendant adhered to the applicable discovery rules, it may have been able to counter the information the court relied on in making its negative inference as to the money generated through click-through advertising.*

## OTHER ISSUES, TRENDS & DEVELOPMENTS

**END OF AN ERA?** – One more sign of "the times they are a changin'" comes from AT&T's recent announcement that it is getting out of the pay telephone business over the next 13 months in the 13 states where it still offers such service. Pay phones have been largely replaced by cell phones over the past ten years with some 250 million subscribers now. Verizon will continue to offer pay telephone service in 28 states where it still offers landline service. Pay telephones are most commonly found today in transportation, hospital and other public facilities, although much fewer in number and often more difficult to find. The former dash from meeting rooms to the nearest pay phone by meeting attendees checking for messages is largely a thing of the past. *It will be interesting to see if hospitals, airports and other public facilities will still provide pay telephone access, possibly by some niche carriers, as AT&T and other major carriers leave the pay phone business.*

## H & H DEVELOPMENTS

During January,

Barbara F. Dunn presented sessions on key contract and association legal issues for an association executives' conference.

Nathan J. Breen has just joined the faculty at the The Les Roches School of Hospitality Management at Kendall College, teaching a course in hospitality law.

**Contributors to this issue...**

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